

# PATNA HIGH COURT

Commissioner of Sales Tax

Vs

New India Sugar Mills

(Ramaswami, C.J. K Singh, J.)

30.09.1958

## JUDGMENT

### **Ramaswami, C.J.**

1. The assessee is a manufacturer of sugar in Bihar, and during the assessment period, namely, from the 1st of April, 1947, to the 31st of March, 1948, the assessee despatched large quantities of sugar to different States, including the State of Madras, under the orders of the Sugar Controller made under the Sugar and Sugar Products Control Order, 1946. The assessee was ordered by the Superintendent of Sales Tax, Darbhanga, to pay sales tax on a turnover, including a sum of Rs. 6,89,422, being the price of sugar despatched to Madras. An appeal was taken by the assessee to the Deputy Commissioner of Sales Tax, but the appeal was dismissed and the assessment order of the Superintendent of Sales Tax was confirmed. The assessee preferred a revision application to the Board of Revenue, and on the 23rd March, 1955, the Board of Revenue allowed the petition of revision and held that, the assessee was not liable to pay sales tax with regard to the despatch of sugar to Madras. The Board, however, directed that the petitioner should file detailed evidence before the Sales Tax Officer to show the amount of despatches in order to facilitate the calculation of the total amount of exemption.

2. Under Section 25 (3) of the Bihar Sales Tax Act the Board of Revenue has submitted the following question of law for the decision of the High Court :-

Whether, in the facts and circumstances of the case as disclosed by the materials on the record, the despatches of sugar outside the State of Bihar are liable to be taxed ?

3. The admitted course of dealing between the parties was that the Government of various consuming States used to intimate to the Sugar Controller of India from time to time their requirements of sugar, and similarly the factory owners used to send to the Sugar Controller of India the statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the

various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned, on receipt, of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the drafts should be sent to the State Bank and it should be drawn on Parry and Company or any other party which had been appointed as stockist-importer on behalf of the Madras Government. It should be added that in this case the assessee was called upon to produce necessary documents relating to the transactions in question, but the assessee did not produce the documents. The assessee, however, admitted that the general arrangement between the parties was the one set out in this paragraph.

4. It is necessary at this stage to reproduce the relevant provisions of the Sugar and Sugar Products Control Order, 1946, promulgated by notification No. 1-SC(1)/46, dated the 18th February, 1946. Paragraph 2(d) of the Order defines a "producer" to mean a person carrying on the business of manufacturing sugar or sugar products or both with the aid of electrical energy or any other form of energy which is mechanically transmitted, and is not generated by human or animal agency. Paragraph 2 (e) defines a "recognised dealer" to mean a dealer who has been recognised as such by the Controller for the purposes of the Order. Paragraph 2(b) defines a "dealer" to mean a person carrying on business in the purchase, sale or distribution of sugar or sugar products. Paragraph 3 of the Order is in the following terms:-

3. No producer shall dispose of, or agree to dispose of, or make delivery of, any sugar, except :-

(1) to or through a recognised dealer, or

(ii) to a person specially authorised in this behalf by the Controller to acquire sugar on behalf of the Central Government or of a Provincial Government or of an Indian State.

Paragraph 5 of the Order requires every producer and dealer to comply with the directions of the Controller regarding the production, sale or distribution of sugar or sugar products. Paragraph 5 is in the following terms :-

5. Every producer and dealer shall comply with such directions regarding the production, sales, stocks or distribution of sugar or sugar products as may from time to time be given to him by the Controller.

Paragraph 6 states :-

6. (1) The Controller may, from time to time, fix by notification in the official Gazette the price or maximum price at which any sugar or sugar product may be sold or delivered, and different prices may be so fixed by him for different areas or different types or grades of sugar or sugar products.

(2) Where the price or the maximum price has been so fixed :-

(a) the price at which such sugar or sugar products may be sold for delivery otherwise than ex-factory shall not exceed the price or the maximum price as the case may be fixed under Sub-clause (1) for sale ex-factory plus such charges in respect of transport to or in specified areas and other incidental charges as are approved by the Controller ;

(b) No person shall sell or purchase or agree to sell or purchase such sugar or sugar product at a price higher than that fixed under the provisions of Sub-clause (1).

Paragraph 7 is important and must be reproduced in full:-

(1) The Controller may, from time to time:-

(i) allot quotas of sugar or sugar products or of both for the requirements of any specified Province, or area, or market,

(ii) issue directions to any producer or dealer to supply sugar or sugar products to such Provinces, areas or markets or such persons or organisations, in such quantities, or such types or grades, at such times, at such prices and in such manner as may be specified by the Controller, and (iii) require any producer or dealer to keep in reserve stocks of sugar or sugar products in such quantities and of such types and grades as he may direct from time to time :

Provided that where the price or maximum price of any sugar or sugar product has been fixed in accordance with Sub-clause (1) of Clause 6 the Controller shall in respect of such sugar or sugar product specify the price or maximum price under para (ii) of this sub-clause accordingly.

(2) Every producer shall, notwithstanding any existing agreement with any other person, give priority to, and comply with, any directions issued to him under Sub-clause (1).

Paragraph 8 prohibits transportation of sugar by rail, road, or water, without a general or special permit issued by the Controller. Paragraph 8 is in the following terms:-

8.(1) No sugar shall be transported, or offered or accepted for transport, whether by rail, road or water, and whether by a railway servant, common carrier or other person except under and in

accordance with the terms of: -

(a) a general or special permit issued by the Controller in this behalf; or

(b) a Military Credit Note :

Provided that nothing in this sub-clause shall apply to the transport of sugar not exceeding 20 seers as part of the personal luggage of a bona fide traveller.

(2) A permit issued in pursuance of Sub-clause (1) shall be returned by the consignor to the Controller on completion of despatch, or on expiry of the period of its actual despatches in the prescribed form.

(3) For the purposes of this clause 'sugar' means sugar manufactured by any process, including sugar made in vacuum pan factories from cane or gur or palmyrah jaggery, as well as khandsari sugar, sugar candy (rnisri) and bura.

Paragraph 11 provided as follows :-

11. If any person contravenes the provisions of the Order, then without prejudice to any other punishment to which he may be liable, any court trying the offence may order that any stocks of sugar or sugar products, together with packages and coverings thereof, in respect of which the court is satisfied that the offence has been committed, shall be forfeited to His Majesty.

5. On behalf of the State of Bihar the argument was put forward that upon the admitted facts there was a contract of sale of sugar between the parties at the time the sugar was actually in Bihar, and so there was a sale within the meaning of Section 2 (g) of the Bihar Sales Tax Act, as it stood on the relevant date, namely, prior to the amendment made by Bihar Act VI of 1949. The section as it stood then 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 contract but does not include a mortgage, hypothecation, charge or pledge :

6. 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 :

7. Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III 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.

8. The argument of the Government Advocate was that at the time the contract of sale was effected between the parties, the sugar was in Bihar and so there was a sale within the proviso to Section 2 (g) of the Bihar Sales Tax Act as it stood on the material date. It was contended on behalf of the assessee that there was no offer and no acceptance and there was no agreement between the parties because there was no consensus ad idem. It was argued that the State of Madras did not know at the time of allotment as to which factory would supply the sugar, and that it could not, therefore, be said that there was a contract between the assessee and the State of Madras with regard to the sale of sugar which was eventually sent by the assessee. I do not think that this argument is right. As soon as an application for allotment is made, there is an implication of an offer to purchase the quantity of sugar at the price fixed by the Controller from the producer to whom the allotment order is to be made by the Controller. It is also clear that if the allotment order is communicated by the Controller to the assessee and the latter appropriates the sugar in accordance with the allotment order and in accordance with the despatch instructions of the competent officer appointed by the Madras Government, there is in the eye of law an acceptance of the offer by the assessee and a contract is immediately brought into existence between the parties. It was argued by Mr. Dutta on behalf of the assessee that there was no communication of acceptance by the assessee and so the contract of sale was not complete. This argument is, however, not valid. Section 5 of the Indian Contract Act must be read subject to Section 8 which states that "performance of the condition of a proposal or the acceptance of any consideration for a reciprocal promise is an acceptance of the proposal". There is in principle a material distinction between the acceptance of an offer which asks for a promise and an offer which asks for an act on the condition of the offer becoming a promise. In the former case where the acceptance is to consist of a promise, there must be communication to the proposer. But in the latter class of cases where the acceptance is to consist of an act, as for example, despatching goods ordered by post, the rule is that no further communication of the acceptance is necessary than the performance of the proposed act. The distinction is recognised in Sections 5 and 8 of the Indian Contract Act. The legal position is correctly stated by Lord Justice Bowen in *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 at p. 269:

One cannot doubt that, as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together but there is this clear gloss to be made upon, that doctrine, that, as notification of acceptance, is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose that there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only

necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it would be sufficient to act on the proposal without, communicating acceptance of it to himself performance of the condition is a sufficient acceptance without notification.

9. In *Brudgen v. Metropolitan Railway Co.* (1877) 2 App. Cas. 666 at p. 691, Lord Blackburn stated the principle in similar terms :

But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon he does that thing, he is bound. If a man sent an offer abroad saying : I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must, ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom- of the sea at the risk of the orderer.

10. Applying the principle to the present case, I hold that the contract between the parties came into existence as soon as the assessee appropriated the sugar in his factory in accordance with the allotment order of the Sugar Controller and the despatch instructions of the Government of Madras. In other words, the contract itself became complete as soon as the goods were appropriated by the assessee in its factory, or latest at the stage when the sugar was put in the carrier at Hasanpur railway station. It follows, therefore, that the second proviso to Section 2(g) of the Bihar Sales Tax Act applies to this case and the contract of sale was completed at the time when the goods were actually in Bihar and so there was a sale within the meaning of Section 2(g) of the Bihar Sales Tax Act and the assessee is liable to pay sales tax on all the despatches of sugar to the State of Madras.

11. An alternative argument was presented by the learned Government Advocate in this connection. It was submitted that the transactions come within the main clause of Section 2(g) of the Bihar Sales Tax Act and title to the sugar despatched passed to the purchaser within the territorial limits of Bihar and so there was sale of goods which was liable to be taxed within the main clause of Section 2(g) of the Bihar Sales Tax Act. It was contended that as soon as the allotment order was communicated by the Sugar Controller to the assessee and as soon as the assessee appropriated the quantity of sugar in accordance with the order of the Controller and the despatch instructions of the competent officer of the State of Madras, there was passing of title in the sugar as provided by Section 23(1) of the Sale of Goods Act. It was submitted that unconditional appropriation of sugar was made by the assessee as soon as it was packed and put in a deliverable state in the factory, or at the latest at the point of time when the sugar was despatched at Hasanpur railway station. It was argued that title passed to the purchaser at that

point of time and there was sale, therefore, within the territorial limits of Bihar. In my opinion, this argument is well-founded and must be accepted as correct. I think that in the circumstances of this case the title to the goods passed as soon as the assessee made appropriation-of the sugar in its factory or at the time, of despatch of sugar at Hasanpur railway station. The point has been well discussed by Blackburn in his Treatise on Sale, 3rd edition, at page 137 as follows :-

The general rule laid down by Lord Coke in Heyward's case 2 Coke 36, 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.

12. It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods, or to do anything to them that cannot be done until 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'.

13. It was pointed out by Mr. Dutta on behalf of the assessee that the arrangement was that the railway receipt was taken in the name of the assessee and the railway receipt was handed over to the purchaser through the Bank against payment of the price. On behalf of the assessee reference was also made to Section 23(2) of the Sale of Goods Act in this connection. In my opinion, the intention of the parties in the present case was that title to the goods will pass as soon as the appropriation was made by the assessee in accordance with the order of the Sugar Controller and the despatch instructions of the Government of Madras, and the mere fact that the railway receipt was delivered to the purchaser on payment of the price is not inconsistent with the fact that title to the goods had passed as soon as the seller had appropriated the goods. In this connection the learned Government Advocate also referred to paragraphs 3, 6 and 7 of the Sugar and Sugar Products Control Order and submitted that the assessee had no right of disposal of the sugar after he had received the allotment order of the Sugar Controller and after he had despatched the sugar in accordance with the allotment order and the despatch instructions of the State Government. In other words, the argument was that, the jus dispossendi of the seller was antecedently taken away by the provisions of the Sugar and Sugar Products Control Order, and in the context of the provisions of that Order the fact that the railway receipt, was taken by the assessee in his own name in order to secure the payment, of the price is quite immaterial on the

question of passing of title. In my opinion, the submission of the Government Advocate is correct and it must be held that title to the sugar passed to the purchaser as soon as the assessee appropriated the sugar in its factory in accordance with the allotment order of the Sugar Controller and the despatch instructions of the competent officer of the Government of Madras. The principle with regard to appropriation has been lucidly explained by Lord Parker in *The Parchim* [1918] A.C. 157 at p. 170 as follows:--

The English cases, however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract: *Wait v. Baker* (1848) 2 Ex. 1; *Gabarron v. Kreeft* (1875) 10 Ex. 274. This seems to be because, the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he, does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract: *Mirabita v Imperial Ottoman Bank* (1878) 3 Ex. Div. 164; *Van Casteel v. Booker* (1848) 2 Ex. 691. *Browne v. Hare* (1858) 27 L.J. Ex. 372; *Joyce v. Swann* (1864) 17 C.B.N.S. 84. The prima facie presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.

14. It is manifest in this case that the general rule of law with regard to appropriation must be applied in the special context of the provisions of the Sugar and Sugar Products Control Order of 1946. My conclusion is that there was an unconditional appropriation of the goods by the assessee as soon as the sugar was packed in the factory and was put in a deliverable state, or latest at the point of time when the sugar was put in the carrier at Hasanpur railway station, that there was no reservation of *jus dispossendi* on the part of the assessee and so title to the purchaser passed at Hasanpur and there was a sale within the meaning of the main clause of Section 2(g) of the Bihar Sales Tax Act.

15. For these reasons I hold that in the facts and circumstances of this case as disclosed by the

materials in the record the despatches of sugar made by the assessee to different States, including the State of Madras, under the orders of the Sugar Controller are liable to be taxed under the provisions of the Bihar Sales Tax Act. I would accordingly answer the question of law in favour of the State of Bihar and against the assessee. The assessee must pay the cost of the reference. Hearing fee Rs. 250.

Kanhaiya Singh, J.

16. I agree.