PATNA HIGH COURT

Rohtas Industries Ltd

Vs

State of Bihar

Misc. Judicial Case No. 406 of 1954

(V. Ramaswami, C.J. and R.K. Choudhary, J.)

07.02.1958

JUDGMENT

V. Ramaswami, C.J.

1.In this case the assessee, Messrs. Rohtas Industries Limited, is a public limited company incorporated under the Indian Companies Act and manufactures various commodities including cement. On 4th of June 1942, an agreement, which was to be valid for ten years, was entered into between the assessee and some other cement manufacturing companies, namely, the Associated Cement Companies Limited, the Patiala Cement Company Limited and Dalmia Cement Company Limited (hereinafter called the Manufacturing Companies) on the one hand and the Cement Marketing Company of India Limited (hereinafter called the Marketing Company) on the other hand, whereby all the Manufacturing Companies appointed the Marketing Company to be "the sole and exclusive sales managers for the sale of their cement during the period of the agreement" and it was stipulated that they will not themselves directly or indirectly sell or export cement to any customer. It appears that on 1st of October 1944, the Bihar Sales Tax Act, 1944, came into operation and the assessee was registered as a dealer under that Act in the Shahabad circle. In respect of assessments of sales tax for the six quarters ending on 30th of June 1947, the assessee claimed deductions under the various clauses of Section 5 (2) (a), Bihar Sales Tax Act, 1944. The claim was disallowed by the Commissioner of Sales Tax on the ground that the sales to third parties were not the sales of the assessee but were the sales of the Marketing Company. It was contended on behalf of the assessee that the Marketing Company was not an independent entity but was a selling organization of the Manufacturing Companies, including the assessee. The argument was rejected by the Commissioner of Sales Tax on the ground that under the agreement of 4th of June 1942, there was no contract of agency but there was contract of sale between the Manufacturing Companies and the Marketing Company. The assessee took the matter in revision to the Board of Revenue, but the revision application was dismissed and the Board of Revenue affirmed the order of the Commissioner of Sales Tax, holding that the petitioner could not be regarded as seller of cement to dealers and consumers but the petitioner was seller of cement to the Marketing Company.

2. Under Section 21 (1) of the Bihar Sales Tax Act of 1944 the Board of Revenue has submitted

a case for the opinion of the High Court on the following question of law :

> "Whether on the construction of the agreement dated 4-6-1942, between the assessee Messrs. Rohtas Industries Ltd., Dalmianagar (along with 3 other Manufacturing Companies) and the Cement Marketing Company of India Ltd., the cement delivered, dispatched or consigned by the assessee to the Cement Marketing Company of India Ltd., or to their order, or in accordance with their directions are sales to the latter, within the meaning of the Bihar Sales Tax Act (Bihar Act 6 of 1944)."

3. In order to find out what is the true legal relationship between the parties it is necessary to analyse the various clauses of the agreement dated 4 6-1942 between the assessee and the other manufacturing companies and the Marketing Company. Under clause 2 of the agreement the manufacturing Companies "do and each of them doth hereby appoint the Marketing Company to be the sole and exclusive sales managers for the sale of their cement during the period of the agreement." Clause 3 of the agreement is very important and it is necessary to reproduce it in full:

> "3. The Manufacturing Companies hereby agree with the Marketing Company and mutually between themselves that on and after the First of January one Thousand nine hundred and forty-one none of them will directly or indirectly sell or deliver or export or consign any cement including rapid hardening cement or coloured cement or any special cement to any person firm or company save and except to the Marketing Company or to the order of or as directed by the Marketing Company and all contracts entered into by any of the Manufacturing Companies for the sale and supply of cement prior to First of January one thousand nine hundred and forty-one which have to be carried out during the period of this agreement shall be carried out and executed by and through the Marketing Company. The Marketing Company shall be bound to carry out all contracts entered into by any of the Manufacturing Companies prior to first January, One thousand nine hundred and forty-one so far as the same have to be carried out during the period of this agreement. Each of the Manufacturing Companies has delivered to the Marketing Company all contracts for sale of cement entered into prior to First January One thousand nine hundred and forty-one and declares that the contracts so disclosed are the only contracts for sale or supply of cement outstanding on First January One thousand nine hundred and forty-one."

It is clear from clauses 2 and 3 of the agreement that the Manufacturing Companies have no power to sell cement to third parties and the right of sale is exclusively vested in the Marketing Company. In other words, the assessee cannot sell or deliver cement to anybody except to the Marketing Company or to its order or direction. This is one of the important points of consideration in judging the true nature of the contract. Clause 5 is in the following terms :

> "5. Each of the said Manufacturing Companies shall be paid by the Marketing Company a uniform basic payment of Rs. 24 per ton, Free on Rail or Free on Board or Free on Truck

> or Lorry, at works as the case may be, for all cement other than rapid hardening cement or coloured cement or special cement packed in good and sound gunny bags delivered by such Manufacturing Company to or to the orders of the Marketing Company or in accordance with the instructions of the Marketing Company provided however that the basic payment above mentioned shall be subject to revision from time to time by the Directors of the Marketing Company. Any of the Manufacturing Campanies supplying rapid hardening cement or coloured cement or other special cement to or to the order of the Marketing Company or in accordance with the instructions of the Marketing Company shall be paid in addition to the basic payment per ton Free on Rail or Free on Board, Free on Truck or Free on Lorry, at works above mentioned such sum per ton as the Marketing Company may fix from time to time at their discretion having regard to the difference between the selling price of such rapid hardening cement or coloured cement or other special cement and the selling price of ordinary cement. In the event of any of the Manufacturing Companies being called upon to supply cement or rapid hardening cement or coloured cement or special cement in special packing such as double gunny, paper sacks, paper-lined jute bags, steel drums or barrels, the Marketing Company shall pay to such Company in addition to the uniform basic payment herein before mentioned such sum per ton as may seem fit to the Marketing Company. The Marketing Company shall pay each of the Manufacturing Companies the uniform basic payment hereinabove mentioned together with the additional sum, if any, for special cement and/or special packing within two-months from the date of despatch by such Company."

Under this clause the Marketing Company agrees to make a uniform basic payment of Rs. 24 per ton, Free on Rail or Free on Board or Free on Truck or Lorry for all cement other than rapid hardening cement or coloured cement or special cement for which additional payments are to be made at the discretion of the Marketing Company. The clause further provides that in the case of special packing, such as double gunny, paper sacks, paperlined jute bags, steel drums or barrels, the Marketing Company shall make additional payment to the Manufacturing Company of such sum per ton "as may seem fit to the Marketing Company." The clause further stipulates that the Marketing Company shall make the uniform basic payment together with the additional sun, if any, for special cement or special packing, within two months from the date of despatch by such Company.

4. Clause 6 of the agreement is also important and is in the following terms :

> "6. The Marketing Company shall sell the said cement at such price or prices and on such terms as they may in their discretion think fit and may enter into such contracts for the sale or supply of cement or rapid hardening cement or coloured cement or special cement and such terms and conditions as they may think fit. Ordinarily the cement Marketing Company in fixing the selling prices shall have regard to the cost of production provided however that whenever or wherever the Marketing Company has to start competition against or to sell in competition against any competing selling organisation or manufacturer or body of manufacturers the Marketing Company shall be free to fix prices

even below cost.

* * * * *"

Under this clause the Marketing Company is empowered to fix the selling prices for the cement in its discretion. The Marketing Company is also authorised to enter into such contracts for the sale and supply of cement and on such terms and conditions as it may think fit. There is a direction that the Marketing Company in fixing the selling prices shall have regard to the cost of production, but there is a proviso that if the Marketing Company has to start competition against or to sell in competition against any competing selling organization or body of manufacturers the Marketing Company shall be free to fix prices even at low cost. It is important to notice that the Marketing Company is given a full discretion to fix the selling prices and it is apparent that even if the Marketing Company sells at low prices the loss is not borne by the assessee but the implication is that the loss is borne by the Marketing Company.

5. Clause 7 of the agreement recites as follows: "7. Each of the said Manufacturing Companies shall deliver, despatch or consign cement in accordance with the orders and instructions of the Marketing Company and from the Factory or works specified by the Marketing Company, provided however that each such Manufacturing Company shall have the right to arrange for any other works of the Company or any order of the Manufacturing Companies to deliver any quantity of cement which such Company itself was called upon to deliver provided however that as to which works or Company should be permitted to arrange such delivery will be decided upon by the Marketing Company at their discretion but in making such decision the Marketing Company shall give due consideration to the obligation to make up the quota for each group under Clause 8."

Clause 11 of the agreement is to the following effect :

> "11. Each of the Manufacturing Companies guarantees that all the Portland Cement or other cement manufactured by it and/or supplied to the orders of the Marketing Company shall comply in all respects with the requirements of the B. S. S. for the time being in force and shall be packed in good and sound gunny bags of uniform quality specified by the Marketing Company or such other special packing as may be directed by the Marketing Company and it shall indemnify the Marketing Company against any complaints or claims as to quality, weight and condition of the cement delivered against their orders or as to the bags or other packing in which it is packed."

Clause 24 of the agreement provides that the surplus profits made by the Marketing Company shall be divided among the Manufacturing Companies in proportion to the quantity of cement supplied by the Manufacturing Company to the order of the Marketing Company. Clause 24 is to the following effect:

> "24. The Marketing Company agree that if after all payments whether by way of basic payment or otherwise to the Manufacturing Companies pursuant to the clauses herein above contained and alter providing for all operating and working expenses and other

> payments charges and disbursements of the Marketing Company including all advertisement and propaganda charges and expenses and including the expenses of the Concrete Association of India at present owned by the Association but which will now be taken up by the Marketing Company and after setting aside such sums as the Marketing Company may think fit for depreciation and for Employees Provident Fund any surplus is left, the Marketing Company will, after paying a dividend not exceeding 6 per cent per annum on ts paid up capital, divide the balance of the surplus among the Manufacturing Companies in proportion to the number of tons of cement of every variety and kind supplied by such Manufacturing Company to the order of the Marketing Company."

It is important to notice that there is no provision in this clause that the loss sustained by the Marketing Company also may be shared among the Manufacturing Companies.

6. It is true that the expression "selling agents" is used in the preamble to the agreement, and the expression "sales manager" in clause 2 of the agreement. But the use of these expressions is not decisive on the question of interpretation. We have to look at what is the real transaction between the parties and not at what the parlies themselves choose to call it. The essence of a contract of sale is the transfer of title of goods for a price paid or promised to be paid. The transferee in such case is liable to the transferor as a debtor for the price to be paid and not as an agent in a fiduciary capacity for the proceeds of the sale. The essence of agency to sell is delivery of goods to a person who is to sell them, not as his own property but as the property of the principal, and who is therefore liable to account for the sale proceeds. In the present case the Marketing Company is at liberty to enter into contracts with third parties and to fix the selling prices at its discretion and receive payments from such third parties at any time it likes. But the Marketing Company is bound, if it sells the goods, to pay the assessee for such goods at a fixed rate of Rs. 24 per ton, and the payment is to be made within a fixed period, that is, within two months from the date of dispatch. That is the gist of clauses 5, 6, 7, and 11 of the agreement. Clause 3 of the agreement is also important, for the assessee cannot sell under that clause any cement to anybody or deliver the cement to anybody except to the Marketing Company or to the order of the Marketing Company or under its direction. As I have already staled, the Marketing Company is bound to make the basic payment of Rs. 24 per ton under clause 5 of the agreement, within a period of two months from the date of dispatch. Under clause 6 the Marketing Company has the discretion to sell the cement at such price as it may fix to third parties and receive payment at any time it likes. It is manifest, therefore, that the Marketing Company is not liable to account for the sale proceeds to the assessee and the Marketing Company has no fiduciary character in respect of the goods despatched by the assessee. My concluded opinion is, therefore, that there is no contract of agency between the assessee and the Marketing Company and that their relationship is one of seller and purchaser in the legal sense. Learned Counsel on behalf of the assessee referred to clause 24 of the agreement which provides that surplus profits made by the Marketing Company shall be divisible among the Manufacturing Companies in proportion to the quantity of cement supplied. I do not think that clause 24 qualifies the legal effect of the other important clauses of the agreement. In the eye of law the Marketing Company has a distinct legal personality and an independent legal existence from that of the assessee and I am satisfied, for the reasons already given, that the cement delivered, dispatched or consigned by the assessee to the Marketing Company or to its order or in accordance with its directions were sales by the

assessee to the Marketing Company and so liable to be taxed under the Bihar Sales Tax Act (Bihar Act 6 of 1944).

7. The view that I have taken is borne out by a decision of the Court of Appeal in Ex parte White; In re, Nevill, (1871) 6 Ch App 397 (A). In that case T. and Company were in the habit of sending goods for sale to N, who was a partner in the firm of N and Co. but received these goods on his private account. The course of dealing between T. and Co. and N was that the goods were accompanied by a price list. N sold the goods on what terms he pleased, and each month sent to T. and Co. an account of the goods he had sold, debiting himself with the prices named for them in the price list and at the expiration of another month he paid the amount in cash without any regard to the prices at which he had sold the goods, or the length of credit he had given. He paid the moneys which he received from the sales into the general account of his firm, and made his payments to T. and Co. through his firm, with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of T. and Co. having executed a deed of arrangement with their creditors, T. and Co. sought to prove against the joint estate for the amount standing to N's credit with his firm, on the ground that the same arose from moneys belonging to T. and Co., and improperly placed by N in the hands of his firm. It was held by the Court of Appeal that such proof could not be admitted, for that course of dealing shewed that although both parties might look upon the business as an agency, N. did not, in fact, sell the goods as agent of T. and Co., but on his own account, upon the terms of his paying T. and Co. for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys, which T. and Co., had no right to follow. At p. 402 Lord Justice Mellish states in the course of his judgment as follows :

> "Now, it is said that he was a del credere agent, and no doubt it requires a very minute examination of what the course of business is, to distinguish between a del credere agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account.

And no doubt persons may suppose that their relationship is that of principal and agent, when in point of law it is not. It is quite clear that Nevill, if he sold these goods, was to pay Towle and Co. for them, at a fixed price that is to say, a price fixed before-hand between him and them and at a fixed time. Now, if it had been his duty to sell to his customers at that price, and to receive payment from them at that time, then the course of dealing would be consistent with his being merely a del credere agent, because I apprehend that a del credere agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorized by his principal to salt, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed

price and a fixed time in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a del credere agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making, on his own account, a contract of purchase with his alleged principal, and is again re-selling." There is a decision to a similar effect in *W. T. Lamb and Sons v. Goring Brick Co., Ltd.*[1], In that case there was an agreement in writing by which certain manufacturers of bricks and other building materials appointed a firm of builders merchants' sole selling agents of all bricks and other materials manufactured at their works. The agreement was expressed to be for three years and afterwards continuous subject to twelve months' notice by either party. While the agreement was in force the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent and thereafter they effected sales to customers directly. It was held by the Court of Appeal that the agreement was one of vendor and purchaser and not one of principal and agent. The same principle is enunciated in another case, *Hutton v. Lippert*[2], in which there was a contract between the defendant and E, which in its terms purported to be one of guarantee or agency; that is to say, the defendant guaranteed the sale of E's property in whole or by lots at a fixed price, E giving the defendant a power of attorney to deal with the property as he thought fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee. It was held by the Privy Council, upon a construction of the agreement, that the transaction was really a sale and that the defendant was liable to pay duty on his purchase-money under Act 2 of 1863. At page 310 Sir Robert P. Collier, who delivered the opinion of the Board, has stated as follows :

> "The declaration in the action contained two counts respectively relying upon these two clauses of the Act; but with respect to the second count no question now arises. The question arises solely upon the first count, which relies upon the second section of the Act; and the question is whether there was or was not a sale of a certain property from Ekstein to Lippert. The law of the Cape with respect to the contract of sale is thus stated by the Chief Justice: 'Under our law, as under the Roman law, a sale may be defined as a contract in which one
> person promises to deliver a thing to another, who on his part promises to pay
> a certain price.'

In Van Leeuwen, cap. 17, Section 1, is this passage:

> 'The purchase is understood to be accomplished as soon as the price and the mutual condition has been fixed, although the money had not been paid, nor the delivery of the article made, unless a real misunderstanding had taken place in the articles sold.' Mr. Justice Blackburn, in his treatise on the Contract of Sale, at p. 177, quotes Pothier thus: 'In general a contract of sale is considered to have become perfect so soon as the parties are

> agreed upon the 'price for which the thing is to be sold. This rule has its operation when the sale is of an ascertained thing, and is pure and simple; Si id quod venierit appareat quid quale quantum sit et pretum et pure venit perfecta est emptio.'

It may be observed that, even if our law governed the case, which it does not, the definition given by Mr. Justice Blackburn in his treatise on the Contract of Sale, which is quoted by the Chief Justice, would apply."

8. I should also refer in this connection to the following passage from the judgment of Lord Pillimore in *Hope Prudhomme and Co. v. Hamel and Horley, Ltd*[3]*.,* (D).

> "There is great force in the observations which were made to their Lordships upon the extension which modern business has given to the terms 'agent' and agency. In many trades, particularly, for instance, in the motor-car trade the so-called agent is merely a favoured and favouring buyer, one who under an overriding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless-as is sometimes the case-he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

It would be quite possible that, in the present case, the position of the respondents, though frequently described by both parties as that of agents, was, notwithstanding, merely that of agents according to the modern business extension of the phrase, so that they would be entitled to treat themselves as buyers from the appellants and to sell at the best price they could get, in which case any damages which they would have to pay to the buyers from themselves on account or the nondelivery of the cargo would be damages which they in their turn could recover as damages from the appellants."

9. The view that I have expressed on the interpretation of the agreement dated 4-6-1942, in this case is also borne out by a decision of the Privy Council in the Kronprinzessin Cecilie (Part Cargo Ex), (1917) 33 TLR 292. In that case the appellants were an American Company; which made an agreement with a German
Company, whereby the latter were to act as the appellants "selling agents." The agreement provided that the appellants were to be paid not what their goods realised on being sold by the German Company but an arranged price. Under that agreement they shipped a quantity of pig lead to the German Company, and it was seized as prize. In this state of facts it was held by the Privy Council that before the seizure the appellants had parted with the property in the goods to the German Company and therefore the goods must be condemned. Therefore, for the reasons I have expressed, I hold that upon a proper construction of the agreement dated 4-6-1942, between the assessee and the Marketing Company, the cement delivered, despatched or consigned by the assessee to the Marketing Company, or to its order, or in accordance with its direction, are sales to the latter within the meaning of the Bihar Sales Tax Act (Bihar Act 6 of 1944), and the question of law referred to the High Court by the Board of Revenue must be answered against

the assessee and in favor of the State of Bihar. The assessee must pay the costs of this reference. Hearing fee Rs. 250.

R.K. Choudhary, J.

10. I agree.

Reference answered.

Cases Referred.

[1]1932-1 K.B. 710 (B)
[2](1883) 8 A.C. 309
[3] ILR 49 Mad. 1 at p. 6 : (AIR 1925 PC 161 at p. 163)