

Amritsar Sugar Mills Co. Ltd.

Vs

Commissioner of Sales Tax, U. P.

Civil Appeal Nos. 86 to 89 of 1965

(K. Subha Rao, J.C. Shah, S.M. Sikri JJ)

13.12.1965

JUDGMENT

SIKRI, J. -

1. These four appeals by special leave are directed against the judgment of the Allahabad High Court in a Sales Tax Reference made by the Judge (Revisions), Sales Tax, Uttar Pradesh, Lucknow, on being directed to do so by the High Court under Sehe Judgment of the Court was delivered byction 11 of the Uttar Pradesh Sales Tax Act, 1948, hereinafter referred to as the Act. The question referred was as follows :

Whether in law the revising authority was right in holding that the sales in dispute were not for delivery outside Uttar Pradesh and that the applicant was not entitled to rebate under sec. 5 of the Act."

The question was referred in the following circumstances. The appellant, hereinafter to as the assessee mills, carries on the business of manufacturing and selling sugar and is registered as a dealer under the provisions of the Act. During the previous year relevant to the Assessment Year 1948-49, the assessee Company had sold sugar to parties who carried on business outside Uttar Pradesh and also delivered the same outside Uttar Pradesh. It also sold sugar to parties who carried on business inside Uttar Pradesh but the sugar was despatched to stations outside Uttar Pradesh in compliance with the instructions issued by the buyers. The assessee mills submitted an application under S. 5 of the Act in form VII, prescribed by the Uttar Pradesh Sales Tax (Temporary) Rules, 1948, claiming 50% rebate on the sales of sugar delivered outside Uttar Pradesh. The Sales Tax Officer allowed rebate in respect of the sales of sugar to parties who carried on business outside Uttar Pradesh but rejected the claim for the sales which were made to parties carrying on business inside Uttar Pradesh. In respect of the assessment year 1948-49 there were four assessment orders covering each quarter of the year, the first quarter being April 1948 to July 1948. Section 5 of the Act reads as follows :

"Sales of certain goods for delivery outside the State-In respect of such manufactured goods as may be notified by the State Government and subject to such restrictions and conditions as may be prescribed, a rebate of one-half of the tax levied on sales of such goods for delivery outside the Uttar Pradesh shall be allowed if such goods are actually so delivered."

In exercise of the powers conferred by S. 5 of the Act, the Governor was pleased to order that rebate of one half of the tax levied on sales of certain goods including sugar manufactured in Uttar Pradesh

for delivery outside Uttar Pradesh shall be allowed if such goods were actually so delivered. It appears that this notification was modified on March 30, 1949, but we are not concerned with this modification.

The Sales Tax Officer dealt with the question at issue in his order in respect of the quarter ending March 31, 1949, in detail and he was of the view that if property passed from the seller to the purchaser in Uttar Pradesh, S. 5 and the notification issued under it could not apply.

The assessee mills then filed four revision applications before the Judge (Revisions) Sales Tax. The Judge (Revisions) disposed of the four applications by two orders, first dated February 1, 1950, and the second dated December 5, 1950. He held that "the words 'sales of such goods for delivery outside U.P.' clearly show that the intention of the framers of the act was to allow a rebate only in cases in which the goods are sold subject to the condition that they would be delivered outside U.P. It is also clear that section 5 contemplates only one buyer who purchase the goods and also take their delivery outside U.P. In other words the party who buys the goods and the party who takes the delivery must be one and the same. It is not disputed that the sales of sugar in respect of which the claim has been disallowed were in favour of one party and delivery was taken by another party outside U.P. The party after buying the sugar under a contract of sale had the goods despatched outside U.P. by the Mills to another party outside U.P." He added later that "on a true construction of section 5 rebate will be permissible only if delivery is taken outside U.P. by the same party which purchased the sugar from the mills." Then on the facts he held that the selling agents, Tandon Bros., who entered into a contract with the assessee mills for sale of the goods were really the buyers and although the goods were despatched outside Uttar Pradesh in accordance with the despatch instructions of some contract arrived at between Tandon Bros., and the party to which the goods were ultimately delivered, the assessee mill had not entered into the contract with the parties to which the goods were dispatched outside Uttar Pradesh. He further repelled the argument that despatch instructions formed part of the contract.

The assessee mills then filed four applications under S. 11 of the Act, but the Judge (Revisions) Sales Tax rejected the applications on the ground that no question of law arose. The High Court, however, directed the Judge (Revisions) to state a case under S. 11 of the Act. A consolidated statement of the case was referred. The Judge (Revisions) drawing up the statement of the case was not the Judge (Revisions) who had disposed of the revision applications. In the statement of the case certain further facts were given and those are as under :

"The applicants (assessee mills) were members of the Indian Sugar Syndicate Ltd., and they were entitled to send sugar under the orders of the Syndicate through some selling agents of their own. M/s. Tandon Bros., were selling agents of the Mills. It was through them that the sales had been made to buyers outside U.P. The goods were despatched outside U.P. under the instructions received from the buyers through the selling agents. The delivery of the goods was made outside U.P. It is on the basis of these facts that the applicants (assessee mills) claimed that the sales had been made for delivery outside U.P."

The standard contract form prescribed by the Indian Sugar Syndicate has been annexed to the case and the following terms are relevant :

"AN AGREEMENT made this Sixteenth day of October 1948 between the AMRITSAR SUGAR MILLS CO. LTD., ROHANA KALAN (hereinafter called "the

Seller") and Tandon Brothers New Mandi Muzaffarpur (hereinafter called "the Buyer") for the sale of the following goods by the Seller to the Buyer upon the following terms and conditions :-

#----- A B C D E F Factory
Description Price per Quantity Period(s) Remarks(Short) of Md. of 40 of Name
Quality Srs. 82 2/7 Delivery lb. F.O.R Station Ex-Factory.-----
-----Rohana Average colour Rs. Thirty Six Bags Ready Mills.
not lower than annas two & 4,000 I.S.S. No. 127 pies three ----- only. -----
Average grain Each of not finer than Packing I.S.S. No.D or 2/30. I. 36/2/3-----
-----##

2. Delivery is to be made F.O.R. Rohana Kalan station, all terms and conditions of the Railway (torn) to be binding on the Buyer.

The goods shall be deemed to have been delivered (a) when tendered Ex-Factory godown, (b) when put on F.O.R. at Factory Station or (c) when tendered for carriage by rail at the said station, and in case of delay in accept (torn) by the Railway after such tender the said goods shall be deemed to be held by the Seller on account of the Buyer until they are put on rail. When the goods are received by Railway, all the terms and conditions of the Railway shall be deemed to be accepted by the buyer. Tender to the Railway for carriage shall be deemed to have been made when a (torn) carriage or a Forwarding Note has been given to the Station Master of the Station. The seller shall not, (torn) circumstances whatsoever, be responsible for non-despatch, or refusal to dispatch or delay in dispatch or any (torn) mistake in dispatch by the Railway. Where (after tender as aforesaid) any delay in despatch occurs, the Buyer shall (torn) delivery of the goods without any claim against the Seller on account of such delay or consequence thereof (torn) delay in despatch is due to non-supply of wagons or due to booking restrictions, the Seller, shall, if required by the (torn) obtain from the factory a letter stating the cause of the delay.

Where owing to restriction of whatsoever nature imposed by Carriers on dispatches, Seller is unable to despatch according to the route requested by the Buyer, then Seller shall have the right, after giving to the Buyer three days time to despatch by the available route at Seller's sole discretion to the destination required by the original despatch instructions. Within the period of three days above mentioned, Buyer may change the destination provided the (torn) despatching instructions are capable of immediate execution. In the case of despatch by road, river or other transport any combination thereof, all the terms and conditions of the Carriers are to be a binding on the Buyer, and tender to Carrier shall be a good delivery within the meaning of the clause.

3. The buyer is to give the Seller despatching instructions in accordance with the above schedule, in the case (torn) ready sales within ten days from the date hereof when quantity is less than 1500 bags, and within fifteen days when quantity is 1500 bags or more; and in the case of forward sales, not less than fourteen days prior to the expiry of the (torn) for delivery of the goods as provided in the above Schedule. When goods are for delivery in instalments the times (torn) clause provided shall apply to the despatching instructions for each instalment. The sugar will be despatched at (torn) Risk unless the buyer shall give to the Seller instructions to the contrary in the Dispatching Instructions.

The despatching instructions to be given as aforesaid shall be such as the Seller will then be in a position to carry (torn) having regard to restrictions on booking, availability of wagons,

transshipment difficulties and other matters. The despatch (torn) instructions once given shall not ordinarily be amended or altered and they can be altered or amended only with the consent of the seller and before the goods have left the factory, the Seller is not in any way responsible for any delays that may arise through error or mistake in the despatching instructions sent by the buyer. If the Buyer fails to give despatching instructions within the time and in the manner aforesaid he will be deemed not to have given any despatching instructions at all.

11. No complaint as regards description, quality or condition of any consignment will be admitted unless the Buyer has complied with Clause 3 thereof and has paid to the Seller the full price and all overdue or other charges and unless the complaint is made in writing to the Seller within three days from the arrival of such consignment at destination, the date of such arrival being deemed to be the date of arrival entered in the Books of the Railway Co., Steamer Co., Carrier or Port Authorities. The completion of Risk Noteform A as required by the Railway authorities at certain seasons of the year shall not be construed as adverse remarks as to the condition of the goods or its packing. If any complaint, as to quality condition quantity or weight is referred to arbitration and an allowance is awarded in respect thereof, the Buyer shall retain the goods and such allowance shall be deducted from the price and be refunded by the Seller."

The High Court, in view of its finding that the delivery was contracted to be made ex-factory, the factory being within the State of Uttar Pradesh and the contract not containing any condition requiring the assessee to deliver the goods outside Uttar Pradesh, held that rebate was not admissible under Section 5. The High Court said that its detailed reasons were contained in its judgment in Lord Krishna Sugar Mills v. Commissioner Sales Tax U.P. In that case Desai C.J., held that the obligation to deliver goods outside Uttar Pradesh must arise only "from a term in the contract, and in the absence of such a term it could not be said that the goods were to be delivered outside Uttar Pradesh. The learned Chief Justice further observed as follows :

A term in a contract that despatch instructions would be furnished later necessarily means that the seller undertakes to comply with them. If under a contract itself something is to be settled later, what is settled later becomes as much binding under the contract itself as the terms already settled under the contract. Still, I do not think that the sales in those cases in which the contracts provided for despatch instructions to be given later became sales for delivery outside Uttar Pradesh merely because the despatch instructions were that they should be despatch outside Uttar Pradesh. All that can be said is that the sales were for "delivery in accordance with despatch instructions" and a sale for "delivery in accordance with despatch instructions" is not necessarily a sale for "delivery outside Uttar Pradesh."

He seemed to be of the view that in order to come within the expression "delivery outside Uttar Pradesh" it must be one of the terms settled at the time of the formation of the contract itself that the goods will be delivered outside Uttar Pradesh, and if this is not so settled and all that is settled is that they will be delivered in accordance with despatch instructions, the sale would neither be a sale for delivery outside Uttar Pradesh nor a sale for delivery inside Uttar Pradesh. He was clearly of the view that despatch instructions were not a part of the contract when it was formed and did not get incorporated into it or become a part of it when given. Pathak, J., in a concurring judgment, was of the view that it must be in the contemplation of the parties at the time of entering into the contract that the goods which were the subject of sale must be delivered outside Uttar Pradesh. He observed

that "there is a distinction between settling and determining the terms of a contract and complying with the terms of that contract. The former relates to the formation of the contract, the latter to its execution."

The first question which arises in these appeals is whether the word "delivery" in the expression "sales of such goods for delivery outside Uttar Pradesh" occurring in S. 5 of the Act means actual delivery or constructive delivery. If it means constructive delivery then there is no doubt that on the facts as stated by the Judge (Revisions) the contract provided for constructive delivery inside Uttar Pradesh and the assessee mills would not be entitled to rebate under S. 5.

The Madras High Court had occasion to consider a similar question in *India Coffee and Tea Distributing Co. Ltd., v. The State of Madras.* (10 S.T.C. 359.) It held that the word "delivery" in s. 5 of the Madras General Sales Tax Act, 1939, which exempts from taxation sales of tea "if the sale is for delivery outside the state and delivery actually was made" did not include anything which the law deemed "delivery" but was restricted to physical delivery of the thing sold. In coming to this conclusion, Subrahmanyam, J., observed :

"In deciding whether the word "delivery" in section 5(v) includes delivery in law, we have to have regard to the objects of the Legislature in enacting section 5(v). The object obviously was the promotion of the export of tea. The Legislature intended that where tea was exported from the State for being delivered outside the State, the sale which resulted in such export should be exempt from taxation. That object would not be wholly achieved if we hold that delivery of documents of title in the State of Madras would make the sale liable to taxation."

We agree with the view expressed by the Madras High Court. It seems to us that the object underlying s. 5 is to encourage export of goods manufactured in Uttar Pradesh and notified under s. 5. The course of trade adopted by the Indian Sugar Syndicate Ltd. and the assessee mills shows that if the word "delivery" is interpreted to mean 'constructive delivery' very few 'export sales', if we may use the expression, would enjoy rebate under s. 5. As long as the contract evinces an intention to export and actual delivery is given to effectuate that intention the object of the Legislature to ensure that only real 'export sales' enjoy the rebate would be fulfilled. It seems to us that in the context of s. 5 the word 'delivery' occurring in s. 5 means 'actual delivery'.

The next question that arises is whether the sales by the assessee mills were for actual delivery outside Uttar Pradesh. The answer to this problem depends on the answer to the question whether despatch instructions contemplated by clause 2 and clause 3 of the contract were part of the contract entered into by the assessee mills. It seems to us that they were. The contract by the assessee mills was to actually deliver at a place to be communicated. This view is reinforced by what is contained in clause 11 of the contract. This clause contemplated a destination in spite of constructive delivery having been contracted to be made at Rohana Kalan Station. Further, the contract was not to actually deliver at some place to be chosen or assented to by the assessee mills but at any place without restrictions. The contract required nothing more for completion than a mention of the place. When the despatch instructions were given, it was not a case of performing the contract but specifying a term of the contract. If the place of actual delivery had been specified and it was a question merely of communicating the route by which the goods were to be delivered this would perhaps relate to the mode of performance of the contract. But communication of the place where actual delivery is to be given does not relate to the mode of performance but formation of the contract. It seems to us, with respect, that the High Court erred in relating despatch instructions to

the mode of performance of the contract.

In the result we hold that the assessee mills is entitled to rebate under s. 5. We set aside the judgment of the High Court and answer the question as follows :

"The revising authority was not right in holding that the sales in dispute were not for delivery outside Uttar Pradesh. Further, the applicant was entitled to rebate under S. 5 of the Act."

The appellant will have his costs incurred in the High Court and here. One hearing fee.

Appeal allowed.

</html