CALCUTTA HIGH COURT

North Adjai Coal Co. (P) Ltd

Vs.

Commercial Tax Officer

A.F.O.O. No. 402 of 1961

(R.K. Bose, C.J. and B.C. Mitra, J.)

14.01.1966

JUDGMENT

B.C. Mitra, J.

1. This appeal is directed against a judgment and order of J.P. Mitter, J dated August 11, 1961. By this judgment a rule nisi obtained by the appellant on a petition under Article 226 of the Constitution was discharged.

2. The appellant is a private company and is the owner of a coal mine in the district of Burdwan. Pursuant to an agreement between the Government of India and the Government of Pakistan, the former agreed to release large quantities of coal for consumption in East Pakistan. The appellant, as one of the colliery owners, delivered coal to the Fuel Inspector, Eastern Bengal Railway, East Pakistan, of the total value of Rs. 88,929-10-0. In respect of this supply of coal bills were drawn by the appellant in the same of the Deputy Coal Commissioner (Production), Ministry of Steel and Mines, Government of India, Calcutta, who was to realise the price of coal supplied to Pakistan. With regard to this supply of coal to Pakistan, the appellant has been made liable for sales tax under the Bengal Finance (Sales Tax) Act, 1941, (hereinafter referred to as the Act). The appellant contended before the sales tax authorities, that it was not liable to pay sales tax on the coal supplied to East Pakistan, as it was entitled to exemption under Section 5(2)(a)(v) of the Act and also under Article 286(1)(b) of the Constitution, as the coal was meant for export and was in fact exported out of Union of India. These contentions of the appellant were overruled and rejected, firstly by the Commercial Tax Officer and secondly by the appellate authority before whom an appeal was preferred against the order of the Commercial Tax Officer and finally by the Additional Commissioner, Commercial Taxes, who disposed of a revision application made by the appellant under Section 20(3) of the Act. Being aggrieved by the orders passed by the sales tax authorities, the appellant moved an application under Article 226 of the Constitution and obtained a rule which was discharged by the judgment and order hereinbefore mentioned.

3. Mr. Noni Coomar Chakravarty, learned Advocate for the appellant, contended that sales could not be charged with regard to the supply of coal to the Government of East Pakistan as the coal in question was exported out of the country. He argued that the transaction was covered by the

provision in Section 5(2)(a)(v) of the Act, which provides that a dealer is entitled to deduct from his taxable turn-over :"sales of goods which are shown to the satisfaction of the Commissioner not to have taken place in West Bengal or to have taken place in the course of inter-State trade or commerce within the meaning of Section 3 of the Central Sales Tax Act, 1956 or in the course of import of the goods into or export of the goods out of the territory of India within the meaning of Section 5 of that Act". It was argued that the transaction must be regarded as a sale which did not take place in West Bengal, or in any event a sale in the course of export of the goods out of the territory of India. There was no sale of coal in West Bengal. It was next argued that the sale in any event was not liable to be taxed as it was a sale in the course of export of coal out of the territory of India as provided in Article 286(1)(b) of the Constitution. The third contention of Mr. Chakrawarty was that under Clause 12-E of the Colliery Control Order, 1945, the transaction could not be regarded as a sale which was liable to tax. It was argued that under Clause 12-E of the Colliery Control Order, 1945, no person could acquire, purchase or agree to acquire or purchase any coal from a colliery and no colliery owner or his agent could dispatch or agree to dispatch or transport any coal from the colliery, except under the authority and in accordance with the conditions contained in a general or Special authority of the Central Government. It was argued that coal could not be sold, dispatched or transported without the permission of the Coal Controller and therefore the supply of coal to the East Pakistan Government could not be treated as a sale of coal by the appellant which was liable to sales tax.

4. In support of the above contention the learned advocate for the appellant firstly relied upon the decision of the Supreme Court in *State of Travencore-Cochin v. Bombay Company Ltd*[1]*.,* in which it was held that whatever else might or might not fall within Article 286(1)(b) of the Constitution, sales and purchases which themselves occasioned export or import of the goods, as the case might be, out of or into the territory of India, came within the exemption under Article 286(1)(b). It was further held that a sale by export involved a series of Integrated activities commencing from the agreement of sale and ending with the delivery of the goods for transport out of the country by land or sea and such a sale could not be dissociated from the export without which it could not be effectuated and the sale and the resultant export formed parts of a single transaction. Of the two integrated activities which together constituted an export of sale, whichever occurred first could well be treated as taking place in the course of the other and even where the property in the goods passed to the foreign buyers and the sales were thus completed within the State, before the goods commenced their journey, the sales must nevertheless be regarded as having taken place in the course of export and were therefore exempt under Article 286(1)(b) of the Constitution. Relying on this decision, it was argued that even if it was held that the sale took place at Calcutta, such a sale could not be dissociated from the export to Pakistan which must be regarded as part of the transaction itself and the sale and the export together formed one integrated transaction. It was further argued that in fact there was no sale to the Government of India by the appellant in West Bengal and therefore the appellant's case stood on a much stronger footing. The goods were supplied to East Pakistan under the directions of the Government of India who was at no stage the purchaser of the coal.

5. Mr. Chakravarty next relied upon a decision of this Court reported in *Indian Steel and Wire Products Ltd. v. State of West Bengal*[2]**.** In

[1] AIR 1952 SC 366 [2](1964) 2 Rev. and Lab R 39 (Cal)

that case the question was whether the sales tax authorities were entitled to tax a transaction or sale which was directed and controlled under the Iron and Steel (Control of Production and

Distribution) Order, 1941. It was held that the sales tax authorities could not impose tax on a transaction op sale which was controlled by the said order, as sales of iron and steel material were controlled by the Controller of Iron and Steel and there was no volition on the part of the contracting parties, who were required to deliver and accept delivery in terms of the order of the Controller and there was therefore no sale and the assessee was not liable to pay sales tax on the transaction.

6. Reliance was also placed on a decision of the Punjab High Court reported in *Mohan Lal Moti Lal v. Assessing Authority, Bhatinda*[3]. In that case it was held that a sale in the course of export within the meaning of Article 286(1)(b) of the Constitution involved an inextricable connection or bond between the sale and the export leaving no option to the purchaser from not exporting without committing a breach of the contract. It was also held that in order to attract the exemption, the sale must itself occasion the export or the export must be made under the sale and to occasion the export there must exist between the contract of safe and the actual exportation, a bond so that each link was inseparably connected with the one immediately preceding it and the two activities of sale and export must be so integrated as to leave no possibility of voluntary interruption without entailing a breach of the contract or an obligation arising from the nature of the transaction. Relying on this decision it was argued that in this case the export out of India was a part of the transaction itself as the coal was meant for the Government of East Pakistan and the export therefore could not be regarded as an independent transaction but must be treated to be a part of the transaction of sale, whoever was the purchaser of the coal.

7. Mr. B.C. Dutt, learned Additional Government Pleader appearing for the respondents, argued that the appellant sold the coal to the Government of India in West Bengal and the latter exported the same to East Pakistan. Therefore, it was argued, that the transaction of sale which took place in West Bengal was liable to be taxed under the Act. It was further argued that there was no contract of sale between the appellant and the Government of East Pakistan and therefore exemption from sales tax could not be claimed either under Section 5(2)(a)(v) of the Act or under Article 286(1)(b) of the Constitution. There was nothing to show, it was argued, that the relationship of buyer and seller existed between the Government of East Pakistan and the appellant. On the contrary, the materials disclosed quite plainly proved, it was further argued, that the appellants sold the coal to the Government of India, the bill was drawn in the name of the Deputy Commissioner (Production), Ministry of Steel, Mines and fuel, Government of India and the price was paid by the said Officer. That being so, it was argued, that the transaction must be regarded as a sale by the appellant to the Government of India and as such was liable to be taxed under the Act. In support of this contention, learned advocate for the respondents relied upon the decision of the Punjab High Court in (1965) 16 STC 553 : AIR 1965 Punjab 391 (supra) and argued that the mere fact that the sale of the goods was followed by the export of the same did not by itself clothe the sale with the quality of its being in the course of export.

8. In our opinion the contention of the Learned advocate for the appellant is well founded. The export of the coal to East Pakistan was a part of the transaction of sale and such

[3](1965) 16 STC 553 : AIR 1965 Pun 391

export could not be separated from the transaction of sale. It is plain on the facts that the appellant supplied the coal, which was exported to East Pakistan and as the agreement or arrangement was that the coal would be loaded into wagons for the Fuel Inspector, Eastern Bengal Railway, Drasna, East Pakistan, who was the consignee, the sale in this case could not be

dissociated from the export, without which the sale itself could not be effectuated as was held by the Supreme Court in AIR 1952 Supreme Court 366 (Supra). The sale, even if it was to the Government of India, could not be dissociated from the export to East Pakistan. Even if it is held that the sale took place in West Bengal and the property in goods passed to the Government of India within West Bengal, such sale must be regarded as having taken place in the course of export and was therefore, exempt under Article 286(1)(b) of the Constitution. The position, however, would have been different, if the export of the coal out of the territory of India was not contemplated and was not part of the bargain. If that was the case, different considerations would have applied. But in this case the supply of coal was made clearly for the purpose of export to East Pakistan and therefore such export must be regarded as an integral part of the transaction itself. In such a case, even if the property in the goods passed within West Bengal and the transaction of sale is otherwise contemplated within West Bengal, the sale must be regarded as having taken place in the course of export and for that reason such sale must be held to be exempt under Article 286(1)(b) of the Constitution. Such a transaction also attracts the exemption provided in Section 5(2)(a)(v) of the Act.

9. The next contention of the learned advocate for the appellant was that having regard to the terms of Clause 12-E of the Colliery Control Order, 1945, to which I adverted earlier in this judgment, the transaction could not be regarded as a sale. In support of this contention reliance was placed on the decision of the Supreme Court in *New India Sugar Mills Ltd. v. Commr, of Sales Tax, Bihar*[4], In that case it was held that the term 'sale' in Section 2(g) of the Bihar Sales Tax Act must be interpreted to mean a sale as defined in the Sale of Goods Act, 1930. Under Section 4 of the latter Act, in order to constitute a sale of goods, property in the goods must be transferred from the seller to the buyer under a contract of sale. But in that case the assessee despatched sugar to the authorised agent of the State of Madras in compliance with the direction given by the Sugar Controller exercising his power under the Sugar and Sugar Products Control Order, 1946. It was held that there was no sale within the meaning of Section 2(g) of the Bihar Sales Tax Act, 1947 and the assessee was not liable to pay sales tax on the value of the sugar so despatched. The definition of 'sale' in Section 2(g) of the Bihar Act is almost identical with the definition of sale in Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941. It was therefore, argued that the supply of coal by the appellant to the Government of East Pakistan could not be regarded as a sale having regard to the terms of Clause 12-E of the Colliery Control Order, 1945. This supply of coal was not made pursuant to a contract between the parties, but was made under the authority and on the conditions specified by the Central Government as contemplated by Clause 12-E of the Colliery Control Order, 1945. Therefore, it was argued, the transaction could not be regarded as a sale at all, liable to be taxed under the provisions of the Act.

10. In our opinion this contention of the learned advocate for the appellant is also sound. There was no contract of sale between the parties, but the supply of coal was made under

[4](1963) 2 SCA 266 : (AIR 1963 SC 1207)

the directions of and the authority of the Central Government. The transaction cannot, therefore, be regarded as a 'sale' as defined in Section 2(g) of the Act. Not being a sale under the Act, the transaction cannot be taxed under the provisions of the same.

11. The learned advocate for the respondents raised another contention, namely, that no relief should be granted to the appellant, as it had an alternative remedy under the Act and the application from which this appeal arises was made without recourse to the remedy provided

under the statute. Our attention was drawn to Section 20(3) of the Act which provides that the Commissioner either upon application or of his own motion may revise any order under this Act or the rules thereunder and the Board of Revenue may in like manner revise any assessment made or order passed by the Commissioner. In this case, it was argued, an appeal was preferred against the order of the Commercial Tax Officer under Section 20(1) of the Act and this appeal was dismissed by the Assistant Commissioner of Commercial Taxes by an order dated January 31, 1957. Thereafter a revision application was made to the Commissioner of Commercial Taxes under Section 20(3) of the Act. This revision application was also dismissed by the Additional Commissioner of Commercial Taxes on July 28, 1957. But it was argued that the appeal and the revision application did not exhaust the remedies provided by the Act. The appellant could have, it was argued, preferred a further revision application to the Board of Revenue under Section 20(3) of the Act. This was not done and therefore, it was argued, that the appellant did not exhaust the remedies provided by the statute and that being so he was not entitled to relief in a writ petition. In support of this contention, reliance was placed on the decision of the Supreme Court in *Sales Tax Officer, Jodhpur v. Shivratan G. Mohatta*[5], In that case after the assessment order was made by the Sales Tax Officer, the assessee immediately moved the High Court under Article 226 of the Constitution without recourse to the remedies provided in the statute and it was held that it was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax. But although these observations were made by the Supreme Court, the petition was not dismissed on the ground that the assessee had an alternative remedy which was not pursued, but the Supreme Court proceeded to deal with the appeal on its merits as the High Court had entertained the petition. Relying upon this decision, it was argued, that as the appellant did not exhaust all the remedies available to him under the statute, he could not be allowed to invoke the special jurisdiction of this Court under Article 226 of the Constitution.

12. The learned advocate for the appellant sought to repel this contention of the respondents by contending that the facts in this case are entirely different from the case before the Supreme Court. In this case, it was argued, the appellant had taken recourse to two of the remedies provided under the statute, namely, an appeal to the Assistant Commissioner of Commercial Taxes and thereafter a revision application to the Commissioner of Commercial Taxes. It was true, it was argued, that the appellant did not take recourse to the last remedy provided under the statute, namely a revision application before the Board of Revenue. But this omission on the part of the appellant, it was argued, did not debar the appellant from seeking relief under Article 226 of the Constitution.

[5](1965) 16 STC 599 : (AIR 1966 SC 142)

13. There is good deal of force in this contention of the learned advocate for the appellant. An alternative remedy under the statute does not take away the jurisdiction of this Court to issue appropriate writs, if the facts otherwise justified interference. But if there is such a remedy, this Court will be slow in exercising its special jurisdiction under Article 226 of the Constitution. In this case the appellant had taken recourse to two of the remedies provided under the statute, though he omitted to avail of the third. Then again, the appellant has challenged the jurisdiction of the sales tax authorities to impose the tax on the transaction on the ground that the export of the coal out of the territory of India was an integral part of the transaction itself and such export could not be treated as a separate transaction. Finally the sales tax authorities could not assume jurisdiction to impose tax on a transaction which was not a sale as defined in Section 2(g) of the

Act. These being the grounds on which the appellant challenged the order of assessment in the writ petition, the mere fact that it did not take recourse to the last of the three remedies provided by the statute, although it had taken recourse to two of such remedies, would not debar the appellant from getting relief in its writ petition.

14. For the reasons mentioned above, this appeal is allowed and the judgment and order of J.P. Mitter, J., dated August 11, 1961, are set aside and the rule is made absolute. The appellant will be entitled to costs of this and also of the trial Court assessed at five and three gold mohurs respectively.

Bose, C. J.

15. I agree.

Appeal allowed.