

**ALLAHABAD HIGH COURT**

Capco Ltd.

Vs.

Sales Tax Officer

Civil Misc. Writ No. 1188 of 1955

(O.H. Mootham, C.J. and Raghubar Dayal, J.)

30.04.1959

**JUDGMENT**

**Mootham C.J.**

1. This is a petition under Article 226 of the Constitution.
2. The petitioner is a private limited company which has its head office in Calcutta and branches at various places in India, including Kanpur. It carries on the business of importing and selling dyes, chemicals, plastics and other similar goods. During the assessment year ending the 31st March 1954 the petitioner's products were sold to buyers in Uttar Pradesh both by its Kanpur branch and by its branches at Bombay and Madras and its head office in Calcutta.
3. The Sales Tax Officer, Kanpur, by an assessment order dated the 28th July 1955 has assessed the petitioner to sales tax in the sum of Rs. 2,426-11-6 on the turnover of sales effected outside the Uttar Pradesh of goods supplied to buyers in the Uttar Pradesh.
4. The petitioner now challenges the validity of this assessment on the ground that as the sales took place outside this State they cannot, under Article 286(1) of the Constitution, be subject to tax. For the State it is contended that as the goods sold were actually delivered in Uttar Pradesh as a direct result of such sales for the purpose of consumption therein the assessment is valid. Article 286(1) as it stood in 1954 provided that :

"286(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -

(a) outside the State; or

(b) .....

Explanation. - For the purposes of sub-section (a), a sale or purchase shall be deemed to

have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

5. The material facts are not in dispute. The sales to buyers in Uttar Pradesh affected by the petitioner outside this State fall into three groups :

I. In which the contract of sale provides for delivery ex-godown Calcutta/Madras/Bombay;

II. In which the contract provides for delivery F.O.R. Calcutta/Madras/Bombay;

III. In which the contract provides for delivery F.O.R. Kanpur.

No difficulty arises with regard to the third group. It is not seriously in dispute that "Delivery F.O.R. Kanpur" means delivery by the petitioner to the buyer at Kanpur, and as it is common ground that the goods were intended for consumption in Uttar Pradesh, sales falling within this group are within the Explanation to Article 286 (1) and must be deemed to have taken place in this State.

6. As regards sales falling within group I or group II it is also common ground

(a) that each sale was for a specific and ascertained imported product in a deliverable state;

(b) that the petitioner dispatched the goods to the destination in Uttar Pradesh to which the buyers desired them to be sent;

(c) that the goods were consumed in Uttar Pradesh;

(d) that in the case of Sales F.O.R. Calcutta/ Madras/Bombay-group II - the petitioner debited the buyer with the railway freight charges; and in the case of sales 'ex-godown' group I - the petitioner debited the buyer with the railway freight charges and the cost of the carriage of the goods from the godown to the railway station;

(e) that the sales were on a credit basis, payment being made by the buyer against the sales bills and railway receipts, either directly or through a bank or by V.P.P.

7. It is convenient first to consider the position with regard to sales falling within group II. There is no doubt that the property in the goods passed to the buyer upon the goods being delivered to the railway authorities; and this is not in dispute. The petitioner's argument is that the goods having been so delivered to the buyer outside Uttar Pradesh there could be no actual delivery within the Uttar Pradesh and the Explanation has no application; and he relies on *Mohammed Ishok v. State of Madras*<sup>1</sup>,. In that case the assessee, who was a manufacturer of groundnut oil, carried on business at Pollachi in the Madras State. He sold oil to a company at Ernakulam, which was outside the State, under a contract of sale which provided that the containers for the oil were to be supplied by the buyers and that delivery would be F.O.R. Pollachi Junction. The

assessee delivered the containers to the railway authorities at Pollachi Junction, and under the instructions of the buyers the oil was then transported to Ernakulam where it was cleared by the buyers. The Court was of

<sup>1</sup>1955-6 STC 230 : AIR 1955 Mad 502

opinion that the delivery of the goods at Pollachi Junction was a delivery to the purchaser, and that as that had taken place within the State of Madras the tax liability had accrued and this was not altered or affected by reason of the subsequent despatch of the goods at the instance of the buyer to Ernakulam. The Court, it appears, took the view that as there had been a delivery of the goods at Pollachi Junction there could be no 'actual delivery' of the goods at Ernakulam. At page 234 (of STC) of the Report the Court said :

"But the crucial fact which has to be established before the exemption could be claimed is that there should be an 'actual delivery' of the goods outside the State. If under the contract there is a delivery of these goods at Pollachi there could not possibly be a delivery of the same goods again in Ernakulam ..... If delivery had taken place within the State, there could not obviously be a delivery of the same goods outside the State merely because they were subsequently transported to and reached Ernakulam."

8. With respect we find ourselves unable to agree with this opinion, which appears to us to make no distinction between the constructive and actual delivery of the goods the subject of the sale. It is now well settled that delivery of goods by the vendor to a carrier, even though the carrier be named and hired by buyer, is only constructive and not actual delivery to the buyer; and the reason is that a contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts : *James v. Criffin*<sup>2</sup>, *Ex Parte, Rosever China Clay Co., In re, Cock*<sup>3</sup>, Both these cases were concerned with the limits of a vendor's right of stoppage in transitu, and in the latter Brett, L. J. said, at page 569 :

"But, as soon as the clay was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the purchaser, and at the same time, as between the vendor and the purchaser there was a delivery of the clay to the latter. But it was a constructive, not an actual delivery."

"On page 570 the same learned Judge says :

"In the present case the clay was placed on board the ship for the purpose of being carried to Glasgow; it was in the actual possession of the shipowner, and only in the constructive possession of the purchaser."

A similar view was taken in *Kendal v. Marshall Stevens and Co*<sup>4</sup>, and by Venkatarama Ayyar J. in *Bengal Immunity Company Ltd. v. State of Bihar*<sup>5</sup>, In the latter case the learned Judge held that the words "actual delivery" in the Explanation to Article 286(1) are used in contrast to constructive delivery as meaning physical delivery of the goods, and that the constructive delivery of goods by a seller to a carrier for transmission to the buyer is not actual delivery within

the meaning of the Explanation.

9. The delivery by the petitioners of the goods the subject of sales falling within group II to the railway administration outside this State was followed by the delivery of those goods by the railway to the buyer in Uttar Pradesh. The former, in our opinion,

<sup>2</sup>(1837) 2 M and W 623

<sup>4</sup>(1888) 11 QBD 356

<sup>3</sup>(1879) 11 Ch D 560

<sup>5</sup>1955-2 SCR 603 at p. 834 : AIR 1955 SC 661 at p. 753

was a constructive delivery and the latter the actual delivery as a direct result of the sale within the meaning of the Explanation. The sales falling within this group must therefore be deemed to be sales which have taken place in Uttar Pradesh.

10. There remains the consideration of sales in group I in which the contract provided for delivery 'ex godown'. Sales within this group are distinguishable from those in group II only by the fact that the carriage of the goods from the petitioner's go-down to the buyers is shared between the two carriers; one who carries from the godown to the railway station and the railway administration which thereafter transports the goods to the buyer in Uttar Pradesh. We cannot see that this makes any difference; actual delivery as a direct result of the sale will take place at the station in Uttar Pradesh at which the buyer receives the goods from the railway. Mr. G.S. Pathak has argued that in this class of cases actual delivery of the goods is given by the petitioner as vendor at the gate of the godown to the petitioner as agent of the buyer. We are unable to accept this submission as there is no evidence to support the assertion that the petitioner in fact acted in the manner alleged. It is unnecessary therefore to consider whether a seller can in law act as the agent of the buyer for the purpose of taking actual delivery of the goods sold; but on the analogy of cases decided under Section 17 of the Statute of Frauds holding that one contracting party cannot act as agent of the other for the purpose of signing the note or memorandum of the bargain we entertain considerable doubt whether he can : see *Farebrother v. Simmons*<sup>6</sup>, and *Sharman v. Brandt*<sup>7</sup>,

11. In our opinion this petition fails and it is accordingly dismissed with costs which we fix at Rs. 300/-.

Petition dismissed.

<sup>6</sup>(1822) 5 B Ald 333

<sup>7</sup>(1871) 6 QB 720