

M/s. Ouchterloney Valley Estates Ltd.

Vs

State of Kerala (with connected appeals)

Civil Appeals Nos. 1084-1088 of 1963

(CJI Gajendragadkar JJ)

23.10.1964

JUDGMENT

GAJENDRAGADKAR C.J.

This is a group of fifteen appeals by special leave which raise a common question of law. The appellants in these respective appeals are Plantation Companies which grow their own tea in Tea Estates and sell their products. Under the relevant provisions of the Travancore-Cochin General Sales Tax Act 11 of 1125 (hereinafter called 'the Travancore Act'), Sales-tax Officers had assessed the appellants to several amounts of tax in respect of their turn-over for different years. The appellants had urged before the Sales-tax Officers that the transactions in question were not liable to pay sales-tax, but their pleas were rejected and sales-tax was ordered to be imposed in respect of the said transactions. The appellants then challenged the correctness of these orders by preferring appeals before the Sales-Tax Appellate Tribunal. The Tribunal concurred with the view taken by the Sales-tax Officers and confirmed the respective orders of assessment. The appellants then moved the High Court of Kerala in its revisional jurisdiction under s. 15B of the Travancore Act. These revision applications also failed; and that has brought the appellants to this Court by special leave.

Though the periods and the amounts of turn-over for which sales-tax has been levied against the different appellants are not the same, the principal point which these appeals raise for our decision rests on facts which are common to all the cases, and so, it would be enough if we refer to the facts in respect of one of these appeals. We will accordingly mention the relevant facts in regard to appeals Nos. 1084-1088/1963 in which the appellant is M/s. Ouchterloney Valley Estates Ltd. We may add that the three other appellants in the present group are : The Kil Kotagiri Tea & Coffee Estate Co. Ltd., M/s. Peria Karamali Tea & Produce Co. Ltd.; and M/s. Chembra Peak Estates Ltd. The appellant M/s. Ouchterloney Valley Estates Ltd. produces tea in its own Tea Estates and sells its products. It does not itself carry on the business of buying and selling its products. The Managing Agents of the appellant are M/s. Peirce Leslie & Co. Ltd., Coimbatore. The quantities of tea produced by the appellant were sold by public auction at Fort Cochin; the purchasers paid the consideration at Fort Cochin and obtained from the auctioneers delivery notes requesting the godown keepers at Wellington Island to deliver the goods. After the goods are produced, they are sent to the godowns at Wellington Island and the sale by public auction is held at Fort Cochin. Fort Cochin was in the State of Madras, whereas Wellington Island was in the State of Travancore at the relevant time. The periods for which assessment has been levied against the appellant are 1952-53, 1953-54, 1954-55, 1955-56 and 1956-57.

The procedure followed for the public auctions in question must now be indicated. This is how the procedure has been summarised in the present proceedings :-

"Teas produced in the concerned Estates are graded, weighed and packed in chests in the estates and are subsequently forwarded with garden invoices to the godowns of their Clearing and Forwarding Agents, Messrs. Peirce Leslie & Co. Ltd., Cochin, at Wellington Island to be stored there awaiting further instructions. Thereafter, the brokers in Fort Cochin check the weight of the chests, draw samples of their contents and group the chests in lots. They then publish printed catalogues giving the names of the Estate and the godowns, the numbers of the lots, the serial numbers and total number of chests in each lot, the weight of each chest and the total weight of each lot and advertise the sale of such chests with export rights, by public auction, at Fort Cochin on particular date and hour. The sale is conducted, by samples, at Fort Cochin, at the proclaimed date and hour and is confirmed in the name of the highest bidder. The bid may be for an entire lot or for a portion thereof, technically known as 'brake'. The buyer shall be entitled to open the chests bid by him and examine the contents to ascertain the actual state and condition of the tea. Difference or inferiority in quality, description, deterioration, damage and defect in packing will entitle the buyer to submit claims or rejection, or allowance or damage. Such claims must be submitted, after inspection, no doubt, not later than 5 P.M. on the 3rd day before the prompt day (ninth day after date of sale) or in the case of removal before the prompt day, at least 24 hours before such removal. Payment shall be made in Cochin on or before prompt day, in cash or by cheque or draft on a Cochin Bank. If the buyer shall fail to pay for the tea or any part thereof on the due date for payment, the goods may be re-sold. Any loss arising on such re-sale shall be borne by the buyer. Delivery shall be taken before 5 P.M. on the 5th day after prompt day. The goods will be at seller's risk to the extent of the sale price only, until 5 P.M. on the 5th day after prompt day or until removal by the buyer, if removed earlier."

When the assessment proceedings in question were pending before the Sales-tax Officer, it was urged by the appellant that the impugned transactions which were included in the turn-over of the appellant were not liable to tax on several grounds. The substantial contention against the appellant was that the transfers of tea which were sought to be assessed could be assessed by the respondent State of Kerala because of a previous decision of the Kerala High Court in *Deputy Commissioner of Agricultural Income-tax and Sales-tax v. A. V. Thomas & Co. Ltd.* (I.L.R. [1960] Kerala 1395). In that case, the Kerala High Court had proceeded to deal with the matter on the basis that the property in the goods sold passed at Fort Cochin on the fall of the hammer at the auction and that they could not be said to be "outside" sale within the meaning of Art. 286(1)(a) of the Constitution. The High Court was inclined to take the view that the said constitutional provision had no reference exclusively to the transfer of the property in the goods according to the provisions of the Indian Sale of Goods Act, 1930 (No. 3 of 1930) (hereinafter called "the Act"); and so, explanation 2 to s. 2(j) of the Travancore Act was not violative of Art. 286(1)(a), and that if at the moment when the property passed, it being not relevant where the property passed, the goods were in the State of Travancore-Cochin, then it was not an "outside" sale quoad Travancore-Cochin and could be subjected to sales tax by that State. Since this judgment of the Kerala High Court was binding on the sales-tax authorities at the time when they considered the dispute between the appellants and the respondent State of Kerala in the present proceedings, they have held that the transactions with which the appellant was concerned could be validly assessed by the respondent State. The same view, in substance, has been accepted by the High Court when it rejected the revision application filed by the appellant before it.

Meanwhile, the decision of the Kerala High Court in the case of *A. V. Thomas & Co.* (I.L.R. [1960]

Kerala, 1395) was reversed by this Court when the matter came before it in appeal in *A. V. Thomas & Co. Ltd. v. Deputy Commissioner of Agricultural Income Tax and Sales Tax, Trivendrum*. ([1963] Supp. 2 S.C.R. 608) In that case, this Court has held that the explanation to Art. 286(1) creates a fiction as between two States, one where the goods are delivered for consumption in that State, and the other where the title in the goods passed and the former is treated as the situs of the taxable event to the exclusion of the latter. In regard to sales of teas in lots by public auction, this Court held that the property in teas passed to the buyer under s. 54 of the Act as soon as the offer was accepted on fall of the hammer at Fort Cochin in the State of Madras and, therefore, the only State which could have power to levy a tax on such sale would be the State of Madras and so far as the Travancore-Cochin was concerned, the sale would be an outside sale. The same view has been expressed by this Court in a subsequent decision coming from Kerala in *Malayalam Plantations Ltd., Quilon v. The Deputy Commissioner of Agricultural Income-tax and Sales-tax, South Zone, Quilon*. (A.I.R. 1965 S.C. 161) The result is that the decision of the Kerala High Court in the case of *A. V. Thomas & Co.* (I.L.R. [1960] Kerala, 1395) on which the sales-tax authorities and the High Court of Kerala have decided the dispute between the appellants and the respondent State in the present proceedings is no longer good law, and that would inevitably mean that the appellants must succeed on the ground that the sales of tea having taken place in the same manner as the sales of tea which had come before this Court in the two decisions to which we have just referred, they are "outside sales" so far as the respondent State is concerned and cannot be legitimately assessed to tax under the relevant provisions of the Sales Tax Act.

Mr. Menon for the respondent State has, however, strenuously contended that the question as to whether the present sales are outside sales so far as the respondent is concerned, has never been properly tried, and he urges that if the essential incidents in regard to the present sales are taken into account, it would be found that the said sales are 'inside' sales so far as the respondent State is concerned. It is common ground that if the sales are held to be inside sales so far as the respondent State is concerned, the view taken by the High Court would have to be confirmed and the appellants would have to pay the sales-tax as ordered by the sales-tax authorities. On the other hand, if the sales in question are not inside sales as urged by Mr. Setalvad for the appellants, the view taken by the High Court must be reversed and the appeals allowed.

It appears that in the two decisions of this Court to which we have just referred, this point has not been considered, In fact in the case of *A. V. Thomas & Co.* ([1963] Supp. 2 S.C.R. 608) the conclusion of the Sales-tax Appellate Tribunal that the property in the goods sold passed at Fort Cochin in full lots with the fall of the hammer was not disputed, and that raised the question about the construction of Act. 286. In the latter case of *Malayalam Plantations Ltd.* (A.I.R. 1965 S.C. 161) this question was attempted to be raised before this Court, but this Court did not allow the appellant to argue that point, because the finding of the sales-tax authorities that the title in the goods had passed at Fort Cochin on the fall of the hammer at the auction had not been disputed before the High Court. Mr. Menon contends that in the present proceedings, the respondent State has been urging at all material stages that the sales in question are inside sales, and so, he should be permitted to argue that point. We have accordingly heard Mr. Menon on this point and we propose to decide it on the merits.

When those appeals were heard by us first on the 10th September, 1964, the procedure followed in conducting the sales in question was placed before us in the form of a summary which we have quoted at the beginning of this judgment. We, however, thought that since we were deciding the question as to where the title in the goods passed, it would be more satisfactory to have before us all the Rules of the Tea Trade Association of Cochin which prescribed the procedure for these sales.

Accordingly, the matter was adjourned to enable the parties to produce the said Rules. The said Rules have since then been produced before us and we have heard both Mr. Setalvad and Mr. Menon fully on the points raised by Mr. Menon that the sales in question are inside sales so far as the respondent State is concerned.

Mr. Menon contends that in deciding this question we ought to bear in mind the fact that the sales are sales by sample to which s. 17 of the Act applies. In the case of a contract of sale by sample, s. 17(2) provides three implied conditions; they are : (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. The argument is that a sale by sample is, in substance, a sale of unascertained goods, with the result that no property in the goods is transferred to the buyer unless and until the goods are ascertained. That is the effect of s. 18 of the Act. Sale by sample, according to Mr. Menon, is a conditional sale and can be described even as an executory contract. It becomes a concluded contract as a result of which title in the goods would pass to the buyer only when the goods have been inspected by the buyer and accepted by him. Section 64(2) of the Act provides that in the case of a sale by auction, the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and it adds that until such announcement is made, any bidder may retract his bid. Mr. Menon accepts this principle, but contends that what is completed under s. 64(2) is conditional sale, and that does not make the contract a concluded contract. The executory contract under s. 17 becomes a completed conditional contract under s. 64(2), but title under such a contract would pass only after the condition of inspection and approval has been satisfied, Thus presented, the argument is no doubt attractive. The sale by public auction took place at Fort Cochin which was in the State of Madras at the relevant time, but the goods had stored in the godowns at the Wellington Island within the territorial limits of Travancore, and the inspection of the goods place at these godowns. It is after the goods are inspected by the buyer and accepted by him that the contract is completed and title passes from the seller to the buyer. This event takes place in the Wellington Island, and so, the transaction of sale is an inside sale for the purpose of sales-tax levied by the respondent State.

In support of this argument, Mr. Menon has referred us to the statement of Benjamin that "where the subject-matter of the sales is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity; and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted". (Judah Philip Benjamin's "A Treatise on the Law of Sale of Personal Property 8th Edn. by Finnomore and James, p. 907) Another passage from the same book on which Mr. Menon relies speaks of acceptance as a taking of the goods by the buyer with the intention of becoming owner (p. 750). The argument is that the goods are required to be inspected in the case of a sale by sample and it is only when inspection discloses no material defects in the goods that acceptance follows, and that makes the contract a concluded contract by which title passes to the buyer. Similarly, Mr. Menon relies on one more statement of Benjamin which says, "The specific goods may, for instance, be sold by description. If the specific existing chattel is sold by description, and does not correspond with that description, the seller fails to comply, not with a warranty or collateral agreement, but with the contract itself by breach of a condition precedent" (p. 304).

In support of his case, Mr. Menon has also relied on a decision of the King's Bench Division in

McManus v. Fortescue & Anr. ([1907] 2 K.B. 1) In that case, the Court of Appeal has held that at a sale by auction subject to a reserve price on the article sold, where the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, and the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, and the fact that the auctioneer knocks down the article to a bidder who had bid a less price than the reserve gives the latter no right of action against the auctioneer, either for breach of duty in refusing to sign a memorandum of or otherwise complete the contract, or for breach of warranty of authority to accept the bid. In dealing with the point raised before the Court, Collins, M.R. observed that no authority had been cited to show that the fall of the hammer could do away with a condition expressly stipulated for the by the conditions of sale. The same view has been expressed by Fletcher Moulton L.J. by observing that the limitation of an auctioneer's authority, by his principal fixing a reserve price, is a perfectly valid and effectual limitation. That is why the fall of the hammer would not affect the binding character of the condition as to reserve price subject to which alone the contract of sale could be concluded. It would be noticed that the whole of the argument thus presented by Mr. Menon proceeds on the assumption that the contract of sale by sample in the present proceedings was a contract of goods which were in a sense unascertained and it would be concluded only when the buyer inspected the goods and accepted them.

The position in regard to the relevant provisions of the Act bearing on the question as to when title in the goods sold passes, is not in doubt. If the contract of sale is for ascertained goods which are actually described in the list prepared before the sales are held and it appears that all material particulars about the goods are shown in the list, then the question as to when title passes would depend essentially upon the intention of the parties expressed in the terms of the contract. Section 19(1) of the Act provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 19(2) adds that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Under s. 19(3) it is provided that unless a different intention appears, the rules contained in sections 20 to 24 would be relevant to decide this question. One thing is clear in the present case viz., that the goods in question were not unascertained goods, nor were they not in existence; goods were clearly in existence, they had been graded, weighed and packed in numbered chests and a list was prepared in respect of the contents of these chests separately. It is true that what the buyers are shown at the time of sale by public auction are samples and the rules authorise the buyers to inspect the goods; but that is not to say that the sale is a sale of unascertained or non-existing goods.

Let us, therefore, consider the relevant and material terms and conditions of the rules which the sales take place, for it is these terms which will decide as to when title passes to the buyer. Condition No. 7 of the Rules provides that subject to the reserved or upset price, the highest bidder shall be the buyer, and it lays down that until the fall of the hammer or until the registration of the sale as provided in clause 5, any bidder may retract his bid. Under condition No. 8, the auctioneer has to declare the name of the highest bidder before the lot is knocked down. Under condition 11, the buyer is entitled to open the chests purchased by him and examine the contents thereof to ascertain the actual state and condition of the tea. Such examination has to take place before the expiration of the time allowed for submission of claims as provided in condition 12 or in the event of earlier removal of the tea, before the date of actual removal. This condition refers to the chests purchased by the buyer and contemplates that as a result of the examination of the goods, the buyer can make claims within the time specified by condition 12. Condition 12 is material, and so, it is necessary to read it. It reads thus :-

"All claims on the ground of difference or inferiority in quality, description, deterioration, damage, defect in packing or any other ground whatsoever must be submitted to the selling broker in writing not later than 5 P.M. on the third day before Prompt Day. Prompt Day shall be the tenth day after date of sale. In the case of tea removed before Prompt Day, such claims must be submitted at least 24 hours before removal of tea. In the absence of any claim submitted in strict accordance with this condition, the tea shall be deemed to have complied with the contract in all respects and to have been accepted by the buyer, who shall not be entitled to reject the tea or to claim any allowance or damages in respect thereof".

Mr. Menon has placed considerable emphasis on the fact that this condition provides that the goods shall be deemed to have been accepted by the buyer when he failed to make inspection within the time allowed. In other words, his argument is that this condition shows that acceptance can be deemed to have taken place only after the procedure prescribed by condition 12 has not been followed and therefore, it envisages acceptance only after inspection in all cases. We do not think that much importance can be attached to the expression "to have been accepted by the buyer" on which Mr. Menon rests his argument. We have already seen that condition 11 has referred to the chests as having been purchased by the buyer; and that would be clearly against Mr. Menon's case. So, it would be reasonable not to base our decision principally on the words used by the conditions, such 'purchased' or 'accepted', but to take into account the substance of these conditions.

It may be stated at this stage that after the public auction takes place, claims have to be made by the buyer not later than the third day before the Prompt Day, or 24 hours before removal of goods, whichever event happens earlier. The Prompt Day is the 10th day on or before which payment has to be made by the buyer, and possession has to be taken by him before 5 P.M. on the fifth day after the Prompt Day (condition No. 22). The goods continue to be at the sellers' risk to the extent of the sale price only until 5 P.M. on the fifth day after the Prompt Day or until removal by the buyer if removed earlier (condition No. 23).

Condition 12 clearly shows that the buyer has a right to make claims either on the ground of difference or inferiority in quality disclosed on inspection, or as a result of a defect in packing or any other ground whatsoever. After the time specified by this condition has expired, the buyer cannot make a claim to reject the goods, nor can he ask for any allowance or damages in respect thereof.

Condition 13 is also important. It reads thus :-

"Each chest comprised in a lot shall be treated as the subject of a separate contract of sale; but this condition shall not entitle the buyer to require the seller to give part delivery of less than the full number of chests sold; and in the event of the buyer claiming to reject the lot purchased by him, the Arbitrators or Umpire, if satisfied that the lot was not a good tender, shall be entitled to award rejection of the entire lot, and not only the particular chests found on examination to be defective."

It would be noticed that the first part of condition 13 corresponds to s. 64(1) of the Act. It, however, adds that though each chest shall be treated as the subject-matter of a separate contract of sale, the buyer cannot claim delivery of less than the full number of chests sold. If the buyer makes a claim for rejecting the contract, the Arbitrators or Umpire may, if satisfied that the lot was not a good tender, hold that the buyer is entitled to reject either the entire lot or in a proper case even particular

specified chests constituting the lot. Like the word "accepted" in condition 12, the word "tender" in condition 13 cannot, however, materially affect the nature of the transaction. Condition 13 makes it clear that in case the buyer finds a substantial defect in the quality of the goods sold to him, he cannot reject the contract of his own; all he can do is to make a claim in that behalf before the Arbitrator; and this condition is consistent only with the view that the goods have already been purchased by the buyer and the claim which he is allowed to make is as a result of the breach of the contract of sale.

Mr. Menon attempted to argue that condition 13 merely enable the buyer to move the Arbitrator. According to him, the buyer can reject the contract of his own, or file a claim for damages in a civil court without having recourse to arbitration. In our opinion, condition 13 is not merely an enabling condition; it is an obligatory condition and it gives the buyer only one remedy, and that is to move the arbitrator for appropriate relief.

Condition 15 is also relevant. It reads thus :-

"If the Buyer shall fail to pay for the tea or any part thereof on the due date for payment, the goods may be resold, either by auction or private sale, at the option of the seller. Any loss arising on such resale, together with interest at 6 per cent per annum from the due date and all charges incurred, shall be paid by the buyer to the seller, and the buyer shall not be entitled to any profit, which may accrue from such resale".

This condition is consistent with the provisions of s. 64(2) of the Act, and it cannot be said to support Mr. Menon's contention that the title in the goods does not pass to the buyer until he has inspected them and indicated his acceptance.

Condition 16 is a general condition as to arbitration and it provides that any disputes or differences which may arise between the parties shall be referred to arbitration as therein indicated. Reading conditions 13 and 16 together, there can be no doubt that all claims which the buyer is entitled to make must be made to the arbitrators and it is the decision of the arbitrators that will determine the dispute between the buyer and the seller.

We have carefully considered all the rules under which sales in question have been held by public auction, and we are satisfied that title to the goods passed to the buyer under s. 64(2) of the Act as soon as the sale was completed by the auctioneer announcing its completion by the fall of the hammer. The initial auction cannot, in our opinion, be treated as an executory contract which became a conditional contract on the fall of the hammer. The auction was an auction sale in respect of ascertained goods and it was concluded in every case on the fall of the hammer. On that view of the matter, we must hold that the High Court was in error in coming to the conclusion that the Sales-tax authorities were justified in imposing sales-tax against the appellants in regard to the transactions which have given rise to the present appeals.

The result is, the appeals are allowed, the orders passed by the High Court in revision are set aside, and the levy of sales-tax imposed by the Sales-tax authorities against the appellants is held to be invalid. There would be no order as to costs.

Appeals allowed.

</html