

PATNA HIGH COURT

Birendra Nath Guha

Vs

State of Bihar

Misc. Judl. Case No. 424 of 1952

(Ramaswami and Ahmad, JJ.)

23.02.1954

JUDGMENT

Ramaswami, J.

1. In this case the assessee, Messrs. B.N. Guha and Company, is an incorporated body with its registered office at Calcutta. The Company has taken lease of timber forest in Nepal and has built godowns and offices in Nepal territory close to the Jogbani railway station in Bihar State. The Company manufactures timber sleepers, squares, logs etc., at their workshop. The Company has taken a big railway contract and the bulk of the timber manufactured by it is supplied to the Railways and despatched to different destination from Jogbani railway station after obtaining instructions from the Sleeper Control Office. For the period from 1-7-1947 to 31-3-1948 the Sales-tax Officer determined the taxable turnover to be Rs.4,50,061 and imposed sales-tax amounting to Rs.7,032/3/-. The objection of the Company was that no sale took place in Bihar since the wooden sleepers were manufactured in Nepal and despatched from Jogbani Railway station to places outside the Bihar State. It was conceded on the part of the assessee that the goods were stored in its godown at Jogbani so long as wagons were not available. But the contention of the assessee was that the sale did not take place in Bihar and there was no liability to pay sales-tax. The objection was overruled by the Sales-tax Officer. An appeal was taken to the Deputy Commissioner of Commercial-taxes but the appeal was dismissed. The assessee went up to the Board of Revenue in a revision. The Board allowed the claim of the assessee to the extent that a sum of Rs.78,211 which represented the sale of timber despatched to the head-office at Calcutta, was excluded from the taxable turnover of the assessee. As regards the balance of Rupees 3,80,354/12/- which represented the sale of sleepers to Railway, the Board of Revenue affirmed the order of the Sales-tax Officer and dismissed the revision application.

2. In this state of facts the Board of Revenue has referred the following question of law for the opinion of the High Court:

"Whether in the facts and circumstances of this case the firm of Messrs. B.N. Guha and Co. is liable to pay sales-tax on the sale of timber to the extent of Rs.3,80,354/12/-?"

3. The main question presented for determination in this case is whether the title to the goods passed to the purchaser within the territorial limits of Bihar State. The contention on behalf of the petitioner is that title passed to the buyer not at Jogbani railway station but when the goods reached the consignee at the respective destinations which are admittedly located outside the territory of Bihar. A contrary view was put forward on behalf of the State of Bihar. It was argued that title passed to the buyer at Jogbani railway station as soon as the timber sleepers were appropriated on behalf of the buyer towards the contract and when the goods were loaded into the railway wagons. In this connection Section 23, Sale of Goods Act is important. Section 23(1) states

"Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Section 23(2) enacts:

"Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

The question therefore arises whether the goods were unconditionally appropriated to the contract at Jogbani railway station, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The question must be determined upon a consideration of the relevant clauses in the written contract between the parties dated 10-8-1948. Paragraph 4 of this contract states that the President, Eastern Group-Sleeper Control would authorise a person, called Sleeper Passing Officer, to inspect, pass and brand sleepers which satisfy the conditions stipulated under the contract. Paragraph 5(a) states that the sleepers shall be offered for examination and passing within the boundaries of the railway stations mentioned in the Schedule. Schedule IV annexed to the contract specifically states that sleepers would be offered at Jogbani railway station. Paragraph 5(b) gives details as to the manner in which the sleepers should be offered for inspection by the contractor. Paragraph 5(f) states that after the branding of passed sleepers the contractor, or his agent shall have a dot of white paint put on each sleeper near the Sleeper Passing Officer's brand. Paragraph 5(g) requires that the Contractor shall make all arrangements with the railway concerned for the lease of an adequate plot or plots of land at stations where he desires to offer sleepers for inspection. Paragraph 6 stipulates that the Contractor shall attend himself or be represented by a representative at the time when the sleepers are being inspected and branded in the presence of the Sleeper Passing Officer. Paragraph 9 states that the Sleeper Passing Officer shall have the right to test and prove the sleepers by all proper means and apply his brand to those passed and in the event of any sleepers not coming up to the specification, such sleepers shall be rejected by the Sleeper Passing Officer. Paragraph 10 states that the Sleeper Control Officer shall give the Contractor a passing certificate of the number passed and rejected at such station. Paragraph 11(a) requires that after the sleepers have been passed, the Contractor should obtain from the Sleeper Control Officer orders as to the disposal of the passed sleepers. The Contractor should act according to these orders and despatch

the consignments by rail to the various consignees to whom the sleepers have been allotted. Paragraph 11(g) contains an important provision. Paragraph 11(g) states:

"In the case of passed sleepers booked by rail the Contractor shall immediately after loading apply for and obtain from the Despatching Station Master a tally receipt for the number loaded. Such sleepers as are acknowledged by the consignee as possessing the passing mark of the Sleeper Passing Officer and the private mark of the Contractor will be deemed fully delivered, subject, however, to the right of the consignee to have such sleepers re-inspected by the Sleeper Control Officer, or his representative, and all sleepers rejected by the Sleeper Control Officer shall be deemed to be non-delivered and all sleepers are to be at the risk of the Contractor until fully delivered and finally accepted at destination."

Paragraph 11(g) should be read along with the opening paragraph of the contract which states:

"The Contractor has agreed to supply and deliver to the State wooden sleepers to the number and of the description and quality and at the prices and at the times and places and in the manner detailed in the Schedule."

Schedule IV states that the sleepers of the description in Col.1 of the Schedule should be delivered at Jogbani railway station which is mentioned in col.2.

The date of the completion of the contract as stated in col.5 is 31-3-1949. Upon a consideration of all these provisions of the contract it is manifest that the goods in question were unconditionally appropriated to the contract at Jogbani railway station. The Sleeper Passing Officer had under the terms of the contract the right to inspect, pass and brand the sleepers at Jogbani railway station. The sleepers were offered for inspection at Jogbani railway station and the Sleeper Passing Officer inspected the sleepers and put his brand on the passed sleepers in the presence of the Contractor, who also put a dot of white paint on each passed sleeper near the Sleeper Passing Officer's brand. As soon as the sleepers were passed and branded by the Sleeper Passing Officer at Jogbani, there was, in my opinion, a legal appropriation to the contract on the part of the buyer within the meaning of Section 23(1), Sale of Goods Act. The principle is very clearly stated by Lord Blackburn:

"The general rule laid down by Lord Coke in Heyward's case, (1595) 2 Coke Rep 35a, and adopted in Comyn's Digest, Election, seems to be, that when from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the seller is to despatch the goods, or to do anything to them that cannot be done till the

goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement, and in Lord Coke's language, the "certainty, and thereby the property, begins by election". (1595) 2 Coke Rep 35a (A)" (Contract of Sale, Edn.3, p.138). To illustrate the principle I shall refer to the case - '*Rodhe v. Thwaites*¹', in which the appropriation by the seller was subsequently assented to by the buyer. The buyer bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the seller. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated by the seller, who gave notice to the buyer to take them away, which the latter promised to do. Upon these facts it was held that there was an implied subsequent assent to the appropriation of the sixteen hogsheads; that the contract was thereby converted into a sale, and the property passed. As stated by Holroyd J. in that case:

"The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes".

4. Alternatively I think that there was appropriation of the goods within the meaning of Section 23(2), Sale of Goods Act at Jogbani railway station. It is the admitted position in this case that after the sleepers were passed by the Sleeper Passing Officer the Contractor loaded the goods in the railway wagons at Jogbani and despatched the consignments to the various destinations. Paragraph 11(g) of the contract states that such sleepers as are acknowledged by the consignee as possessing the passing mark of the Sleeper Passing Officer and the private mark of the Contractor would be deemed to be fully delivered. It is also clear from the terms of the contract that the petitioner delivered the goods to the buyer at Jogbani railway station without reserving the right of disposal. Paragraph 4 states that the Sleeper Passing Officer shall be deemed to be an agent of and acting on behalf of the State and Para.11(g) states that such sleepers as possess the passing mark of the Sleeper Passing Officer and the private mark of the Contractor shall be deemed to be fully delivered. There is nothing to suggest from the terms of the contract that the Contractor reserved the 'jus disponendi'. Upon the construction of the terms of the contract I am of opinion that there was delivery to the carrier at Jogbani railway station and there was an unconditional appropriation of the goods also within the meaning of Section 23(2), Sale of Goods Act.

5. It was argued on behalf of the petitioner that title could not pass to the buyer at Jogbani railway station since Para. 11(g) of the contract said that all sleepers would be at the risk of the Contractor "until fully delivered and finally accepted at destination". It was also pointed out on behalf of the petitioner that the consignee had a right to have the sleepers re-inspected by the Sleeper Control Officer at destination and Para.11(g) said that all sleepers so rejected by the Sleeper Control Officer shall be deemed to be non-delivered. Counsel on behalf of the petitioner referred to Para.11(j), according to which the cost of the sleepers rejected at destination and the railway freight charges on these rejected sleepers and the expenses of handling and unloading should be deducted from any moneys due to the Contractor. Reference was also made to Para.13(a) which provides that payment would be made to the Contractor only if there is an acknowledgment from the consignee to the Sleeper Control Officer certifying that the sleepers have been received by him and have been checked and found to be in order. In my opinion the

argument addressed by counsel on behalf of the petitioner is not sound. None of these clauses have any bearing on the question whether title to the goods passed to the buyer at Jogbani Railway station. It is true that Para.11(g) places the risk on the Contractor till the sleepers reached the final destination and Paras.11(j) and 13(a) impose further restrictions on the right of the contractor. But these are merely additional stipulations superimposed on the Contractor who agreed to act as insurer of the goods till the stage of final destination and also agreed to the other conditions. But these additional conditions have no bearing on the question as to where and when the title to the sleepers passed to the buyer. For the reasons I have already stated I think that title to the goods passed to the buyer at Jogbani railway station as soon as the Sleeper Passing Officer approved the sleepers and put his brand on the sleepers which were so approved by him.

6. Mr. B.C. Ghosh made the alternative submission that even if the title to the goods passed to the buyer at Jogbani railway station, the petitioner was not liable to pay sales-tax under the provisions of the Bihar Sales-tax Act. Counsel relied upon Section 2(g) of the Act (Bihar Act 19 of 1947) which states:

" 'Sale' means, with all its grammatical variations and cognate expressions, 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 contract but does not include a mortgage, hypothecation, charge or pledge: Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale: Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods, which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in Section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar".

Counsel referred in particular to the second proviso which enacts that the sale of goods which are actually in Bihar at the time of the contract of the sale shall be deemed to have taken place in Bihar irrespective of any contrary provision in the Indian Sale of Goods Act. The argument of the Counsel is that there is no sale within the meaning of the statute unless the goods are within the territorial limits of Bihar at the time the contract of sale was effected between the parties. It was contended that even though title to the goods in this case passed at Jogbani, the contract of sale was effected at Calcutta and at the time of the contract the goods were in the territory of Nepal. In effect the argument of the counsel is that there is no sale within the meaning of the Act unless (1) title passed within the territorial limits of Bihar, and (2) the goods were in Bihar at the time the contract of sale was effected. In my opinion the argument addressed on behalf of the assessee on this point is completely misconceived. The main clause of Section 2(g) defines "sale" to mean '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 contract'. That is the main provision of the Act, dealing with the meaning of 'sale' and there is nothing in the language of this clause to suggest that in addition to the transfer of title inside Bihar there is any other condition imposed. The conception of sale as enacted in the main clause, Section 2(g), refers only to the passing of title to goods within the territorial limits of Bihar. The two provisos

to Section 2(e) do not in any way restrict the scope of the conception. The first proviso states that if there is a transfer of goods on hire-purchase or other installment system of payment, such transfer shall be deemed to be a sale, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price. The second proviso states that if the goods are actually in Bihar at the time the contract of sale is made, the sale would be deemed to have taken place in Bihar even though the contract of sale was made outside the State and even though title to the goods passed outside the State. It is clear that the two provisos enlarge the scope of the conception of the sale as embodied in the main section and transactions on the part of the assessee are made taxable even though there is no sale within the strict meaning of the Sale of Goods Act. That is the correct interpretation of the language used in the two provisos to Section 2(g) of the Act. If there is transfer of property within the Bihar State the transaction of sale would be taxable under the provisions of the Act and it is not necessary that the goods should have been within the territorial limits of Bihar at the time the contract of sale was effected between the parties. Mr. B.C. Ghosh referred in support of his argument to two Supreme Court decisions. - '*State of Bombay v. United Motors (India) Ltd.*²', and - '*Poppatlal Shah v. State of Madras*³', but neither of these authorities has any relevance to the question raised in the present case. The argument of Mr. B.C. Ghosh on this aspect of the case must fail.

7. I next turn to the argument put forward on behalf of the assessee that the transaction in the present case is tantamount to delivery of goods on approval or on "sale or return" within the meaning of Section 24, Sale of Goods Act. Counsel referred on this point to Para.11(g) of the contract, according to which the consignee at destination has a right of re-inspection of the sleepers by the Sleepers Control Officer and all sleepers rejected by the Sleeper Control Officer at destination shall be deemed to be non-delivered. Reference was also made to Para.11(j) of the Contract which stipulates that the Contractor should pay the railway freight and expenses of handling and unloading of rejected sleepers. Counsel also referred to Para.13(a) which requires the Contractor before submitting a bill of payment to obtain an acknowledgment from the consignee certifying that the sleepers have been received by him and have been checked and found to be in order. In my opinion the argument put forward on behalf of the assessee is without substance. I have already referred to the relevant clauses of the contract and have reached the conclusion that title to the

sleepers passed to the buyer at Jogbani railway station as soon as the Sleeper Passing Officer inspected the sleepers and put his brand on those sleepers which he approved. In the eye of law there was a sale of these sleepers at Jogbani railway station and title passed to the buyer at Jogbani railway station. Though there is a condition in the contract that sleepers would be subjected to a second inspection at destination, the transaction cannot by any stretch of reasoning be deemed to be a contract within the meaning of Section 24, Sale of Goods Act. The transaction in the present case is a transaction in the nature of conditional sale and the title to the sleepers passed to the buyer at Jogbani railway station subject to the buyer's option to return the goods if they had not passed at the second test by the Sleeper Control Officer at the respective destination. The transaction is in the nature of a conditional sale which is of a different legal character from the transaction of "sale or return" which is only a contract of bailment and does not pass title to the goods. I do not think that Section 24, Sale of Goods Act has any application to this case. The argument addressed on behalf of the assessee on this point is not valid.

8. For the reasons which I have expressed. I hold that the firm of Messrs. B.N. Guha and Company is liable to pay sales-tax on the sale of timber to the extent of Rs.3,80,354/12/- and that

the question referred to the High Court must be answered in favor of the State of Bihar. The assessee must pay the cost of the reference. I would assess the hearing fee at Rs.250/-.

Ahmad, J.

9. I agree.

Answer in the affirmative.

Cases Referred.

¹(1827) 6 B. and C. 388

² AIR 1953 SC 252

³ AIR 1953 SC 274