CALCUTTA HIGH COURT

S.K. Roy

Vs.

Addl. Member, Board of Revenue

Sales Tax Ref. No. 391 of 1961

(A.N. Ray and D. Basu, JJ.)

25.04.1966

JUDGMENT

D. Basu, J.

1. The facts, as stated in the Statement of Case in this Reference, are as follows :

2. The assessment year is the year ending March, 1952 and the Assessee is the Bhowrah Coal Co., a registered dealer under the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as 'the Act'). The Assessee's claim for exemption from being taxed under the Act, on two categories of transactions have been disallowed and this disallowance has led to this reference. These two transactions are

> (i) "Sales of coal made to certain shipping agents for shipment of coal to countries outside India and
> (ii) Sales of coal made to B. N. R."
> (i) As regards the first item, the facts are that at the relevant period, under the provisions of the Colliery Control Order, 1945 coal could not be exported out of India without the sanction of the Government. The latter placed orders for export through dealers selected by it and such dealers delivered the good to the shipping agents as directed in the orders. The assessee executed such orders and the coal was in fact exported in pursuance thereof, though the names of the foreign buyers were unknown to the Assessee.
> (ii) As regards the second item, the coal was supplied by the Assessee to the B. N. Railway, inter alia, in compliance with the directions of the Government of India, by loading the coal into wagons at the Assessee's colliery sheds in Bihar. In the Railway receipts, the Assessee was named as the consignor and the B. N. Railway as the consignee and some place in West Bengal was shown as the destination.

3. The Assessee's claim for exemption having been disallowed by all the authorities up to the Board of Revenue, the Assessee made an application under Section 21(1) of the Act (Ann. H, p.

60 of the paper Book) to have the question of law stated therein referred to the High Court. The Board, however, refused to refer and the Assessee was obliged to apply to the High Court under Section 21(2). This Court (Ann. K, p. 77, Paper Book) allowed the application and directed the Board to refer to itself the five questions, which have, accordingly, been referred by the Board. These questions are :

> "(a) Whether on the facts and in the circumstances of the case the sales in question made under sanction and direction of the Deputy Coal Controller (Distribution) for the purpose of export were assessable under the Bengal Finance (Sales Tax) Act, 1941;
> (b) Whether on the facts and in the circumstances of the case the sales in question by delivery to the Shipping agents can be said to have taken place in the course of export of the goods out of the territory of India within the meaning of Section 27 of the Bengal Finance (Sales Tax) Act, 1941 and Article 286 (1)(b) of the Constitution of India and as such exempt from taxes under the Bengal Finance (Sales Tax) Act, 1941;
> (c) Whether on the facts and in the circumstances of the case the sales in question to the Shipping Agents who are (within the meaning of the Bengal Finance (Sales Tax) Act, 1941) registered dealers of coke are exempted from taxes under Section 5(2)(a)(ii) of the Bengal Finance (Sales Tax) Act;
> (d) Whether on the facts and in the circumstances of the case the Hon'ble Member, Board of Revenue was legally justified in not allowing the stand taken by the petitioner that the sales in question having been made to registered dealers are exempt from taxes on the ground that the stand is a new one;
> (e) Whether on the facts and in the circumstances of the case the sales in question of goods to the Bengal Nagpur Railway can be said to have taken place in West Bengal within the meaning of explanation 2 of the Section 2 (g) of the Bengal Finance (Sales Tax) Act and as such liable to be taxed under the said Act. We shall deal with these questions seriatim : Question (a) :

4. There is little substantial difference between this question and the next one except that while Question (a) uses the expression "purpose of export", Question (b) refers to "the course of export". Mr. Mitra on behalf of the Board of Revenue has drawn our attention to the fact that in its application before the Commissioner (Ann. D), the Assessee claimed exemption as regards item (i) on these twofold grounds, namely, that the sale of the goods in question took place either "in the course of export or "for the purpose of export" and that, in either case, they were exempted by Article 286 (1)(b) of the Constitution. This appears to be true, from paras. 2(A) (iv) and 3(ii), at p. 32 of the Paper Book.

5. But throughout the subsequent stages, beginning from the Assessee's application for reference before, the first question was frame not with reference to the Constitution, but to "the Bengal Finance (Sales Tax) Act, "generally taking advantage of this fact, it has been urged by Dr. Pal, on behalf of the Assessee. that the wide question of assessability under the Act is open to this Court under Question (a) and that he is, accordingly, entitled to urge that the transaction in item (i) did not amount to a "sale" at all, as defined in the Act, being a transaction made under the directions of the Government of India under Clause 12E of the Colliery Control Order, 1945 and that this

Question should be answered in favour of the Assesse he succeeds in showing that it was not a "Sale" under the law as it exists. Mr. Mitra, on behalf of the Board, has vehemently opposed this on the ground that it is a new case which was never urged before the authorities below so that there is no finding thereon. It has further been urged that throughout the Statement of Case upon which this Reference has been made, it has been assumed that the disputed transaction is a 'sale' and even Question (a) has been framed with reference to the 'sales in question.'

6. In fairness to the Department it must be said that not only did the Assessee not contend at any earlier stage but that, indeed, it was not possible for him to so contend because of the fact that the decision of the Supreme Court in the *New India Sugar Mills Ltd. v. Commr. of Sales Tax*[1], on which this contention is founded, was not pronounced before November 26, 1962 and that the was reported in the All India Reporter only in August, 1963 and near about the same time in (1963) 2 SCA 266. It was in this case that the Supreme Court laid down that where sugar was despatched by the Assessess in compliance with the directions issued by the Controller under the Sugar and Sugar Control Order, 1946, such disposal did not constitute a 'sale' within the meaning of Section 2(g) of the Bihar Sales Tax Act, 1947, or within the meaning of Entry 48 of List II of the 7th Schedule of the Government of India Act, 1935 (to which corresponds item 54 of List II of the 7th Schedule of the Constitution), so as to enable the Provincial or State Legislature to impose a sales tax on the transaction on the footing that it was a 'sale'. But the fact that the case now sought to be made was not urged at any earlier stage is not conclusive of the matter, according to the observations in *I. T. Commr. v. S. S. Navigation Co. Ltd*[2]*.,* a decision on which either party before us relied. At the outset, it may be pointed out that the terms of Section 21(1) of the Act out of which the instant reference arises are similar to those of Section 66(1) of the Income Tax Act, 1922, to which the case just cited relates and the parties are in agreement that the decision in this case is applicable to solve the problem in question. Now, it is true that the Supreme Court observed in the cited case that when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order, notwithstanding that it may arise on the findings given by it (p. 1645, ibid.). But the Court put an addendum to the above proposition as follows: "Section 66(1) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein..... .....All that Section 66(1) requires is that the question of law which is referred to the Court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to these aspects of the question which had been argued before the Tribunal. It will be an over refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of Section 66(1) of the Act.

7. In the case before the Supreme Court, the question which was debated before the Revenue authorities was whether the specified sum could be assessed for the year 1946-47 or the sum was received in a previous year, as contended by the Assessee. The question which was eventually referred to the High Court was in this form : Whether the sum of Rs. 9,26,532 was properly included in the assessee company's total income computed for the assessment year 1946-47.

8. In the High Court, it was contended by the Assessee that the amount could not be

[1] AIR 1963 SC 1207

[2] AIR 1961 SC 1633
assessed for the year 1946-47 by reason of the Proviso to Section 10(2)(vii) of the Act. This Proviso was introduced in May 4, 1946, after the liability of the Assessee had accrued. It was next contended by the Assessee that the Proviso was retrospective in operation. It is evident that this question was not considered and could not be considered by the Tribunal. Nevertheless, the Supreme Court held that this question was included in the framework of the question referred and that the High Court was entitled to answer the question referred to upon a determination of the new contention raised by the Assessee. The following are the reasons given by Venkatarama Aiyar J., speaking for the majority :

> "As the question on which the parties were at issue, which was referred to the Court under Section 66(1) and decided by it under Section 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question and the High Court rightly entertained it ..... In the present case, the question actually referred was whether the assessment in respect of Rs. 9,26,532 was proper. Though the point argued before the income-tax authorities was that the income was received not in the year of account but in the previous year, the question as framed is sufficient to cover the question which was actually argued."

9. In the instant case, the question in issue before the Revenue authorities was whether the Assessee was entitled to exemption in respect of the transaction in item No. 1. While Questions (b) (e) refer to particular provisions of the Constitution or the Sales Tax Act, Question (a) is generic and refers to the Act as a whole. If, therefore, the Assessee can show that he is entitled to the exemption by reason of the very definition of 'sale' as given in Section 2(g) of the Act, I do not find anything in Question (a) to hold that any reframing of the issue would be necessary to give any answer on that point.

10. In this connection, we may also refer to the observations of Hidayatullah J. in *Prashar v. Vasantsen*[3], In that case, the reference mentioned only Section 34(3) of the Income-tax Act, but the limits imposed by that section were subsequently removed by Section 31 of the Amending Act of 1953 and it was held that it was the duty of the Court to answer the question referred to it with reference to the changes introduced by Section 31 of the Amending Act, even though that section was not even brought to the notice of the High Court by the parties. In this opinion, Raghubar Dayal J. concurred. Their Lordships relied upon the S. S. Navigation Case, AIR 1961 Supreme Court 1633, referred to by me above.

11. But even where the question is wide enough to admit of new aspects of law involved in the question, the High Court cannot answer the new aspect if it cannot be done without the investigation of new facts, which is a business of the Revenue authorities and not the High Court In such a contingency, there is no other alternative left to the High Court than to ask the Tribunal below to send a supplement statement of case under sub-section (4) Section 21 of the Act (which corresponds to Section 66(4) of the I. T. Act; vide *Zoraster v. I. T. Commr*[4]*.,*

12. Having regard to the foregoing authorities, we are satisfied that we are justified in
[3] AIR 1963 SC 1356 (1391)

[4] AIR 1961 SC 107 (111)
answering Question (a) with reference to the new aspect of law raised, namely, whether the transaction was a 'sale', provided it would not require the investigation of and finding on any facts outside those in the Statement of Case before us.

13. In our opinion, no such investigation of new facts would be required and the very first sentence of para 2 of the Statement of case suffices to bring the instant case within the proposition laid down in the New India Sugar Mills case, AIR 1963 Supreme Court 1207 which would answer the point in favour of the Assessee. This sentence is as follows :

> "Under the Colliery Control Order, the Government of India were exercising control on the output and disposal of coal during the relevant period with the result that coal could not be exported outside India without the sanction of the Government of India and such export as was allowed to be made could only be made by or through persons selected by the Government of India."

14. Now, the definition of 'sale' in Section 2(g) of the Act before us says : " 'sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract but does not include a mortgage, hypothecation, charge or pledge."

15. The definition 'sale' in Section 2(g) of the Bihar Sales Tax Act, to which the Supreme Court decision, just cited, relates was similar. Their Lordships in the majority stressed on the consensual element which was involved in the word 'transfer' and also held that the legislative power of the State under item 48 of List II of the Government of India Act, 1935 or Entry 54 of List II of the 7th Schedule to the Constitution was to be read in the light of the definition of 'sale' in the Sale of Goods Act, 1930, which again, was in accord with the concept of a 'sale' under common law. Of the various elements of this concept, two were that there must be (a) parties competent to contract and (b) there must be mutual consent of these parties to transfer the goods. At p. 1212 of the Report, the Lordships came to the conclusion that this consensual element was absent where the manufacturer was obliged, on pain of penalty to deliver the goods to the nominee of the Government and he had no option to sell it to any other person. These facts are established in the instant case by the opening sentence of para 2 of the Statement or Case and nothing more is required to apply the New India Sugar Mills decision, AIR 1963 Supreme Court 1207 (ibid.) to come to the conclusion that the transaction referred to in Question (a) was not taxable (as a 'sale') under the Bengal Finance (Sales Tax) Act, 1641.

16. The Question is answered accordingly.

17. Question (b).

This question relates to Article 286(1)(b) of the Constitution which makes it unconstitutional for a State to tax a sale or purchase which takes place

> "in the course of the import of the goods into, or export of the goods out of the territory of India."

18. No separate treatment of Section 27(1) (a)(ii) of the Act is necessary inasmuch as it merely reproduces the foregoing provision of the Constitution for the sake of incorporating a comprehensive provision in the statute itself.

19. This question relates to item (i) and proceeds on the assumption that the transaction in question is a 'sale'. Hence, even though the answer to Question (a) were against the Assessee, the transaction in item (i) would be exempted from taxation in case it is established that the transaction took place "in the course of export of the goods out of the territory of India."

20. The facts on this point are stated in para 2 of the Statement of Case as follows :

> "For the purpose of exporting, orders were placed by the Government of India with the dealer and in pursuance of the orders, the goods were delivered by the Petitioners to the different shipping agents; the dealer submitted bills to the shipping agents and received payment from them for the goods supplied. The shipping agents got their money from the Government of India through the account of the Chief Mining Engineer, Railway Board, presumably out of the fund deposited by the foreign buyers. The names of the foreign buyers were unknown to the petitioners but evidently coal was meant for export and was in fact exported."

21. As regards the relationship between the Assessee and the shipping agents to whom the Assessee was directed by the Government of India to deliver the goods, the statement in para 4 of the Statement of Case is :

> "He further held that there was no contract of sale between the Petitioner and the Shipping agents and that the goods were received by such shipping agents as nominees of the Government of India."

22. Though the foregoing statement summaries the finding of the Commissioner of Commercial Taxes, this finding was affirmed by the Board, as will appear from the Order of the Board at Ann. G.

23. While the case of the Assessee is that the export or the movement of the goods outside the territory of India is occasioned by the contract of the Assessee with the Government of India (assuming it to be a contract) and that the delivery of the goods by the Assessee to the shipping agents nominated by the Government of India and the eventual export by the shipping agents are parts of an integrated activity, the contention of the Revenue is that the goods were sold by the Assessee to the Government of India ana that the export of the goods by the Government of India through the shipping agents to foreign buyers unknown to the Assessee is a separate transaction. The contetion of the Revenue is, in short, based on the assumption of two sales, of which the earlier one took place within the territory of India. In support of this contention, reliance is placed on on the following findings of the Board:

> (a) That there was no privity of contract between the Assesses and the foreign buyers;

(b) That the bills of lading were made out, not in the name of the Assessee, but in the name of the Government of India.

24. What we have to determine, on the foregoing facts, is whether the transaction as between the Assessee and the Government of India or the latter's nominee, - the shipping agents, was a transaction 'in the course of export' of the goods across the borders of India. The material time in the instant case, as has been stated at the outset, is 1951-52. The meaning of the expression 'in the course of export or import in Article 286(1)(b) of the Constitution was explained by the Supreme Court in the leading case of *State of Travencore-Cochin v. Shanmugha Cashewnut Factory*[4], It was laid down there that a transaction of sale or purchase may take place in the course of export or import in one of two ways :

(i) Where as sale or purchase occasions an import into or export out of the territory of India;
(ii) Where a sale or purchase by transfer of shipping documents takes place before or after (as the case may be) the goods have crossed the customs frontiers of India.

25. We are concerned, in the instant case, as to the applicability to its facts of the first of the foregoing two propositions, namely. Whether the 'sale' in question (assuming it to be a sale) 'occasioned' the export which, admittedly, did take place.

26. Subsequent to the Travencore-Cochin Case, just cited, the two propositions laid down herein have received legislative recognition, in the following manner. By the Constitution (Sixth Amendment) Act, 1956, clause (2) of Article 236 was substituted, to empower Parliament to "formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)". Thus empowered to lay down the principles to determine when a transaction of sale or purchase of goods might be held to have taken place 'in the course of export or import, Parliament enacted Section 5 of the Central Sales Tax Act, 1956, which, however, merely reproduced the two propositions evolved by the Supreme Court in the Travencore-Cochin case, thereby ensuring certainty in the sphere of judicial interpretation. Sub-section (1) or Section 5, which relates to export, thus, provides-

"(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India." The result is that the law as it stands to-day, is the same as that laid down by the Supreme Court in the Travencore-Cochin case, so that whatever has been said in later cases, by way of explanation, has become relevant on the interpretation of Article 286(1)(b) of the Constitution, even though the later cases may refer to the terms of the statute. At the same time, anything said in these later cases must be understood with reference to what was said in the Travencore-Cochin case 1954 SCR 53: (AIR 1953 Supreme Court 333), on the basis of which the Legislature made the enactment.

27. The phrase "occasion the export or import of the goods" was first used by the

[4](1954) SCR 53 (62, 92) : AIR 1953 SC 333 (336; 346)

Supreme Court in the first Travencore-Cochin case (1952) SCR 1112 : (AIR 1952 Supreme Court 366), while interpreting the meaning of the expression 'on the course of in Article 286(1)(b) of the Constitution. The Court held that "whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or import of the goods as the case may be, out of or into the territory of India come within the exemption." This proposition was affirmed by the Court in the second Travencore-Cochin case (1954) SCR 53 (60-61) : AIR 1953 Supreme Court 333 (335) and such sale or purchase which occasions the export or import was termed by the Court as 'export sale' and 'import purchase', in order to distinguish them from local transactions such as 'a purchase for the purpose of export' and 'a sale after import' (pp. 63-64), ibid., also *State of Madras v. Gurviah*[5], which would not be transactions 'in the course of export or import' and would not be included within the exemption offered by the Constitution in Article 286(1) (b). That the expression 'in the course of' implies a movement of the goods from one terminus to another was emphasised by Sastri C. J. in the second Travencore-Cochin case, (1954) SCR 53 (62): (AIR 1953 Supreme Court 333 (336)), in these words :- "The word 'course' etymologically denotes movement from one point to another and the expression 'in the course of not only implies a period of time during which the movement is in progress but postulates also a connected relation ..... A sale in the course of export out of country should be understood .....as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. The time factor alone is not determinative. The previous decision proceeded on this view and emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export."

Then again (p. 67-8, (of SCR) : (at p. 337 of AIR) ibid.) :-

> " ..... the words 'in the course of' imply a movement or progress and, therefore, a beginning and an end of such movement or progress ..... It would seem, therefore, logical to hold that the course of the export does not commence or terminate until the goods cross the customs barrier."

28. In other cases such as *Mohanlal Hargovind Das v. State of M. P*[6]*.,* the Court has applied the same concept of movement to interpret the expression 'in the course of' in connection with clause (2) of Article 286, as it then stood, dealing with a 'sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce. What was decided in Mohanlal's case, 1955-2 SCR 509 : (AIR 1955 Supreme Court 786) (ibid.) was that a transaction as a result of which there was a movement of the goods across the border of a State was a transaction 'in the course of inter-State trade or commerce, as distinguished from a purely internal sale or purchase. About the same time, Venkatarama Ayyar J., in the Bengal Immunity Case, (1955) 2 SCR 603 (784-5) : (AIR 1955 Supreme Court 661 at p. 734), observed that in order to render a transaction as a sale 'in the course of inter-State trade', one of the necessary elements was a "transport of those goods from one State to another under the contract of sale". This view was not only reiterated by Venkatarama Ayyar J., in the later case of *Endupuri Narasimham and Son v. State of Orissa*[7]*,* but it was pointed out there

[5] AIR 1956 SC 158 [7] AIR 1961 SC 1344 (1346)
[6](1955) 2 SCR 509 (514) : (AIR 1955 SC 786 at p. 788)
that the principle or the test in this behalf was the same for the purpose of ascertaining whether a transaction was 'in the course of inter-State trade or of export from or import into the territory of India. This concept of the contract or transaction itself involving the movement of the goods was applied in the next case of *Cement Marketing Co. v. State of Mysore*[8], In *Tata Iron and Steel Co. Ltd. v. Sarkar*[9], and in *State Trading Corporation v. State of Mysore*[10], it was expressed as a movement resulting from a 'covenant' or 'incident' of the contract of sale.

29. Another judgment of the Court per Venkatarama Ayyar J., is *East India Tobacco 60. v. State of Andhra Pradesh*[11], where his Lordship quoted the observations of Sastri C. J., in the first Travencore-Cochin case, (1952) SCR 1112 (1118) : (AIR 1952 Supreme Court 366 (367-368)), to explain what was the test to determine whether a sale was in the course of export –

> "The phrase 'integrated activities' was used in the previous decision to denote that 'such a sale' (i. e., a sale which occasions the export) cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction. It is in that sense that the two activities - the sale and the export - were said to be integrated. A purchase for the purpose of export like or manufacture for export, is only an act preparatory to export and cannot be regarded as an act done 'in the course of the export of the goods out of the territory of India' ..... "

30. From a review of the preceding cases, it is abundantly clear that where a local or internal sale is made 'for the purpose of export' or is an act merely 'preparatory to export, it cannot come under the exemption offered by Article 286 (1) (b). But it would be exempted if the export or the movement of the goods out of the territory of India (that is, outside the customs barrier of India) takes place as a result of the covenant or contract between the seller and the purchaser, so that the sale and the resultant export are parts of the same transaction and they cannot be dissociated from each other. The facts of the instant case come under the latter category inasmuch as, according to paragraph 2 of the Paper Book, "for the purpose of exporting, orders were placed by the Government of India with the dealer and in pursuance of the orders, the goods were delivered by the Petitioners to different shipping agents" nominated by the Government and the shipping agents did in fact export such goods delivered to them by the Petitioners. As the Letters in the Supplementary Paper Book and the Bills show the order upon the Assessee was, to deliver the goods at the Docks, for loading in a named ship bound for a specified foreign destination, e.g., West Pakistan, under a "special shipping programme". The purchase from ; the Assessee (if it was a purchase) was thus a part of an arrangement for exporting the goods outside the territory of India and the contract was completed by the Assessee by delivering the goods to shipping agents for being loaded into ships outside the customs barrier. In such a case, the sale by the Assessee could not be dissociated from the export. The export took place in pursuance of the contract or arrangement as between the Government of India and the assessee.

31. The foregoing conclusion is sought to be repelled on behalf of the State of West
[8] AIR 1963 SC 980 (983, 984) [10] AIR 1963 SC 548 (549)
[9] AIR 1961 SC 65 (72) [11] AIR 1962 SC 1733 (1736)
Bengal by the learned Standing Counsel on two grounds : Firstly, it is urged that there was no

contract between the Assessee and the undisclosed foreign buyer and that, accordingly, this transaction could not be treated as one 'in course of the export' but must be held to be a local sale to the Government of India, though the purpose or object of the transaction was to export. In support of this contention, the learned Counsel relies on the recent decision in *Ben Gorm Nilgiri Plantations Co-conoor (Nilgiris) etc. v. S. T. O*[12]*.,* But, as will he seen just now, neither in this case nor in any of the earlier cases on Article 286 (1)(b) has it been said that there cannot be any sale in the course of export except where the seller sells the goods directly to the foreign buyer under a direct contract between them. This to no doubt a most usual instance of such a transaction as would come in under Article 286(1)(b), but this is not the exclusive instance.

32. A contract between the seller and the foreign buyer resulting in export was dealt with by the Supreme Court in the first Trayancore Cochin case, (1952) SCR 1112 (1118) : (AIR 1952 Supreme Court 366 (367-368) and it was held that it was an instance or a sale which 'occasioned the export': "Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and resultant export form parts of a single transaction."

33. The Court, however, did not mean to be exhaustive, i.e., to lay down that the only possible case of a sale 'in the course of export' was a sale which 'occasioned the export'. This is evident from the following observation:-

> ..... Whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be.....come within the exemption."

34. That the Court did not in the first Travencore-Cochin case, 1952 SCR 1112 : (AIR 1952 Supreme Court 366) (ibid.) mean to be exhaustive is also pointed out by Sastri C. J. in the second Travencore Cochin case (1954) SCR 53 (60) : (AIR 1953 Supreme Court 333 (335)) and in the latter case, the Court has added another instance of a sale 'in the course of export', namely :- A sale effected within the State by the exporter by the transfer of shipping documents while the goods are beyond the customs barrier or in transit (pp. 67-69; 93-94).

35. Even these two instances would not exhaust the concept of a sale 'in the course of export'. This is elaborately explained by the majority in the Ben Gorm case, AIR 1964 Supreme Court 1752 (1756), per Shah J.-

> "There are a variety of transactions in which the sale of a commodity is followed by the export thereof.

At one end are transactions in which there is a sale of goods in India and the purchaser,

[12] AIR 1964 SC 1752 (17560)

immediate or remote, exports the goods out of India for foreign consumption ..... Such a

transaction, without more, cannot be regarded as one in the course of export because etymologically 'in the course of export' contemplates an integral relation or bond between the sale and the export. At the other end if a transaction under a contract of sale with a foreign buyer under which the goods may under the contract be delivered by the seller to a common carrier for transporting them to the purchaser. Such a sale would indisputably be one for export, whether the contract and delivery to the common carrier are effected directly or through agents. But in between lie a variety of transactions in which the question whether the sale is one for export or is one in the course of export i.e., it is a transaction which occasioned the export, may have to be determined on a correct appraisal of all the facts. No single test can be laid as decisive for determining that question. Each case must depend on its facts.

36. It is thus clear that the mere fact that there is no contract between the seller and the foreign buyer does not conclusively establish that a transaction cannot be one in the course of export'. It may still be held to be such transaction provided it is established that the contract between the seller and a third party 'occasions' the export. The recent decision in *Singarenni Collieries v. Commr. of Commercial Taxes*[13], also demonstrates that for the application of the principle of 'occasioning the movement', a direct contract between the seller and the purchaser is not necessary.

37. Of course, if the instant case was a simple case of purchase by a private exporter for the purpose of export, or a transaction of sale preceding the export sale, as happened in the case of *State of Mysore v. Mysore Spinning and Manufacturing Co., Ltd*[14]., it would not be entitled to the exemption offered by Article 286 (1) (b) of the Constitution. But here is a case of an export directly and immediately resulting from the transaction between the Assessee (the seller) and the Government of India, or an export 'occasioned' by such transaction. Such a transaction would be entitled to the exemption even according to the majority judgment in the Ben Gorm case, as observed by Shah J., (p. 1756, ibid):-

> "In general where the sale is effected by the seller and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export."

38. The transaction with the Assessee, in the instant case, as has been pointed out earlier, was part of a 'special shipping programme of the Government'. It could not be dissociated by the export or movement of the goods out or the territory of India without violating the nature of the transaction or the mutual understanding between the parties, as referred to in the observation of Shah J., just quoted. Hence, the fact that there was no contract between the Assessee and the foreign buyer or that the Bill of Lading was made in the name of the Government of India are immaterial.

39. It has been argued, secondly, by the learned Standing Counsel that though the

[13]AIR 1966 SC 563 (570)

[14] AIR 1958 SC 1002 or in AIR 1962 SC 1733

Government directed the Assessee to deliver the goods to the shipping agents, there was nothing

to prevent the Government to divert the goods for internal consumption in India. Before adverting to the observations in the Ben Gorm case, AIR 1964 Supreme Court 1752 (ibid.), on which the learned Standing Counsel relies on this point, I would like to refer to the decision in, AIR 1963 Supreme Court 548, which, though a decision on Section 3(a) of the Central Sales Tax Act, throws light on the question as to when a movement of the goods may be said to be a result of "the covenant or incident of the sale" and these observations are pertinent in the instant case inasmuch as the sale in that case was the result of permits issued by the Government of Mysore. The permits were issued to purchasers on the terms that though the Cement Marketing Co., in the State was named as the supplier and the purchasers had to place their orders with that Company, the supplies were to be made by any of the named factories outside the State. On these facts, the question before the Court was "whether the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or an incident of such contract." It was held by the Supreme Court that, even though the contract entered into by the purchaser and the Cement Marketing Co., did not itself stipulate that the cement was to be supplied from a factory outside the State, under the terms of the permit granted by the Government, it could not be supplied otherwise. Hence, it was as an incident of the contract of sale that the goods moved from outside the State of Mysore into it, so that it was a sale 'in the course of' inter-State trade. The following observations of the Court (pp. 549-550) are relevant :

> "Now, at the relevant time, cement could be purchased only under a permit issued by the Government and on the terms contained in it. ... It appears from the specimen produced that a cement factory which was required to supply the cement covered by the permit was named in it. We are concerned with sales in which the permits required supplies to be made from factories outside Mysore .... It is true that the written contracts (between the purchaser and the Marketing Co.,) did not themselves contain any covenant that the supply had to be made from any particular factory but it seems to us that the agreement between the parties was not fully set out in them. In any case, each contract was subject to the terms of the permit to which it referred. As it is not in dispute that the sale could only be under a permit and on the terms contained in it, a contract has to be read as subject to it. Since the permits with which we are concerned provided that the supply had to be made from one or other factory situated outside Mysore, the contracts must be deemed to have contained a covenant that the goods would be supplied in Mysore from a place situate outside its borders. A sale under such a contract would clearly be an inter-State sale....."

40. What follows from this decision is that the covenant relating to movement may be an implied covenant or an incident of the arrangement, taken as a whole. Where the movement of the goods takes place from one terminus to another as a result of such an implied covenant or as an incident of the arrangement of the parties, it must be held that the movement has been 'occasioned' by the contract. Now, in the case before us, the Assessee, admittedly, could not dispose of the coal without the sanction of the Government of India and except in accordance with the directions contained therein. The directions of the Government of India in the instant case (as summarized in the order of the Additional Commissioner, at pp. 40-41 of the Paper Book) make it clear that "the Government of India directed the appellant to deliver coke to the handling agents, in the account of the C. M. E. Railway, for the purpose of exporting the goods to the destination outside

India by specified vessels." The whole arrangement, as I have pointed out earlier, was in pursuance of a 'Special Coal Shipment Programme'. The order upon the Assessee (e. g., p. 3 of the Supplementary Paper Book) referred to the Programme and also intimated that the goods would be lifted from the Docks where they were to be delivered by the Assessee by the named ship. The movement of the goods outside India was therefore an incident of the 'sale' by the Assessee and could not be dissociated from it. It was in the nature of the transaction that the coal supplied by the Assessee must be exported. In this state of affairs, it is idle to contend that there was nothing to prevent the Government to divert the coal for purposes of internal consumption. Such diversion would do violence to the arrangement based on the 'Shipping Programme' and would not be imagined by the Court as a real possibility. No doubt in the Ben Gorm case, AIR 1964 Supreme Court 1752 (1756), the majority made the following observations on which the learned Counsel relies :-

> "There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain export licence, which he may or may not obtain. There is nothing in law or even in the contract between the parties, or even in the nature of the transaction which prohibits diversion of the foods for internal consumption. The sellers have no concern with the actual export of the goods once the goods are sold."

41. These observations must however, be read in the light of the facts of the case which, in short, were as follows : Though tea was a controlled commodity like coal, as in the present case, the arrangements for the disposal of tea by the manufacturers were different. A manufacturer applies for and obtains from the Tea Board allotment of 'export quota rights' on payment of the necessary licence fee. The tea chests are then sent by the manufacturers to an auctioneer. The auctioneer sells by auction the chests of tea together with the export quota rights which had been obtained by the manufacturers. Agent of foreign buyers bid at the auction and they then obtain from the Government licenses for export of the tea under the export quota rights purchased by them at the auction. On these facts, it was held by the majority that even though the manufacturer knew that those purchasing at the auction purchased for the purpose or export, there was no obligation upon the auction purchasers to export. The export quota right sold by the manufacturer merely enabled the auction-purchaser to obtain an export license without which the tea chests could not be exported. But it was at the option of the auction-purchaser to apply for a license; again, even though he might apply, the Government was under no obligation to grant such license. In either case, the manufacturer had no say in the matter and there was no breach of the arrangement under which the chests had been sold at auction if the auction-purchaser released the chests for sale and consumption within this country. Upon these facts, the majority held that the auction-sale was not integrally connected with the export which might or might not take place.

42. The facts in the case before us are basically different inasmuch as it is the Government itself which enables the Assessee to sell the coal and directs that the sale shall take place by delivery to the docks for shipment to a foreign destination, under a 'Shipping Programme'. The entire transaction, including the movement of the goods beyond the customs barriers of India, takes place on the footing of export and the two cannot be dissociated from each other without undermining the 'Special export programme', as a part of which the transaction with the Assessee was made.

43. From all aspects, therefore, we are satisfied that the 'sale' in question in the instant case is an 'export sale' or a sale which 'occasions' the export or one 'in the course of export'. Question (b) must, therefore, be answered in the affirmative and in favour of the Assessee.

44. Dr. Pal, on behalf of the Assessee, sought to support this conclusion by an additional argument. He pointed out that in some of the Bills submitted by the Assessee (e. g. at p. 86 of the Supplementary Paper Book), the price quoted was F. O. B. and argued that in view or the decision in *Wadeyar v. Daulatram*[15], that a sale under an F. O. B. contract would normally constitute an export sale, the instant sale should so be held and exempted under Article 286 (1) (b). This aspect of the case, however, does not appear in the Statement of the Case or in the orders of the tribunals below. We cannot, therefore, go into this point nor is it necessary to do so. Question (c). Section 5(2)(a) (ii) of the Act says :-

> "In this Act the expression 'taxable turnover' means, in the case of a dealer who is lible to pay tax under Section 4, that part of his gross turnover during any period which remains after deducting therefrom -
> (a) his turnover during that period on - .....
> (ii) sales to a registered dealer - of goods of the class or classes specified in the certificate of registration of such dealer, as being intended for re-sale by him . . . ."

45. Before the Additional Commissioner (pp. 42-43 of the Paper Book), the Assessee contended that since the shipping agents to whom the goods were delivered by the Assessee at the instance of the Government were registered dealers, the 'sale' by the Assessee to such shipping agents should be exempted under the foregoing provision. We find that the Additional Commissioner rightly rejected this contention on the ground that the shipping agents were mere nominees of the Govt. of India and that there was no transaction of 'sale' between the Assessee and the shipping agents.

46. This question is, therefore, answered in the negative and against the Assessee. Question (d).

47. This question is dependent on Question (c) and must, accordingly, be answered against the Assessee.
Question (e).

48. This question relates to item (ii), i. e., the sales to the B. N. Railway.

49. It would be useful, at the outset, to refer to the provision in Explanation 2 to Section 2(g) of the Act under which the exemption regarding this item is sought by the Assessee:

[15] AIR 1961 SC 311

> "A sale shall be deemed to have taken place in West Bengal if the goods are actually delivered in West Bengal as a direct result of such sale for the purpose of consumption in West Bengal notwithstanding the fact that under the general law relating to the sale of goods the property in the goods has by reason of such sale passed in another State."

50. It will be noticed that the above provision is a substantial reproduction of the Explanation to Article 286(1) of the Constitution, as it existed prior to its omission by the Constitution (Seventh Amendment) Act, 1958 (sic) Sixth Amendment Act 1956? Since the material period is anterior to the repeal of the latter, the repeal is immaterial for our purposes.

51. Article 286(1)(a) provides that a State Legislature cannot tax a sale which takes place 'outside that State'. The Explanation in question explains what is meant by the expression 'outside the State'.

52. The applicability of the above provision to the following facts as stated in the Statement of Case, has to be determined :-

> "The Government of India issued directions to the different Collieries allotting coal to different railways ... In accordance with the instructions issued to the dealer, coal was loaded into wagons at the dealer's colliery sheds, i. e., at Bhowrah in Bihar. In the Railway Receipts the Petitioner was shown as the consignor and the B. N. Railway as the consignee and some places in West Bengal were noted thereon as destination. There is nothing on record to show that it was the Railway which accepted delivery of the coal at Bihar as purchaser and arranged its distribution. On the other hand, they seemed to have been consigning coal to a specific point, i. e., to the Superintendent, Mechanical Workshop, Kharida (West Bengal)....."

53. The facts as stated above prima facie bring the transaction between the consignor and consignee within the purview of the Explanation to Section 2(g) as quoted earlier, for, it is as a direct result of the transaction that the goods were actually delivered in West Bengal for consumption there.

54. Dr. Pal, however, contends that there was a delivery to the B. N. Ry., the purchaser, as soon as the goods were loaded in Railway wagons at the colliery sheds of the Assessee at Bhowrah in Bihar, inasmuch as delivery to a common carrier is delivery to the buyer. In support of this contention. Dr. Pal relies on decisions of the Madras and Andhra High Courts, such as *Md. Ishok v. State of Madras*[16], and *Associated Cement Co. v. State of Andhra Pradesh*[17], which, again, are founded on the provision in Section 39(1) of the Sale of Goods Act, 1930. We are, however, unable to agree with these decisions for a number of reasons and it would suffice to indicate these reasons in brief :

55. Firstly, Section 39(1) of the Sale of Goods Act only introduces a fiction while the Explanation to Article 286(1)(a) of the Constitution or the relevant provision of the Act

[16] AIR 1955 Mad 502

[17] AIR 1962 And Prad 522

before us uses the words 'actual delivery'. The very words 'prima facie deemed' in Section 39(1) of the Sale of Goods Act show that, but for that provision, delivery to a common carrier would not have constituted a delivery to the buyer.

56. Secondly, the decisions relied upon by Dr. Pal overlook the observations of enkatarama Ayyar J., in the leading decision of the Supreme Court in *Bengal Immunity Co. Ltd. v. State of*

Bihar[18], where his Lordship explained both the provisions in the Sale of Goods Act and the Explanation to Article 286 (1)(a) and held that the meaning of 'actual delivery' meant physical delivery of the goods at the place of destination and not any constructive delivery to the common carrier. There is nothing in Section 39(1) to lead to the conclusion that delivery to the common carrier would constitute 'actual delivery'. The concluding sentence of his Lordship's judgment would suffice to repel the contention made by Dr. Pal :-

> "It must, accordingly, be held that the expression 'actual delivery in the Explanation to Article 286(1)(a) means delivery' in the goods to the purchaser or his agent and delivery to the common carrier is not 'actual delivery' and that, in this case, the goods were actually delivered not in Bengal when they were delivered to the common carrier but in Bihar when they were delivered to the purchaser."

57. Thirdly, the view taken in the above observations of Venkatarama Ayyar J., has been followed by a number of High Courts, e. g., *Capco. Ltd. v. Sales Tax Officer*[19], *Birendra v. Commr. of Taxes*[20], *Khaitan Minerals v. Sales Tax Appellate Tribunal, Mysore*[21] and it is somewhat late in the day to assert the contrary. I find just now that this view of mine stands supported by the recent decision of the Supreme Court in *Shree Bajrang Jute Mills v. State of Andhra Pradesh, reported in*[22]

58. We are clearly of the opinion that the sale under the present item took place within West Bengal and that Question (e) must be answered in the affirmative and against the Assessee. There would be no order as to costs.

Reference answered in the affirmative.

[18](1955) 2 SCR 603 (834, 837) :AIR 1955 SC 661 (753, 754)
[19] AIR 1960 All 62
[20]1959-10 STC 327 : (AIR 1958 Ass119)
[21] AIR 1963 Mysore 141
[22](1964) 6 SCR 691 (698) (AIR 1966 SC 376(379))