

PATNA HIGH COURT

Tata Iron and Steel Co

Vs

State of Bihar

Misc. Judicial Case No. 577 of 1953

(Ramaswami and Banerji, J.)

17.10.1955

JUDGMENT

Ramaswami, J.

1. In this case the assessee, namely, the Tata Iron and Steel Company Limited, is registered as a dealer under the Bihar Sales Tax Act (Bihar Act 19 of 1947). For the period from 1-7-1947, to 31-3-1948, the Sales Tax Officer determined the gross turnover of the assessee to be Rs. 12,80,15,327/- and odd. Similarly for the period from 1-4-1948 to 31-3-1949, the Sales Tax Officer held that the gross turnover was Rs. 21,74,45,540/-. The assessee claimed before the Sales Tax Officer that the sale of goods which has been sold and delivered outside the province should not be included in the gross turnover. The assessee also claimed that the amount of sales tax collected from the customers should not be added to the gross-turnover for the purpose of computing sales tax. As regards the first head of exemption, the assessee claimed a sum of Rs. 2,88,60,78/- and odd for the first period of assessment and a sum of Rs. 10,71,66,233 and odd for the second period of assessment. Under the second head of exemption the assessee claimed that a sum of Rs. 13,66,496 and odd should be deducted for the first period of assessment and a sum of Rs. 22,37,919 and odd should be deducted for the second period of assessment. Both these claims were rejected by the Sales Tax Officer, who made the final order of assessment on 22-7-1949, for the first period and on 24-9-1948, for the second period. The assessee preferred appeals against both these assessments to the Commissioner of Chotanagpur. Both the appeals were dismissed on 29-4-1950. The assessee took the matter in revision to the Board of Revenue, which rejected the application on 30-8-1952, and confirmed the assessments made by the Sales Tax Officer subject to some modification. At the instance of the assessee however, the Board of Revenue has stated a case and referred certain questions of law to the High Court under Section 23(1), Bihar Sales Tax Act (Bihar Act 19 of 1947).

2. Before proceeding to consider the question submitted in the statement of the case, it is convenient to set out the relevant statutory provisions. The Bihar Sales Tax Act (Bihar Act 19 of 1947) received the assent of the Governor General on 21-6-1947. The Act came into force on 1-7-1947, by virtue of the notification in the Official Gazette under Section 1(3) of the Act. Section 4(1) of the Act provided as follows :

"Subject to the provisions of Sections 5, 6, 7 and a and with effect from such date as the Provincial Government may, by notification in the Official Gazette, appoint being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act, on sales which have taken place both in and outside Bihar, exceeded Rs. 10,000/- shall be liable to pay tax under this Act on sales which have taken place in Bihar after the date so notified".

It should be noticed that the liability of the dealer under this section was dependent upon a notification of the Provincial Government fixing the relevant date. It appears that no notification was issued by the Provincial Government as required by the section. Ordinance No. 3 of 1948 was, therefore, promulgated. Section 4 of the Act was amended by this Ordinance and the amendment was made expressly retrospective by Section 3 of the Ordinance. Section 4(1) as newly substituted reads as follows :

"Subject to the provision of Sections 5, 6, 7 and 8 and with effect from the commencement of this Act every dealer whose gross-turnover during the year immediately preceding the date of such commencement on sales which have taken place both in and outside Bihar exceeded Rs. 10,000/-shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement".

On 22-3-1949, Bihar Act 6 of 1949 was enacted and Section 16 of the Amending Act provided that the substituted Section 4(1) shall form part of the Act and shall always be deemed to have formed part of the Act with effect from its commencement, namely, from 1-7-1947.

3. I next turn to Section 2(g) Bihar Sales Tax Act. Previous to the amendment made by Bihar Act 6 of 1949, Section 2(g) read as follows :

" '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 a contract but does not include a mortgage, hypothecation, charge or pledge :

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (3 of 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 been made in Bihar".

4. Section 2(g) was amended by Bihar Act 6 of 1949 and after the amendment it reads as follows :-

" '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 :

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Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (3 of 1930), the sale of any goods :-

(i) 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 or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar".

5. The sanction has been further amended in 1951 by Bihar Act 7 of 1951 but we are not concerned in this case with this amendment. I have set out in detail the legislative history of Section 4(1) and Section 2(g) of the Act, as much of the argument in this case ranged round these two-statutory provisions.

6. It is convenient at this stage to set out in full the questions submitted to the High Court in the statement of the case :

"1. Is the Bihar Sales Tax Act, 1947 as amended in 1948, ultra vires the Provincial Legislature in view of the extended meaning of the expression 'taxes on sale of goods' given in the Act in the light of the provisions of Government of India Act, 1935 ?

2. Are the provisions of Section 2(g) of the 1947 Act ultra vires of the Provincial Legislature ?

3. Is it legal to include Sales tax in the taxable turnover of an assessee like the petitioner ?

4. Was the Bihar Tax (Amendment) Act of 1948 legally extended to Chotanagpur ?

5. Were the levy and collection of sales taxes for periods prior to 26-1-1950, under the Sales Tax Act then in force rendered illegal by the provisions of the Constitution ?

6. Was the Commissioner, who passed orders, in appeal, after the Constitution came into force, bound to decide the appeal according to the provisions of the Constitution in respect of taxes levied or sought to be levied for periods prior to 26-2-1950, when the Constitution came into force ?"

7. The second question is in substance the same as the first question, though put in a different form. Before examining the first two questions, it is necessary to describe the "course of dealings" of the assessee. . The case of the assessee is that its registered office is in Bombay, but the chief sales office is located in Calcutta. The intending purchaser has to apply for a permit to the Iron and Steel Controller at Calcutta, who forwards the requisition to the Chief Sales Officer of the assessee working in Calcutta. The Chief Sales Officer thereafter makes a "works order" and forwards it to Jamshedpur. The "works order" mentions the complete specification of the goods required. After the receipt of the "works order" the Jamshedpur factory initiates a "rolling"

or "manufacturing" programme. After the goods are manufactured, the Jamshedpur factory sends the invoice to the Controller of Accounts who prepares the forwarding notes, and on the basis of these forwarding notes railway receipts are prepared. The goods are loaded in the wagons at Jamshedpur and despatched to various stations, but the consignee in the railway receipt is the assessee itself and the freight also is paid by the assessee. The railway receipts are sent either to the branch offices of the assessee or to its bankers, and after the purchaser pays the amount of consideration, the railway receipt is delivered to him. These facts are admitted and the correctness of these facts is not disputed by the State of Bihar.

8. On the basis of these facts, the Attorney General of India appearing on behalf of the assessee submitted the argument that the passing of title took place outside the Province of Bihar and the delivery of goods to the purchaser was also made outside the province of Bihar. The learned Attorney General submitted further that the contract of sale was also concluded outside the Province of Bihar. It was conceded by the Attorney General that as a matter of construction Section 2(g) of the Act applied to the disputed transactions. The argument of the Attorney General, however, was that Section 2(g) after its amendment was not constitutionally valid to the extent that the legislature empowered the State Government to impose tax on transactions of sale which were concluded outside the frontiers of the province. It was contended that the passing of title was the most important element in the transaction of sale and that the Provincial Legislature had no constitutional power to impose a tax on a transaction of sale wherein title had passed outside the limits of the province. The Attorney General maintained that the taxable event of the sale transaction was the passing of title and the State Legislature had, therefore, no authority to impose a tax if the taxable event was extra-territorial. It was pointed out that the Provincial Legislature has authority to impose a sales tax under item 48 of List II of Schedule 7 read with Section 100(3), Government of India Act. But it was contended that as a matter of construction, the authority conferred upon the Provincial Legislature should be restricted to transactions of sale concluded within the provincial limits. As a variant of this argument the Attorney General submitted that the legislation would be extra-territorial and, therefore, invalid so far as the State Legislature was empowered to tax transactions of sale concluded outside the province. In my opinion the submission of the learned Attorney General is not correct. The power of the Provincial Legislature to make a law imposing sales tax is granted by Section 100(3), Government of India Act read with item 48 of List II of Schedule 7. The Legislature of the Province has under these provisions the exclusive power to make laws "for a province or any part thereof with respect to "taxes on the sale of goods and on 'advertisements". But the expression "for a province or any part thereof" in Section 100(3), Government of India Act cannot be interpreted to mean that the sale of goods must take place within the territory of the province. All that the section means is that the law which a province is empowered to make must be for the purposes of the province. A transaction of sale is a composite transaction and consists of many legal ingredients, like agreement of sale, passing of title, and delivery of goods.

But it is not necessary for the purpose of legislative jurisdiction that all the legal ingredients of sale or even that transfer of title should have taken place within the province. It is sufficient if there is some territorial 'nexus' or connection between the taxing authority and the transaction sought to be taxed. In my opinion the fact that the goods are manufactured in Bihar constitutes a sufficient territorial 'nexus' or connection which confers jurisdiction upon the provincial legislature to impose the tax. This opinion is supported by the derision of the Judicial Committee in the case of *'Wallace Brothers and Co., Ltd. v. Commissioner of Income Tax, Bombay'*¹. In that case the income-tax authorities of India imposed a tax upon a company incorporated in England

having its registered office there but carrying on business in India. The income-tax authorities imposed a tax on the company not merely with respect to the income received in India, but also with respect to the income received in England. It was held by the Judicial Committee that the major portion of the income of the company was derived from British India and there was hence territorial connection sufficient; to justify the company being treated as at home in British India and being properly subject to the jurisdiction of the Indian legislature. It was pointed out by the Judicial Committee that the competency of the Indian Legislature to impose the tax did not depend on the possession by the Indian Legislature of any extra-territorial powers but on the existence of sufficient territorial 'nexus' between the taxing State and what it seeks to tax. At p. 120 Lord Uthawatt states :

"There is no rule of law that the territorial' limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends on the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background, that only a defined territory has been committed' to the charge of the legislature.

Concern by a subordinate legislature with affairs or persons outside its own territory may, therefore, suggest a query whether the legislature is in truth minding its own business. It does not compel the conclusion that it is not." That was a case dealing with the imposition of income-tax. But the principle of the case was applied by the Supreme Court to a provincial statute imposing sales tax in the *'State of Bombay v. United Motors (India) Ltd².'* (B). It was held by the Supreme Court in that case that Article 286(1) (a) of the Constitution read with the explanation thereto and construed in the light of Article 301 and Article 304 prohibited the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein. It was affirmed by the Supreme Court that the latter State had authority to tax such sales or purchases not by virtue of the Explanation to Article 236(1), but by virtue of Article 243(3) read with entry 54 of List II of the Constitution. In a recent decision *'Bengal Immunity Co., Ltd. v. State of Bihar³'*, a Bench of the Supreme Court held by majority that the previous decision in AIR 1953 SC 252 should be reversed so far as the interpretation of Article 286(1) (a) and Article 286(2) of the Constitution was concerned. It was held by majority of the learned Judges that Article 286(2) prohibited the imposition of any tax on sales and purchases of goods even though the Goods had actually been delivered as a direct result of such sale or purchase for the purpose of consumption in the taxing State. But none of the learned Judges expressed any opinion as to the correctness of the earlier decision of the Supreme Court in AIR 1953 SC 252 on the doctrine of 'nexus'. The authority of the previous decision of the Supreme Court in the 'United Motors' case' on this point has, therefore, not been affected or in any way shaken by the subsequent decision of the Supreme Court in the 'Bengal Immunity case (C.)'. The doctrine of 'nexus' has also been applied by the Supreme Court in another sales tax case *'Poopatlal Shah v. State of Madras⁴'*, That was the decision of a unanimous Court of five Judges, namely, Patanjali Sastri C.J., Mukherjea, Vivian Bose, Ghulam Hasan and Bhagwati, J. In that case, the appellant company received orders in its Madras office from Calcutta merchants for supply of certain articles. These articles were purchased in the local markets and they were despatched to Calcutta by rail or steamer. Railway receipts and bills of lading were taken in the name of the appellant company and so also were the insurance policies and they were sent to the

company's bankers in Calcutta who delivered the same to the consignees on payment of prices and other charges. It was argued before the Supreme Court that in these circumstances the sale transactions were not liable to be taxed under the General Sales Tax Act of Madras. The argument on behalf of the appellant was that sales-tax imposed would be extra-territorial in its operation and, therefore, ultra vires of the provincial legislature. It was contended on behalf of the appellant that the provincial legislature was constitutionally incompetent to enact a legislation of this character which according to the interpretation put upon it by the High Court was capable of operating on sale transactions concluded outside the Province of Madras. This argument was rejected by the Supreme Court which expressed the view that the provincial legislature could impose tax on transactions concluded outside the province, provided there was sufficient and real territorial 'nexus' between such transactions and the taxing province. At p. 276 Mukherjea, J., who pronounced the judgment for the unanimous Court states :

"The "first contention appears to us to be unsustainable. Section 100(3), Government of India Act, 1935, upon which Mr. Somayya relied and which corresponds to Article 246(3) of the Constitution runs as follows :

"Subject to the two preceding sub-sections, the Provincial Legislature has and the Federal Legislature has not, power to make laws for a, province or any part thereof with respect to any of the matter enumerated in List II in the Second Schedule".

The entry in the Provincial List that is relevant for our purpose is Entry No. 48 and that speaks of 'taxes on the sale of goods and on advertisements'. The entry does not suggest that a legislation imposing tax on sale of goods can be made only in respect of sale taking place within the boundaries of the province and all that Section 100(3) provides is that a law could be passed by a Provincial Legislature for purposes of the province itself. It admits of no dispute that a Provincial Legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the province, but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the province, provided that there was sufficient and a real territorial 'nexus' between such transactions and the taxing province. This principle, which is based upon the decision of the Judicial Committee in AIR 1948 PC 118 has been held by this Court to be applicable to sale tax legislation, in its recent decision in the 'Bombay Sales Tax Act case', Civil Appeal No. 204 of 1952 (Pat), and 'its propriety is beyond question.' As a matter of fact, the legislative practice in regard to sale tax laws adopted by the Provincial Legislatures prior to the coming into force of the Constitution has been to authorise imposition of taxes on sales and purchases which were related in some manner with the taxing province by reason of some of the ingredients of the transaction having taken place within the province or by reason of the production or location of goods within it at the time when the transaction took place. If in the Madras Sales Tax Act the basis adopted for taxation is the location of the place of business or of the goods sold, within the province of Madras, undoubtedly it would be a valid piece of legislation to which no objection on constitutional grounds could be taken".

9. Reference should also be made in this connection to the recent case *'State of Wisconsin v. J.C. Penney Co⁵*, in which the Supreme Court upheld the validity of a tax imposed by Wisconsin State on dividends declared by a foreign corporation licensed to do business in Wisconsin. In the course of his opinion Frankfurter, J. states :

"Constitutional provisions are often so glossed over the commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the States are those in the Constitution and not verbal weapons imported into it. "Taxable event", "jurisdiction to tax", "business situs", "extra-territoriality", are all compendious ways of implying the importance of State power because State power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one.

That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the State has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a State does not destroy the 'nexus' between such a tax and transactions within a State for which the tax is an exaction".

10. The Attorney General then submitted that even if the doctrine of 'nexus' applied to sales tax, the mere fact that the goods were manufactured within the province did not constitute sufficient territorial 'nexus'. The learned Attorney General submitted that there must be a real and relevant nexus, otherwise the provincial legislature would not have Jurisdiction to impose the sales tax. I am unable to accept the argument that there is no sufficient territorial connection in this case. In my opinion, the manufacture or production of goods by the assessee within the province constitutes a real territorial nexus and the provincial legislature is clothed with jurisdiction to impose the tax upon the assessee, by reason of the manufacture or production of goods within the province. Legally speaking, a transaction of sale is not merely a contract; it is a contract plus a conveyance. The location of the goods is, therefore, a paramount factor in deciding what are the legal consequences of the transaction. I shall illustrate this point by analogy. In the realm of private international law the 'lex situs' is the paramount law applicable in the case of transfer of moveable properties. It is well settled that even if the proper law of transfer '(lex actus)' differs from the 'lex situs' of the tangible movable at the time of the transfer, the 'lex situs' governs the effect of the transfer on the proprietary rights of the parties (see R. 130 at page 560 of Dicey's Conflict of Laws, Edn. 6). In an English case - 'In re, Anziani, (1930) 1 Ch 407, Maugham J., observed :

"I do not think that any one can doubt that with regard to the transfer of goods, the law applicable must be the 'lex situs'. Business could not be carried on if that were not so".

The controlling influence of the 'lex situs' is also illustrated by the case of - '*Inglis v. Robertson*⁶¹', in which the rights of unpaid sellers over whisky in Scotland were held not to be displaced by a hypothecation of the whisky in England, because "the situs of the goods was in Scotland". I have taken recourse to the analogy in order to make good my point that the location of the situs of

goods has a real and pertinent connection to the transaction of sale. In my opinion the situs of the goods attracts the constitutional authority of the provincial legislature to tax the sale transaction. I hold, therefore, that there is in the present case sufficient territorial connection between the taxing state and the transaction sought to be taxed and the constitutional objection raised by the Attorney General must be rejected.

11. The point was also raised on, behalf of the assessee that the tax imposed on the production of manufacture of goods was a tax in the nature of an excise tax and, therefore, beyond the competence of the provincial legislature. It was argued by the Attorney General that the Central Legislature had exclusive competence to impose an excise tax and the Provincial Legislature was not, therefore, competent to impose a tax of that character. In support of his argument the learned Attorney General referred to item 45 of List I of Schedule 7, Government of India Act. In my opinion, the argument of the Attorney General is not well founded. It is not right to say that the sales tax imposed upon the assessee in this case is of the nature of an excise tax. In the case of a sales tax the liability to pay tax arises on the transaction of a sale, but in the case of an excise tax the liability arises in respect of the manufacture or production of the commodity taxed. The two taxes are in the eye of law two separate and distinct entities. If Section 2(g), Bihar Sales Tax Act is rightly interpreted, it is clear that the sales tax imposed on the producer or manufacturer upon his first sale is levied upon him qua seller and not qua manufacturer or producer. In - *'Province of Madras v. Messrs Boddu Paidanna'*, it was held by the Federal Court that the power of the provincial legislature to levy a tax on the sale of goods extends to sales of every kind, whether first sales by the manufacturer or not, and the provisions of the Madras General Sales Tax Act, 1939, imposing a tax upon the first sales by the manufacturer were not ultra vires of the provincial legislature. In view of the ratio of this case, I do not think there is much substance in the point taken by the Attorney General.

12. In the course of his argument, the learned Attorney General referred to - *'Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash'*⁸, But the decision of this case has no bearing on the question at issue in the present case. The point for decision in the Supreme Court case was whether the power to impose a tax on the sale of goods under Entry 48 included a power to impose a tax on forward contracts. The statutory provisions which were challenged in that case were Section 2(h), U.P. Sales Tax Act, Explanation III to that section and also Section 3B of the same Act. Section 2(h) was to the following effect :

"'Sale' means, with its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration and includes forward contracts"

Explanation III to Section 2(h) stated :

"Where goods under a forward contract are not actually delivered, the sale in respect of such contract shall be deemed to have been completed on the date originally agreed upon for delivery". Section 3B further enacted that

"Notwithstanding anything contained in Section 3, the turnover of any dealer in respect of transactions of forward contracts, in which goods are not actually delivered, shall be taxed at a rate not exceeding rupees two per unit as may be prescribed".

It was held by the Supreme Court that these provisions were ultra vires of the provincial legislature and Entry 48 of Schedule 7 could not be construed to mean that the provisional legislature was empowered to impose a tax on a mere contract of sale. The Supreme Court observed that Entry 48 authorised the imposition of a tax only when there was an executed contract of sale, that is, a sale involving transfer of the property in the goods to the purchaser and that there was no power conferred on the provincial legislature to impose a tax where there was only an executory contract of sale. In the present case, the material facts are wholly different. Section 2(g), Bihar Sales Tax Act does not authorise imposition of sales tax on executory contract of sale. The authority given to impose tax is only after the title has passed and the transaction of sale is completed. The decision of the Supreme Court in 'AIR 1954 SC 459', does not, therefore, support the view for which the Attorney General has contended in the present case.

13. The Attorney General then presented the argument that the Bihar Legislature had no authority to impose a levy of sales tax with retrospective effect. It was pointed out that the Bihar Sales Tax Act (Bihar Act 19 of 1947) came into force on 1-7-1947 by virtue of a notification of the Provincial Government under Section 1(3) of the Act. Section 4(1) of the Act as it originally stood imposed the liability to pay sales tax on dealers only from such date as the Provincial Government may by notification in the Official Gazette appoint.

It appears that the Provincial Government did not issue any notification and, therefore, Ordinance 3 of 1948 was passed amending Section 4(1). Section 4(1) after being amended by the Ordinance imposed the liability to pay sales tax upon the dealers from the date of the commencement of the Act, namely, from 1-7-1947. Act 6 of 1949 replaced Ordinance 3 of 1948 and Section 16 of this Act gave retrospective effect to the amended Section 4(1). Section 16 provided that

"the substituted Sub-Section (1) shall form part and always be deemed to have formed part of the Act with effect from its commencement, namely, 1-7-1947."

It was pointed out by the Attorney General that Act 6 of 1949 was enacted on 22-3-1949. It was maintained that the Bihar Legislature was not competent to impose a sales tax retrospectively with effect from 1-7-1947 by this amending Act. The contention of the assesseees was that sales tax, though payable by the dealer, was really an indirect tax payable by the consumer. It was argued that if the sales tax was levied 'ex post facto', it would be in the nature of a direct tax payable by the dealer, since he was not in a position to pass the burden on to the consumer. In support of his contention, the Attorney General referred to Section 14A which was inserted by Section 9 of Bihar Act 6 of 1949. Section 14A states" :

"No dealer who is not a registered dealer shall realise any amount by way of tax on sale of goods from purchasers, nor shall any registered dealer make any collection of such tax except in accordance with such, restrictions and conditions as may be prescribed."

In my opinion, the argument of the Attorney General is not right. Section 14A is only permissive and even under the Amending Act, the legal liability to pay sales tax is upon the dealer and not upon the consumer. From the standpoint of economic theory sales tax may be not a direct tax upon the dealer but an indirect tax upon the consumer, but the legal liability under the statute is imposed not upon the consumer but upon the dealer. For example, Section 14(6) states that the

amount of sales tax due from a dealer shall be recoverable as arrear of land revenue. I see, therefore, no constitutional reason why the Bihar Legislature should not make the legal liability of the dealer retrospective from any particular date. It is well established that the Provincial Legislature under the Government of India Act was endowed with plenary powers of legislation and that it was competent to legislate with prospective or retrospective effect. Retrospective legislation is one of the particular incidents of plenary legislative power and in - *'United Provinces v. Atiqua Begum'*, the Federal Court held that there was nothing in the Government of India Act to deprive the provincial legislatures of the power of retrospective legislation. Under the present Constitution, there is only one restriction imposed upon the power of retrospective legislation. Article 20 of the Constitution imposes such a restriction against retrospective penal legislation, but there is no such restriction on legislative power with regard to taxation. In the absence of any constitutional provision against retrospective fiscal legislation, it is not right to argue that the Court should apply such restriction. It is true that as a matter of construction the Courts presume that a statute

is not intended to be given retrospective effect unless the intention is made clear by express words or by necessary implication. That is however only a canon of construction and not a constitutional principle. To adapt the language of Frankfurter, J., in a recent American case, the ultimate touchstone of constitutionality is the constitution itself and not any general principle outside it. In my opinion therefore, the argument of the learned attorney General on this point must fail.

14. My concluded opinion is that the provisions of Section 2(g), Bihar Sales Tax Act (Bihar Act 19 of 1947) as amended by Bihar Act 6 of 1949 are constitutionally valid, and that the Bihar Legislature had the constitutional power and authority to enact Section 16 of Bihar Act 6 of 1949 expressly making the newly substituted Section 4(1) retrospective with effect from 1-7-1947. I accordingly answer the first two questions against the assessee and in favor of the State of Bihar.

15. I now proceed to consider the question whether the Sales Tax Department was right in including the amount of sales tax realised from the customers in the taxable turnover of the assessee. The learned Attorney General put forward the contention that payment of the sales tax by the consumer was not a part of the bargain and sale and that the amount of sales tax was not a part of the price of the goods sold, and that the dealer merely collected the sales-tax from the customer and paid it to the Government under Section 14, Bihar Sales Tax Act. The Attorney General based his argument upon Section 14A which was enacted for the first time by Bihar Act 6 of 1949. Section 14A provides that a registered dealer may realise any amount by way of tax on sale of goods from purchasers in accordance with such restrictions and renditions as may be prescribed. The Attorney General also referred to Section 14(6) which says that any amount of tax imposed upon the dealer shall be recoverable as arrear of land revenue. Reference was also made to Section 2(h) which defines "sale-price" to mean the amount payable to a dealer as valuable consideration for the sale or supply of any goods. Section 2(1) defines "turnover" to mean the aggregate of the amounts of sale-prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract. Section 5 provides that the tax payable by a dealer under the Act shall be levied at the rate of six pies in the rupee on his taxable turnover. Reference was also made to Section 26(j) which imposes a penalty upon a person who not being a registered dealer realises any amount by way of tax on sale of goods from purchasers R. 19 states that no registered dealer shall realise any amount by way of tax on sale of goods from any purchaser unless such registered dealer issues a cash memo, or bill which shall be

serially numbered and shall show separately the price of goods sold and the amount realised by way of tax. Reading all these statutory provisions, I am satisfied that the amount collected by the registered dealer from the customers as sales tax and paid over to the Government cannot be treated as part of the purchase price under Section 2(h) and so does not constitute part of the taxable turnover of the registered dealer. A similar view has been taken by the Madras High Court in - *'Deputy Commissioner of Commercial Taxes Coimbatore Division, Coimbatore v. M/s. M. Krishnaswami Mudaliar'*¹⁰, It was pointed out on behalf of the State of Bihar that a contrary view has been taken by a Bench of this Court in - *'Messrs Kaniram Janki Das v. State of Bihar'*¹¹, But that authority is distinguishable. The basis of that decision was that there was no provision in the statute empowering the dealer to realise sales tax from the and in the absence of such a provision it be taken that the entire amount payable by the purchaser including sales, tax was the sale price of the goods supplied. But this reasoning is no longer sustainable in view of the amendment made by Bihar Act 6 of 1949. By this amended Act, Section 14A was for the first time introduced and a registered dealer was empowered to make collection of sales tax from consumers in accordance with such restrictions and conditions as may be prescribed. The Amending Act also introduced Section 28(j) which imposes a penalty on unregistered dealers who realise sales tax from purchasers. In view of these statutory amendments it is clear that the basis of the decision in 'AIR 1953 Patna 10, is gone and that decision cannot apply to the present case. For the reasons I have already expressed, I hold that the Sales-tax authorities were not legally entitled to include sales tax in the taxable turnover of the assessee, and the third question referred to the High Court must be answered in favour of the assessee and against the State of Bihar.

16. The fourth question is whether the Bihar Sales Tax (Amendment) Act of 1948 was legally extended to Chotanagpur. The Attorney General conceded that there is no merit in this question and that he is not in a position to argue that the Amendment Act of 1948 was not legally extended to Chotanagpur. I would, therefore, answer this question against the assessee and in favour of the State of Bihar.

17. The fifth and sixth questions really deal with the same point. On behalf of the assessee the Attorney General pointed out that the Constitution came into force on 26-1-1950, and Article 265 of the Constitution required that no tax shall be levied or collected except by the authority of law. The Attorney General referred to Article 372 which provides for continuance in force of existing laws and their adaptation. Reference was also made to Article 236(1) which states as follows :

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

It was argued on behalf of the assessee that the assessment was made by the Sales Tax Officer on 22-7-1949, and 24-9-1949. Appeals were preferred on behalf of the assessee to the Commissioner of Chotanagpur and the order dismissing the appeals was finally passed on 29-4-1950. It was contended by the Attorney General that the assessment of a sales tax was not complete till the appellate order was made, and the Constitution came into force on 26-1-1950, before order was passed and so the assessment of sales tax was governed by the provisions of the Constitution. The argument of the Attorney General was that levy of tax includes assessment of

tax and the levy was not complete till the Commissioner of Chotanagpur finally dismissed the appeals. It was submitted that Section 2(g). Bihar Sales Tax Act was directly hit by Article 286(1) of the Constitution. The Attorney General maintained that the assessments of sales tax upon transactions of sale which were concluded outside the State of Bihar were invalid after 26-1-1950, when the Constitution was promulgated.

In my opinion, the argument of the Attorney General is not correct. It is well established that the Articles of the Constitution are not retrospective and that the Articles do not affect transactions which are past and closed or rights which have already vested or liabilities which have already accrued (see the decision of the Supreme Court in - *'Keshavan Madhava Menon v. State of Bombay'*¹²). In the present case, the sales tax had been levied upon the assessee long before the Constitution came into force. The levy of sales tax, was imposed under Sections 4 and 2(g), Bihar Sales tax Act after amendment by Bihar Act 6 of 1949 which came into force on 1-10-1948. The charge of sales tax, or in other words the liability to pay sales tax was, therefore, imposed on the assessee with effect from 1-10-1948. The Sales Tax Officer had made orders of assessment on 22-7-1949 and 24-9-1949 for the two periods in dispute. It is true that the Commissioner of Chotanagpur disposed of the appeals preferred by the assesses on 29-4-1950 after the Constitution had come into force. But that is not a material circumstance. It was argued by the Attorney General that the assessment was not complete till the appellate order was passed. But the liability to pay sales tax does not depend upon the assessment. The liability is created by the charging sections and the assessment order only quantifies the liability which has already been created by the charging sections. That was the view expressed by the Judicial Committee in 'AIR 1948 PC 118'. At p. 119, Lord Uthwatt states :

"The general nature of the charging section is clear. First, the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the 'previous year', not a charge in respect of the income of the year of assessment as measured by the income of the previous year. That has been decided and the decision was not questioned in this appeal.

Second, the rate of tax for the year of assessment may be fixed after the close of the previous year, and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed". The same principle has been expressed by the Federal Court in - *'Chatturam v. Commissioner of Income-tax, Bihar'*¹³;

"The liability to pay the tax is founded on Sections 3 and 4. Income-tax Act, which are the charging sections. Section 22 etc., are the machinery sections to determine the amount of tax. Lord Dunedin in - *'Whitney v. Commissioners of Inland Revenue'*¹⁴. stated as follows : 'Now, there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment.

Liability does not depend on assessment, that ex hypothesi has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the

methods of recovery if the person taxed does not voluntarily pay'. In '*W.H. Cockerline and Co. v. Commissioners of Inland Revenue*'¹⁵, Lord Hanworth. M.R.

after accepting the passage from Lord Dunedin's judgment quoted above, observed as follows : 'Lord Dunedin, speaking, of course, with accuracy as to these taxes, was not unmindful of the fact that it is the duty of the subject to whom a notice is given to

render a return in order to enable the Crown to make an assessment upon him; but the charge is made in consequence of the Act, upon the subject; the assessment is only for the purpose of quantifying it'. Applying the principle to the present case, it is clear that the levy of sales tax upon the assessee was made and the liability of the assessee to pay sales tax had accrued long before the Constitution came into force. In my opinion, Article 286 of the Constitution has no retrospective force; and the assessments of sales tax upon the assessee under Section 4(1) read with Section 2(g), Bihar Sales Tax Act are legally valid. I further hold that the Commissioner of Chotanagpur was not bound to decide the appeal according to Article 286 of the Constitution. It follows that the fifth and sixth questions referred by the Board of Revenue to the High Court must be answered against the assessee and in favour of the State of Bihar.

18. As the State of Bihar has succeeded in this reference on five out of the six questions, I direct that the assessee should pay the costs of this reference. Hearing fee Rs. 250/.

Banerji, J.

19. I agree.

Answer accordingly.

Cases Referred.

1 AIR 1948 PC 113

2 AIR 1953 SC 252

3 AIR 1955 SC 661

4 AIR 1953 SC 274

5(1940) 311 U.S. 435

61898 AC 616

7 AIR 1942 PC 33

8 AIR 1954 SC 459

9 AIR 1941 PC 16

10 AIR 1954 Mad 856

11 AIR 1953 Pat 10

12 AIR 1951 SC 128

13 AIR 1947 FC 32 at p. 35

14(1926) 10 Tax Cas 88

15(1932) 16 Tax Cas 1 at p. 19