

BOMBAY HIGH COURT

Dauiatram Rameshwarlal

Vs.

B.K. Wadeyar

Appeal No. 16 of 1957 and Misc. No. 362 of 1956.

(Chagla, C.J. and Desai, J.)

25.03.1957

JUDGMENT

Chagla, C.J.

1. The appellants deal in cotton and castor oil. They are registered dealers under Section 11 of the sales tax Act, and they have also received the necessary authorisation under Section 12-A. On the 29th of September 1956, a notice of demand was served upon them calling upon them to pay a sum of Rs. 25,448-9-9. The notice dealt with the period from 1-4-1954 to 31-3-1955. As the notice indicated, the assesseees were liable to pay sales tax and purchase tax in respect of certain quantities of castor oil and cotton sold by the appellants to the firm of Godimetla China Appalaraju. The matter came up before Mr. Justice K. T. Desai, and he took the view that the demand made was justified and dismissed the petition of the appellants, which had been filed to challenge this notice of demand.

2. The question briefly is this. The sale with which we are concerned and which is sought to be taxed under the Sales Tax Act is a sale effected by the appellants with the firm of Godimetla China Appalaraju (hereinafter referred to as 'the exporters') under certain contracts, a specimen of which has been annexed to the petition. The contention of the appellants is that the sale is exempted by the provisions of Article 286 of the Constitution, inasmuch as the sale was effected in the course of export of these goods outside India. Everyone of the contracts shows that the goods were sold by the appellants to the exporters F.O.B. It also shows that the exporters were to make payment against presentation of the documents, and also shows that the goods were covered by the buyers' export license. On these provisions of the contract, the material question that we have to determine is: when did the property in these goods pass? because, as we shall presently point out, it has been laid down by the Supreme Court that if a sale is effected after the goods have entered the export stream or have passed the customs barrier, then such a sale attracts the provisions of Article 286 and is exempt from taxation.

3. Before we look at the authorities, it will perhaps be better if we look at the principle of the matter. A sale by A to B of certain goods, which goods could be diverted by B for domestic use or which goods could be sold by B in the State itself could not be covered by the exemption

under Article 286 because such goods would not be in the export stream. They would still be outside the stream because they could be diverted and never reach the stream so as ultimately to be exported outside India. It is, therefore, that the Supreme Court has emphasized the fact that it is only that sale which takes place after the goods are incapable of being diverted that attracts the application of Article 286 of the Constitution.

4. Now, what is the position here? The contract is an F.O.B. contract, and the price is to be paid by the exporter to the purchaser only on presentation of bills of lading. Therefore, two important and salient facts emerge from this; one that the delivery of the goods is not obtained by the exporter till after the goods have crossed the customs barrier and the price is not received by the sellers, the appellants, till they gave the delivery of goods across the customs barrier, because it is not disputed that the bills of lading could only be prepared after the customs duty on the goods had been paid and they had passed the customs barrier. Now, the question of passing of property is normally a question of intention, and the intention of the parties must be gathered from the terms of the contract. It is true that if the goods are appropriated to a contract, the property will pass. But the appropriation must be unconditional, and if the appropriation is not unconditional, then the property will only pass when the condition is satisfied. In the contract before us it seems to us that it is clear that there was no unconditional appropriation of the goods by the appellants towards the contract. The appropriation was conditional upon the payment being made by the exporters on the presentation of the bills of lading, and therefore, it is clear that the sellers wanted to keep the power of disposal over the goods till they had received the payment from the exporters. This fact is borne out rather emphatically by the circumstance that although the bills of lading were to be made out in the name of the exporters, the bills of lading were to be retained by the appellants, and the appellants would not part with the bills of lading till payment had been made to them by the exporters. Now, the Advocate-General has suggested two reasons why we should hold that the property had already passed in the goods before the goods crossed the customs barrier, and the first circumstance upon which considerable emphasis is laid by the Advocate-General is that the bills of lading in this case were taken out in the name of the exporters and not in the name of the sellers, and the Advocate-General says that if the intention was that the property should not pass, then one would have found a provision in the contract that the bills of lading should be made out in the name of the sellers. Now, we see no difference between a provision in the contract that the bills of lading should be made out in the name of the sellers and a provision that the exporter was to get the bills of lading, although they were in his name, only after he paid the price of the goods. In the first case on the price being paid, the seller would have to endorse the bill of lading in favour of the exporter. In the latter case, he would have physical control over the bills of lading till the price was paid. In either case the exporter would not be able to make any use of the bills of lading till he had paid the price. In a F.O.B. contract, delivery is ordinarily given by means of shipping documents, and therefore, in both the cases we are contemplating the delivery would only be given against payment. In one case the delivery would be given on the shipping documents being endorsed over by the seller to the exporter and in the other case, the delivery would be given by the sellers by the bills of lading being physically handed over to the exporter. Therefore, there is not much substance in the distinction sought to be made by the Advocate-General.

5. The other circumstance on which strong reliance has been placed by the Advocate-General is that under the Export Trade Control Rules, the goods for the export of which a license is granted shall be the property of the licensee at the time of the export. This is a circumstance which has

also impressed the learned Judge, and what is suggested is that only an owner of the goods can obtain a license and only an owner can export the goods under the license, and therefore, it is urged that the exporter was the owner of the goods, that the property had passed and that the appellants were not the owners of the goods. Now, in the first place, we are not dealing with anything in *pari materia* when we compare the language used by the Export Trade Control Order and the rules made thereunder and the question of passing of the property for the purpose of deciding whether Article 286 has application or not. But even if they were in *pari materia*, all that the export rule requires is that the exporter who has obtained the necessary license should be the owner of the property at the time of the export. This rule does not deal with the niceties of the time at which property passes. It deals particularly with the question that the goods which are on the high seas and which are being exported to a country outside India should be the goods of the exporter, who has obtained the necessary license from the Government. This is admittedly the fact here. There is no doubt that the appellants agreed to sell the goods in question to the exporters so that the exporters should export them under their license. It is equally true that the goods had become the property of the exporters. While we are concerned here with the point of time at which the goods became the property of the exporter, the Export License Rule is not concerned with that question at all. Therefore, although it may be true for the purpose of Export Control Order that the goods at the time of export were the property of the exporter, it may be equally true for the purpose of deciding the question under Article 286 that the goods became the property of the exporter only after they crossed the customs barrier. Therefore, this particular circumstance does not assist the Advocate-General in the contention that the property in the goods had passed before they crossed the customs barrier.

6. One test, which is a fairly simple and easy test, and which is almost infallible test in these matters is to consider whether the exporter could have diverted the goods which he had purchased to any purpose other than the purpose of export. Could he have re-sold the goods within the State? or could he have utilized these goods for his own domestic purpose? and the answer to that question must obviously be in the negative. Inasmuch as the exporter only gets delivery of the goods by means of the documents of title after they have crossed the customs barrier, it is impossible to suggest that he could have made any other use of these goods except exporting them outside India.

7. Now, turning to the authorities we have first the decision of the Supreme Court, reported in *State of Trav-Co v. Shanmugha Vilas Cashewnut Factory*¹, and the basis of this part of the judgment of the Supreme Court is to be found in the citation from an American case, *Empresa Siderurgica, S. A. v. Merced*², which passage appears at p. 65 (of SCR) of the Report:-

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use" and the conclusion of

¹1954 SCR 53

²(1949) 337 US 154

the Supreme Court is summed up at p. 69 (of SCR) in three propositions. It is conceded by Mr. Bhatt, who had appeared for the appellants, that his case does not fall either under the first or the second head, and his contention is that it falls under the third head, and the Advocate-General says that when we look at the language of the third head,

it does not clearly apply to the facts of this case. The third head is:-

"Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier are within the exemption, assuming that the State power of taxation extends to such transactions." and the Advocate-General says that here we are not dealing with the case of an exporter transferring shipping documents, but here we have a case of a seller transferring shipping documents to an exporter. In our opinion, this is not the correct way of reading the proposition laid down by the Supreme Court. This proposition must be read in the context of the judgment, and as we have pointed out, what the Supreme Court has emphasized is a sale which is effected after the goods have crossed the customs barrier. It is that sale which comes within the exemption of Article 286 and it is that sale which cannot be subjected to a sales tax under a law passed by the State. Therefore, for the purpose of this proposition, the appellants must be looked upon as an exporter because he is transferring shipping documents for a price after the goods are beyond the customs barrier and in this sense the case of the appellants does fall under this head. But there is a clear and direct authority of the Madras High Court, reported in *Gandhi Sons Ltd. v. State of Madras*³, In a very well-considered judgment, the Madras High Court on almost identical facts came to the conclusion that a sale effected under those circumstances would be exempt from tax by reason of the provisions of Article 286 of the Constitution, and the facts there, if anything, were stronger than the facts before us. In that case there were three contracts, two C. and F. and one F.O.B. and the goods were packed and marked with the initials of the buyer. The bill of lading in case of each contract was taken in the name of the buyer and yet inasmuch as the price was to be paid on presentation of the bill of lading, the Madras High Court held that the property passed after the goods had entered the export stream, and therefore, the sale was not liable to tax and at p. 702 (of STC), Mr. Justice Rajagopala Ayyangar, correctly disposes of the question:-

"The crucial question to be considered in this connection is whether the sellers continued to be the owner of the goods upto or beyond the time when the goods, so to speak, entered the export stream" and at p. 704 (of STC), the learned Judge refers to a judgment of Lord Wright in *Smyth and Co. Ltd. v. Bailey and Co*⁴, where the learned Judge discusses the course of a business under a C.I.F. contract and Lord Wright says that in this course of business, the general property in the goods remains in the seller until he transfers the bills of lading. Now, in our opinion, this also applies to the F.O.B. contracts before us. The same view of the law was taken in a subsequent judgment of the Madras High Court in *Louis Dreyfus and Co. Ltd. v. State of Madras*⁵, As against this, the Advocate-General has relied on an Income-tax Case decided by the Supreme Court in *Commissioner of Income Tax, Madras v. Mysore Chromite Ltd*⁶, The question that the Supreme Court was considering was whether a certain sale had

³(1955) 6 STC 694: AIR 1955 Mad 722

⁵1956-7 STC 720

⁴(1940) 3 All England Reporter 60

⁶1955-27 ITR 128: AIR 1955 SC 98

taken place in British India or outside British India for the purpose of tax, and what was argued was that since the assessee-company placed the goods on board the steamer

named by the buyer, the goods became ascertained and the property in the goods passed immediately to the buyer, and Mr. Justice Das, as he then was, rejected this contention and asked the question as to whether there was an unconditional appropriation of the goods by merely placing them on board the ship, and the answer that the learned Judge gives is this:-

"It is true that the price and delivery was F.O.B. Madras but the contracts themselves clearly required the buyers to open a confirmed irrevocable Bankers' credit for the requisite percentage of the invoice value to be available against documents. This clearly indicated that the buyers would not be entitled to the documents, that is, the bill of lading and the provisional invoice, until payment of the requisite percentage was made upon the bill of exchange. The bill of lading is the document of title to the goods and by this term the assessee-company clearly reserved the right of disposal of the goods until the bill of exchange was paid." Therefore, the learned Judge clearly held that the property did not pass till the bill of exchange was paid and till then the assessee-company, the seller, reserved the right of disposal of the goods. But what is pointed out by the Advocate-General and what is emphasised by the Advocate-General is that in this case the bill of lading was taken in the name of the seller, the assessee-company, and according to the Advocate-General it was because of this circumstance that the Supreme Court came to the conclusion that it did. Now, there is no indication whatever in this judgment that it was that factor induced the Supreme Court to take the view that the property in the goods had not passed till the bill of exchange was paid. The point that the Supreme Court was emphasizing was that the assessee-company, the sellers, had reserved the right of disposal until the bill of exchange was paid. The case is precisely the same here. The appellants have reserved the right of disposal of these goods till the price was paid, and as we have already pointed out, the fact that in the case before the Supreme Court the bill of lading was made out in the name of the sellers and in the case before us it was made out in the name of the exporters, has no relevancy to the question that we are considering. In our opinion therefore with great respect to the learned Judge below the sale in question which is sought to be brought to tax is a sale exempted under Article 286 of the Constitution, and therefore, it cannot be brought to charge.

8. There is one other matter of minor importance compared to what we have been considering, which has also been challenged before us by Mr. Bhatt on behalf of the appellants, and that is his liability to pay purchase tax. That liability has been imposed upon him by reason of Section 10(b) of the Act, and the scheme of that section must be understood in the light of Section 8(b) and the second proviso to that sub-section. Now, Section 8(b) provides for what is to be deducted from the turnover which is liable to tax and sub-Clause (b) is in these terms:-

"Sales of goods to a dealer who holds an authorization and furnishes to the selling dealer a certificate in the prescribed form declaring inter alia that the goods so sold to him are intended for being dispatched by him, or by registered dealers to whom he sells the goods, to an address outside the State of Bombay."

9. Now, when the goods were sold to the appellants, they gave a certificate to their purchaser and the certificate was that the goods which were purchased by them were intended for being dispatched by them or by a registered dealer to whom they sell the goods to a place outside the State of Bombay. Therefore, the seller of the appellant is exempt from paying sales tax on these goods which are sold (a) to a dealer who holds the necessary authorization and (b) who gives a certificate that the goods were not intended for local use but were intended for being dispatched by him outside the State of Bombay or if they were not to be dispatched by him or if they were not dispatched by him, then they would be dispatched by a registered dealer to whom he has sold the goods. Now, the second proviso to (b) is:-

"Where any goods to which this clause applies are not shown to the satisfaction of the Collector to have been dispatched by the purchasing dealer, or by a person to whom he has sold the goods, to an address outside the State of Bombay within a period of six months from the date of purchase by the dealer furnishing the certificate, the said dealer shall be liable to pay a purchase tax under clause (b) of Section 10 on the purchase of such goods." Inasmuch as the seller of the appellants escapes sales tax by reason of certain representations made by the appellants, the scheme of this proviso is that if these representations did not turn out to be correct, then the appellants would pay the purchase tax in lieu of the sales tax which his seller would have paid but for the representation. But the ingenious argument that is put forward by Mr. Bhatt is that whereas under sub-Clause (b) the certificate requires that the goods must be dispatched by the appellants or by a registered dealer to whom they sell the goods, when we look to the proviso (2) even though the goods might be sold by the appellants to a person who is not a registered dealer, so long as that person dispatches the goods outside the State of Bombay, there is no liability upon them to pay the purchase tax. In this particular case the exporters are not registered dealers. Therefore although they dispatched the goods outside the State of Bombay, not being registered dealers the representations made by the appellants in the certificate given to the purchaser was not carried out.

10. Now, when we turn to the charging Section 10(b), it provides:-

"Where a certificate under clause (b) of Section 8 has been furnished in respect of such goods and the purchasing dealer does not show to the satisfaction of the Collector that the goods have been dispatched by him or by a person to whom he has sold the goods to an address outside the State of Bombay within a period of six months from the date of purchase by the dealer furnishing such certificate" then the purchase tax would be levied. Now, it is true that as we are dealing with a taxing statute and Section 10(b) is the charging section, it must be strictly construed and Mr. Bhatt's contention is that here again the expression used is the dispatch of the goods by 'a person' and not by a registered dealer, and inasmuch as that condition has been satisfied, the appellants are not liable to purchase tax. In our opinion, we cannot ignore or overlook the preamble to Section 10(b) and if we cannot ignore or overlook that preamble, then we must construe the expression 'a person' in the light of this preamble, and if we have to construe the expression 'a person' in the light of the certificate which the appellants were bound to furnish, then the proper

canon of construction requires that the person in this context must be read to mean a registered dealer. The whole object of obtaining a certificate from the appellant is to see that the goods are dispatched by them or by a registered dealer and if that is the object, it is difficult to accept the contention that although the representation made by the assesseees has not been carried out, by reason of the use of the expression 'a person', the assesseees are entitled to escape the purchase tax levied under Section 10(b). We must, therefore, agree with the learned Judge so far as the appellant's contention under this head is concerned.

11. The result will be that the Sales Tax Officer will be directed not to enforce the demand notice for payment of general sales tax with regard to the sale aggregating to Rs. 2,68,553-3-0, which is of cotton and aggregating to Rs. 6,47,509-1-6 of castor oil, both these sales being covered by the F.O.B. contracts which we have considered in this appeal.

12. As the appellants have substantially succeeded, we direct that the respondent must pay to the appellants, half the costs of the appeal and with regard to the costs below, the order of costs made by the learned Judge will be set aside and we direct that the respondent should pay Rs. 250 to the appellants as costs.
Order accordingly.