

(1964) 09 MAD CK 0025

In the Madras High Court

Case No : Tax Case No. 135 of 1963 (Revision No. 91)

Bengal Corporation Private Ltd.

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 29-09-1964

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 3, 4, 5
Constitution of India, 1950 — Article 269, 286, 301
Sales of Goods Act, 1930 — Section 23

Citation : (1965) ILR (Mad) 268 : (1965) 16 STC 62

Hon'ble Judges : Ramamurti, J; Ramakrishnan, J

Bench : Division Bench

Advocate : M. Ranganatha Sastri and S. Bhaskaran, for the Appellant; G. Ramanujam, for Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Ramamurti, J.—Messrs Bengal Corporation Private Ltd., Netaji Subhas Road, Calcutta, a private limited company dealing in iron and steel

goods is the petitioner in this revision petition relating to the assessment year 1957-1958.

2. The brief facts are: Tenders for the supply of M.S. Sheets were called for by the Government of India, and the tender of the petitioner-company

was accepted and a contract was entered into on 14th May, 1957, between the Government of India, Iron and Steel Controller, Calcutta, and the

petitioner-company. In pursuance of this contract the steel material was imported by the petitioner from London and delivered over to the Deputy

Controller of Stores, I.C.F., Madras. The turnover in dispute is Rs. 34,51,010-98. The contention of the department is that the assessee imported

the goods from London, cleared them from the customs frontier at Madras and

then sold the same at Madras to the Deputy Controller of Stores, I.C.F., and therefore it was a local sale, and that the import effected by the petitioner was only for the purpose of enabling itself to perform its contract, namely, for the sale and delivery of the iron and steel within the State of Madras. On the other hand, the contention of the assessee is that this was a case of a sale in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act of 1956 inasmuch as the import of the goods in question was solely occasioned by the contract, that the contract itself involved the movement of the goods from the manufacturers in London to the purchaser (the I.C.F.), and that if the nature of the transaction, its incidents and the specific object underlying the same are taken into account it would be clear that the movement of the goods was as a direct result of a covenant in and as an essential incident of the contract of sale. It was also contended on behalf of the assessee, that the goods were not situate in Madras when the contract for sale was entered into and that the appropriation of the goods took place only in London at the time of the shipment and therefore u/s 4(2)(b) of the Central Sales Tax Act it was clearly a sale outside the State of Madras, and that the levy of sales tax is illegal in view of the embargo in Article 286(1)(a) of the Constitution. It is necessary to set out the entire contract which runs as follows:

Government of India,

Ministry of Heavy Industries, Iron and Steel Control,

33, Netaji Subhas Road, Calcutta.

Ref: RP/21/N/ICT/12/RC Dated the 14-5-1957

Messrs Bengal Corporation Private Ltd.,

14, Netaji Subhas Road, Calcutta-1.

Dear Sirs,

Ref: Import of 3055-57 tons of M.S. Sheets from Continent against this office invitation of tender No. PG. 117 Dt. 14-1-1957 for Integral Coach

Factory, Madras.

With reference to the offer contained in your letters dated the 15th March and 2nd April, 1957 respectively against this office Invitation to Tender

No. PG. 117 dated 14-1-1957, and further to this office letter Order No. RP/21/N/CIF dated the 6th April, 1957, I am to convey the acceptance

of your offer for supply of three thousand fifty-five decimal five seven tons of M.S. Sheets as per details in Schedule attached herewith, subject to

the following terms and conditions:--

1. Quality: The materials must be manufactured by the process as stipulated in the specifications as mentioned against each size in the Schedule

attached.

Cast number must be stamped on each piece or in metal tags attached to each bundle. The materials shall be free from surface defects of any kind,

free from cracks and conform to the section specified and finished in a workman-like manner. Inspection Test Certificate must accompany each

consignment.

2. Price: Your C.I.F. price Madras per long ton will be as indicated in the attached Schedule.

The above prices are inclusive of all extras for quality, size, packing, guarantee for weldability etc., and of your remuneration and are based on

current conference liner ocean freight rate of Sh. 152-6d. less 9½% plus 17½% per long ton and exchange rate of Sh. 1-6d. = Re 1. Any

variation in the above conference liner ocean freight at the time of actual shipment will be on consignee account. An extra of Sh. 2-6d. may be

added on to the freight indicated for shipment to Madras Port.

3. Shipment: Shipment of the entire tonnage as promised by you, must be completed by December 1957 commencing from June 1957. In the case

of failure to ship the materials in full within the aforesaid date and unless the Iron and Steel Controller is satisfied that the failure was due to reasons

beyond the control of the importers, the Government of India will be entitled to recover from you as liquidated damages (and not by way of

penalty) a sum of 2% for every week or part thereof of default of the landed cost of such materials as you fail to deliver within the above date. The

Government of India also reserves the right to purchase elsewhere without notice to you, on your account and at your risk and cost, such materials

as have not been shipped within the above date and you will be liable for any loss which the Government of India may sustain on this account but in

any event you will not be entitled to any gain on purchase made against such default. The Government of India will however appreciate shipment of

the entire quantity well before the completion period indicated above.

With a view to enabling the Iron and Steel Controller to plan properly for the distribution of the steel in question immediately on arrival of

consignment, you must submit to the Iron and Steel Controller advance information of all expected shipments of steel against the A/D indicating the

name of the vessel, the port of arrival and the categories and quantities of steel. Such information should reach this office at least 30 days before

the date of arrival of a steamer at the Port and for shipments for the Port of Madras, copies of the required information should be repeated to the

Regional Offices of the Iron and Steel Control concerned.

4. Delivery: The materials as soon as received in the jetty should forthwith be delivered ex-jetty to the Deputy Controller of Stores, Integral Coach

Factory, Madras-23, and no demurrage incurred at the Port upto the point of landing on the wharf will be reimbursed by the consignee. When the

consignee wishes that the steel should be booked by rail, the steel should be booked "freight to pay".

5. Inspection and its charges: The materials shall be inspected by the D.G., I.S.D., London and the inspecting officer shall have the right to be

present during all stages of manufacture and shall be afforded all reasonable facilities for satisfying himself that the materials are being manufactured

in accordance with the specifications laid down in the Schedule attached. If you are asked to pay any inspection charges for the inspector

nominated by the Iron and Steel Controller, such charges shall be paid by you in first instance and be reimbursed to you later by the consignee.

Such charges which will be approved by the Iron and Steel Controller shall not lie taken into account to build up the C.I.F. cost.

6. Payment: On completion of delivery of each consignment you shall submit your 100% bill at full landed cost as defined in Commerce and

Industry Gazette Notification No. SC(P)-16(9)/52 dated 22-4-1952, based on the C.I.F. price indicated in this letter to the Deputy Controller of

Stores, Integral Coach Factory, Madras-23, with the procedure laid down in this office Circular No. ISC. 51/19/Cir. 1/55 dated 27-2-1955.

7. Please acknowledge receipt of this letter by returning duly signed the duplicate copy of this order to this office. Will you please intimate the name

of the manufacturers to the D.G., I.S.D., London for the inspection of the stores.

3. The Appellate Tribunal in rejecting the contention of the assessee has not

carefully examined the terms and the conditions of the contract and its special incidents. But it has merely referred to some decisions without making any effort to understand the reasonings and the principles contained therein. Even at the outset, we may state that the view taken by the Tribunal is wrong and that the assessee's contention must be accepted as clearly well founded. The instant case is a clear and obvious one directly coming u/s 5(2) of the Central Sales Tax Act. The petitioner had no liberty or freedom to acquire the goods in the market wherever it liked but it was specifically obliged to import the materials from London, the shipment and movement of the goods was solely because of the contractual stipulation contained in the contract. To put it negatively the assessee cannot perform its contract in any manner other than a direct import of the specific goods from London. I am also of the opinion that the contention of the assessee based upon Section 4(2)(b) of the Central Sales Tax Act of 1956 (hereinafter referred to as the Act) is clearly well founded, and that the appropriation of the specific goods towards the contract had taken place in London, i.e., outside the State of Madras.

4. It is not necessary for the petitioner to make out that its case is exempted by Sections 4 and 5 concurrently, but it is enough if it is established that the conditions in Section 4(2)(a) and (b) have not been satisfied or alternatively that the conditions of Section 5(2) have been fulfilled. Before I take up the question of the proper interpretation of the provisions of Sections 4 and 5, it is necessary to briefly advert to the prior legislative background, before the Constitution Sixth Amendment Act of 1956.

5. The power of the State to levy sales tax was made subject to the limitations contained in Article 286 of the Constitution. There was sharp divergence of judicial opinion about (1) the tests to be applied for determining when a sale was an outside sale outside the State or a local sale and (2) the tests to be applied for determining when a sale takes place in the course of inter-State trade or commerce and when a sale took place in the course of import or export. The majority judgment of the Supreme Court in the Bengal Immunity Co. case [1955] 6 S.T.C. 446. decided that the purpose of the Explanation to Article 286(1) was only to explain what an outside sale referred to in Sub-clause (a) of Article 286(1) was, that the Explanation did not confer or enlarge the legislative powers of the State, and

that the Explanation cannot be legitimately extended to Clause (2) either as an exception or as a proviso, with the result that whenever a sale took place in the course of inter-State trade or commerce within the meaning of Article 286(2) the State Legislature will have no power to levy sales tax. As the test of delivery for consumption dealt with in the Explanation to Article 286(1) was based upon a legal fiction for fixing the situs of a sale the problem still remained as to the situs of the sale when the Explanation did not cover a particular sale (conveniently called as non-explanation sales). Difficulties arose on account of overlapping of jurisdiction of the several States and multiple taxation. In the interests of national economy of India and in the interests of inter-State trade and commerce it became necessary for the Parliament to enact law regarding the levy of sales tax on inter-State sales. There was again sharp divergence of judicial opinion as to the tests applicable for determining when a sale could be said to have taken place in the course of import or export as well as in the course of inter-State trade and commerce. Article 286(1) (b) did not contain a statutory definition of an inter-State sale or a sale in the course of import or export, and the problem in each case had to be solved by the application of the tests laid down in the two decisions of the Supreme Court in the First Travancore case [1952] 3 S.T.C. 434 and the Second Travancore case [1953] 4 S.T.C. 205. It was naturally realised that. Article 286, as it then stood, which contained provisions merely delimiting the jurisdiction of the States to levy sales tax, did not serve the real purpose, and that, in the interests of uniformity and in view of the great importance of the export and import trade and inter-State trade and commerce there was real necessity for legislation, defining a local sale as distinguished from an outside sale, as well as a sale in the course of import and export and a sale in the course of inter-State trade and commerce. Important amendments were introduced by the Constitution Sixth Amendment of 1956. Entry No. 92-A was added in List I by which tax on sale or purchase in the course of inter-State trade or commerce was made an exclusive Union subject and Entry No. 54 of List II (State List) providing for levy of tax by the States on the sale or purchase of goods was made expressly subject to the provisions of Entry No. 92-A of List I. A new provision, Article 286(2), was enacted to the effect that

Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned hereunder:

(a) when a sale is a local sale or an outside sale, and (b) when a sale takes place in the course of import or export. Article 286(3) is another new

provision introduced containing restrictions to be observed by the States in the matter of levy of sales tax on the sale or purchase of goods

declared by Parliament to be of special importance in inter-State trade or commerce. Corresponding amendments were also carried out in Article

269 of the Constitution. All these amendments took effect from 1st September, 1956.

6. In pursuance of the Constitution Sixth Amendment the Parliament enacted the Central Sales Tax Act of 1956. Section 3 of the Act formulates

the principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce and Section 5 for determining

when a sale or purchase takes place in the course of import or export. Section 4 deals with one of the important aspects of the Central legislation,

containing the definition of the locale or the situs of the sale. Sales or purchases specifying the conditions of Section 4(2)(a) and (b) alone are

regarded as local sales or purchases empowering the States to levy sales tax thereon and all other sales or purchases are regarded as outside the

States. The test of delivery of the goods for the purpose of consumption or the test of passing of property was given up and it ceased to be of

significance. They run as follows:

Section 3: A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase--

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.--Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of

Clause (b), be deemed to commence at the time, of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2.--Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods

from one State to another by reason merely of the fact that in the course of such

movement the goods pass through the territory of any other State.

Section 4(1): Subject to the-provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with subsection (2)

to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State--

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether

assent of the other party is prior or subject to such appropriation.

Section 5(1): A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if

the sale or purchase either occasions such export or is effected by a transfer of documents of title, to the goods after the goods have crossed the

customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or

purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs

frontiers of India.

7. It must be noticed that Section 4 which fixes the situs or locale of a sale inside the State is made expressly subject to the provisions of Section 3,

the consequence being that if a sale was a local sale within the meaning of Section 4(1), at the same time it had taken place in the course of inter-

State trade or commerce coming u/s 3 the latter provision would prevail and the State cannot levy sales tax merely because the situs of the sale

was within the State. Though there is no similar express reference to Section 5 (in the opening words of Section 4) the same principles would apply

in the case of a sale which takes place in the course of import or export. This must be so is clear from the embargo in Article 286. If therefore

Section 5 applies to a sale as an import or export sale the States will have no power to levy sales tax though the conditions of Section 4(2)(a) or

(b) may be present. This view of the relative operation of Sections 4 and 5 has

been taken in a Bench decision of the Andhra Pradesh High Court in Guduthur Thimmappa and Son v. State of Andhra Pradesh [1964] 15 S.T.C. 299. It was held that Section 4 will not have any independent or overriding operation when either Section 3 or Section 5 comes into play but that Section 4 would yield to Section 5.

8. The conditions of the contract in the instant case provide for the inspection of the materials during all the stages of the manufacture of the goods

in London. The goods are to be manufactured in accordance with the specifications set out in the Schedule. The contract also provides for the cast

number being stamped in each piece or in metal tags attached to each bundle. The goods shipped were specific ascertained goods answering the

description and conforming to the terms and conditions of the contract and the shipment itself takes place only after those specific ascertained

goods were appropriated. The test certificate must accompany each consignment and looked at from any point of view Section 4(2)(a) or (b) will

have no application to the instant case. The conclusion necessarily follows that the sale is an outside sale outside the State of Madras.

9. The learned Government Pleader contended that the appropriation to the contract of sale referred to in Section 4(2)(b) signifies the same idea

as appropriation specified in Section 23 of the Sale of Goods Act, and that the appropriation must be such as to pass the property in the goods to

the buyer. He contended that such an appropriation resulting in the passing of the property took place within the State of Madras only when the

assessee cleared the goods and delivered the same to the Deputy Controller of Stores, I.C.F., Madras. His argument was that whenever Section

4(2)(b) of the Act applied the passing of property is the nexus for the State to levy sales tax. There is no substance in this argument and a reference

to Section 4(2)(a) is sufficient to repel the same. Further the acceptance of his argument would result in perpetuating the very evil which the

Parliament wanted to avoid while defining u/s 4 a local sale. In the case of a contract of sale of specific ascertained goods it is the State in which

the goods are situated at the time of the contract of sale that will have the power to levy sales tax u/s 4(2)(a), though the property in those goods

may pass in some other State. I am not able to see any reason why there should be such a vital difference ""in the nexus"" between a case arising u/s

4(2)(a) and one u/s 4(2)(b), in the former the passing of property having no relevance at all, but in the latter it being the decisive factor. The legislative background, when the Central Sales Tax Act of 1956 was enacted, afforded by the Sales Tax Acts of all the States clearly tends to the same irresistible inference. I find that at the time of the enactment of the Central Sales Tax Act of 1956, there were about 17 Sales Tax Acts of the various States and in all of them there is the provision that "notwithstanding the provisions of the Sale of Goods Act" the sale or purchase of any goods shall be deemed to have taken place in the State where the goods were actually in the State at the time when the contract of sale or purchase in respect thereof was made or in the case of a contract of sale or purchase of future goods if the goods were actually produced in the State at any time after the contract of sale or purchase. Except some difference in the phraseology I find the general scheme and pattern is the same in all the Acts, i.e., the locale of the sale is fixed as the place where the goods are situated at the time of the contract of sale in the case of specific goods, and in the case of future goods when the goods are manufactured. As these Sales Tax Acts enacted by the several States were pre-Constitution Acts suitable amendments were incorporated by the several States so as to conform at the same time to the provisions of Article 286 as un-amended. At the same time it is significant to notice that as regards the "non-explanation sales" all the States retained the same test of the location of the goods. During the period 1950-1956 in some decisions the view was taken that in the case of "non-explanation sales" the passing of property within the State alone can constitute the nexus empowering the State to levy sales tax and that the specific definition aforesaid fixing the situs of the goods as the nexus was ultra vires. Reference may be made to the following decisions of the Supreme Court: *India Copper Corporation Ltd. v. State of Bihar* [1961] 12 S.T.C. 56; *A.V. Thomas & Co., Ltd. v. Deputy Commissioner of Agricultural Income Tax and Sales Tax* [1963] 14 S.T.C. 363 and *Malayalam Plantations Ltd. v. Deputy Commissioner* [1964] 15 S.T.C. 665 (though rendered later, but dealing with cases arising before 1956).

10. The Legislature was faced with the serious problem of multiplicity of taxation of the same transaction of sale by a plurality of States resulting in

the very heavy burden on the consumer and also affecting the trade and national economy in that process. It is quite legitimate to presume that

when the Parliament enacted the Central Sales Tax Act of 1956 its evident undoubted object was to formulate one single uniform test regarding the

locale of the sale in all the States and that the law-makers were well aware that in all the Sales Tax Acts the passing of property was not regarded

as a nexus but the locale of the goods within the State either at the time of the contract of sale or later at the time of the appropriation. I have not

the slightest doubt in holding that while defining the local sale the Parliament has quite properly adopted the single test which had been adopted

uniformly by all the States and that the Parliament deliberately left out of account altogether the passing of property as of any relevance. To

introduce any notion of passing of property into the framework of Section 4 of the Act would cut at its very root and scheme.

11. I may in this connection make a passing reference to the decisions of the Supreme Court rendered after the Central Sales Tax Act of 1956, but

dealing with cases arising under prior enactments of some of the States, as in my opinion, they also tend to the same conclusion. In *India Copper*

Corporation Ltd. v. State of Bihar [1961] 12 S.T.C. 56, Rajagopala Ayyangar, J., delivering the majority judgment held that in the case of non-

explanation sales it is only the State in which the property in the goods passes that can levy sales tax. Das and Shah, JJ., dissented and Shah, J.,

delivering the minority judgment was inclined to the view that the territorial nexus, i.e., the location of the goods inside the State at the time when

the contract was entered into was still an available factor for the State to levy sales tax. This majority view was followed and applied in a later

decision of the Supreme Court in *A.V. Thomas & Co., Ltd. v. Deputy Commissioner of Agricultural Income Tax and Sales Tax* [1963] 14 S.T.C.

363. The matter again came up for consideration recently before the Supreme Court in *Malayalam Plantations, Ltd, v. Deputy Commissioner*

[1964] 15 S.T.C. 665 (a case before the Central Act of 1956). Rajagopala Ayyangar, J., delivering the judgment of the majority held that in the

case of non-explanation sales the only (SIC) which the property passes would have the power to levy sale (SIC) The following provision in the

Travancore-Cochin Sales Tax Act was declared to be invalid.

Notwithstanding anything contrary in the Sale of Goods Act, the sale or purchase of goods shall be deemed to take place in the State if the goods

were actually in the State at the time the contract for sale or purchase of goods thereof was made.

12. Here again Shah, J., dissented and adhered to the view expressed by him earlier. While adverting to the legislative history of the Constitution

Sixth Amendment and the Central Sales Tax Act of 1956 the learned Judge observed as follows:--

It is necessary to record in this judgment, lest it be assumed that I agree with the view that the doctrine of territorial nexus in its application to sales

tax legislation has, since the enactment of the Constitution, been completely abrogated. It may be pertinent to note that since the amendment of the

Constitution by the Constitution (Sixth Amendment) Act, Article 286(1)(a) (which remains unamended) is now free from the shackles of the

Explanation which is deleted and by Clause (2) the Parliament is invested with power to formulate principles for determining when a sale or

purchase of goods takes place in any of the ways mentioned in Clause (1), namely, outside the State or in the course of the import of the goods

into, or export of the goods out of, the territory of India. Exercising the power under Clause (2) the Parliament has enacted the Central Sales Tax

Act (Act 74 of 1956), and by Section 4(2) the doctrine of territorial nexus has been given legislative recognition, though in somewhat limited form.

13. In a very recent judgment reported in Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, the validity of the Assam Sales

Tax Act of 1947 which had fixed the situs of sale for the purpose of levy of sales tax upon the actual situation of the goods came up for

consideration and the Supreme Court upheld the validity holding that the Legislature has thereby not overstepped the limits of its authority. The

learned Judge (Shah, J.) has summed up the position thus at page 1425:

The constitutional question on which certificate was granted does not need consideration in any detail. By the explanation to Section 2(12) of the

Act notwithstanding anything to the contrary contained in the provisions of the Indian Sale of Goods Act, 1930, a sale is deemed to be complete

when the goods are actually within the State of Assam at the time when the contract of sale is made, irrespective of the place where the contract is

made. Under the Sale of Goods Act, 1930, in the absence (SIC) ntract to the contrary, a sale is complete when property in the go (SIC) passes,

but by the Assam Sales Tax Act the Legislature has attempted to locate the situs of sale for the purpose of levy of sales tax by fixing upon the

actual situation of the goods within the Province at the date of the contract, for the purposes of levying tax on sales. The Legislature has thereby not

overstepped the limits of its authority.

14. If I may say so, with respect, the Legislature has adopted, in anticipation as it were, the single test of territorial nexus, the location of the goods

inside the State, a view which Shah, J., has been uniformly expressing. This view which I have taken follows from the clear language of the section

besides fully effectuating the object of the Legislature in remedying the mischief or the evil of having a plurality of next leading to the inevitable evil

of multiple taxation. The Legislature has solved difficulties and problems by using adequate language in Section 4 to define and delimit the positive

concept of a sale inside the State, as well as the negative concept of a sale outside the State.

15. I am clearly of the opinion that in the instant case the appropriation within the meaning of Section 4(2)(b) took place in London only. I am

unable to agree with the contention of the learned Government Pleader that the appropriation in London when the goods were shipped is not

referable to the contract of sale between the assessee and the Deputy Controller of Stores, I.C.F., and that the appropriation so far as the latter

contract was concerned must be deemed to have taken place only in Madras when the goods were cleared and delivered. Appropriation is

different from delivery. The bargain was for import of the goods from London specially manufactured and the identical shipment has been cleared

and delivered to the I.C.F. Nothing is known as to what arrangements the assessee made in London for the manufacture of the goods and have

shipments thereof. He was entitled to make his own arrangements for shipment. He may arrange either through correspondence or he may send an

agent to London to attend to the manufacture and the shipment of the goods as per the terms of the contract. The circumstance, even assuming to

be so, that the shipment in question at the same time constituted appropriation by the London manufacturer towards his contract with the assessee

does not in any manner detract that shipment also constituting at the same time an appropriation by the assessee towards his contract with the

I.C.F. The crucial question is did not the assessee set apart those goods either through himself or through someone towards the performance of

this contract? The answer obviously is "yes". The fact that payment was to be made later on does not mean that there could not be an

appropriation of the goods. In the instant case the contract provides that the materials since received in jetty should forthwith be delivered ex-jetty

to the Deputy Controller of Stores, I.C.F., Madras, and payment was to be made after delivery. Delivery and payment of the price are not

provided as concurrent conditions under the contract. Clause 6 which provides for payment clearly emphasises this view, if property in the goods

would pass before payment of the price. I am of opinion that reading all the clauses in the contract there has been the requisite appropriation of the

goods towards the contract in London outside the State of Madras. To sum up, therefore, in my opinion the appropriation referred to in Section

4(2)(b) signifies and connotes the earmarking and setting apart of the goods as specific goods to be delivered under the contract of sale and does

not signify an appropriation carrying with it the idea of passing of property. I am of the clear view that this objection based u/s 4(2)(a) or (b) goes

to the root of the matter and on this view alone the petitioner is entitled to succeed.

16. I shall now take up the question of the applicability of Section 5(2) of the Act. Here again the contention of the assessee is well-founded

supported by ample authority and has to be accepted. The Central Act of 1956 now contains a definition and explanatory clause defining an inter-

State sale and a sale in the course of export or import and as will be presently seen in doing so the Parliament has adopted the tests laid down in

the several decisions rendered earlier. It will be also noticed that the same test "sale or purchase occasioning the movement of the goods" has been

applied in all the decisions both before and after the amendment, whether it is an inter-State sale or a sale in the course of export or import. From

the following observations in a recent judgment of the Supreme Court in Cement Marketing Co. v. State of Mysore [1963] 14 S.T.C. 175, it will

be clear that in Sections 3 and 5 of the Act the Parliament has accepted the tests and principles laid down in the earlier decisions of the Supreme

Court:

In *Endupuri Narasimham & Son v. State of Orissa and Ors.* [1961] 12 S.T.C. 282, it was held in the case of sales covered by Article 286(1)(b)

that only sale or purchase of goods which occasions the export or import of the goods out of or into the territory of India were exempt from the

imposition of tax on the sale or purchase of goods and in regard to prohibition against imposition of tax on inter-State sales the test, it was said,

was that in order that a sale or purchase might be inter-State it is essential that there must be transport of goods from one State to another under

the contract of sale or purchase. The following observations from the *Bengal Immunity Co. Ltd. v. State of Bihar and Ors.* [1955] 6 S.T.C. 446,

were quoted with approval in support of the proposition:--

A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods

from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State

trade.

17. Thus the tests which have been laid down to bring a sale within inter-State sales are that the transaction must involve movement of goods

across the border: *Mohanlal Hargovind's case* [1955] 6 S.T.C. 687; transactions are inter-State in which as a direct result of such sales the goods

are actually delivered for consumption in another State: *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax and Ors.* [1955] 6 S.T.C.

627; a contract of sale must involve transport of goods from one State to another under the contract of sale: *Bengal Immunity Co.'s case* [1955] 6

S.T.C. 446. In the case of sales in the course of export or import the test laid down was a series of integrated activities commencing from an

agreement of sale and ending with the delivery of goods to a common carrier for export by land or by sea: *The Bombay Co. Ltd. Case* [1952] 3

S.T.C. 434. In the course of was explained to mean a sale taking place not only during the activities directed to the end of the exportation of the

goods out of the country but also as part of or connected with such activities, and "integrated activities" was explained in similar language. This

Court again accepted these tests in *Endupuri Narasimham's case* [1961] 12 S.T.C. 282. In Section 3 of the Central Sales Tax Act (Act 74 of

1956), the Legislature has accepted the principle governing inter-State sales as laid down in Mohanlal Hargovind's case [1955] 6 S.T.C. 687.

18. In the First Travancore case⁴, explaining a sale in the course of export Patanjali Sastri, C.J., put the matter thus:

Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single

transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place

in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales

were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must,

nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Article 286(1)(b). That clause,

indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods

concerned.

19. From the above statement of the law it will be noticed that if the sales or purchases themselves occasion an export or import the fact that the

property in the goods passes to the buyer within the State even before the goods commenced their journey would not make the sale or purchase

any the less in the course of import or export; the passing of property was not regarded as a decisive factor when the sale itself occasions import

or export. In the Second Travancore case [1953] 4 S.T.C. 205, the conception of sales or purchases themselves occasioning the export or import

as the case may be was however explained by Patanjali Sastri, C.J. Patanjali Sastri, C.J., delivering the judgment on behalf of the majority

emphasised the integral relation between the contract of sale and the export or import occasioned by that contract. It was held that a purchase for

export is not an activity so integrally connected with the exportation of the goods as to regard that purchase as done in the course of export. The

same principle was held to apply to a case of a first sale after import which would be regarded as a local transaction effected after the import of the

goods into the country and having no integral relation with the actual import. Das, J., in his dissenting judgment however took a broader view that a

purchase made by the exporter to carry out or implement his agreement for sale with the foreign buyer should also be regarded as having taken

place in the course of export on the ground that a purchase by the exporter should be regarded as an activity closely integrated with the act of

export so as to constitute the exporter's local purchase part of the export process itself. Pursuing the same reasoning the learned Judge was also of

the view that in the case of an import it was only after the first sale of the goods by the importer to the dealers that the goods would become part of

the general mass of the property in the State concerned, and thereafter subject to the taxing power of the State, and that the first import for the

purpose of sale was inextricably wound up with the import itself, and that the sale immediately after the import should be regarded as a culmination

of the import activity.

20. In the Bengal Immunity Co. case [1955] 6 S.T.C. 446 the difference of opinion amongst the learned Judges related only to the question of the

relative operation of Article 286(1) Explanation and Article 286(2). We are not concerned in the instant case about that difference of opinion. But

that case was undoubtedly a case of inter-State sale as the contract admittedly involved the movement of the goods from Calcutta (West Bengal)

to the State of Bihar. Even though the question as to what is meant by a sale in the course of import did not directly arise, Venkatarama Aiyar, J.,

while examining the legal position explained as hereunder as to what is meant by inter-State trade at page 583:

A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) a sale of goods, and (2) a transport of those goods

from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State

trade. Thus, if X, a merchant in State A goes to State B, purchases goods there and transports them into A, there is undoubtedly a movement of

goods in inter-State commerce. But that is not under any contract of sale. X might be entitled under Article 301 to certain rights in the matter of

transportation. But Article 286(2) has no application, as there is no sale in the course of inter-State trade or commerce. In the same illustration, if

X after transporting the goods into State A sells them, then also there is no sale in the course of inter-State trade. It is true that there is a sale, and

there is also a movement of goods from one State to another. But that movement has not been under the sale, there having been no sale at the time of transportation. In Rottschaefer on Constitutional Law (1939 Edition) sale in the course of inter-State commerce is thus defined:

The activities of buying and selling constitute inter-State commerce if the contracts therefore contemplate or necessarily involve the movement of goods in inter-State commerce.

21. From the above statement it will be seen that it is in these observations that we get this conception, i.e., in order that a sale may be said to be

an inter-State sale it is necessary that the movement of the goods from one State to another should be as a result of the terms of the contract which

contemplate or necessarily involve the movement of the goods in the nature of inter-State trade and commerce. An examination of the later

decisions of the Supreme Court shows that the above test formulated by Venkatarama Aiyar, J., "the contract of sale or purchase containing the

essential stipulation or condition or covenant for the movement of the goods into India or outside India" has been uniformly applied.

22. In *Tata Iron & Steel Co. v. S.R. Sarkar* [1960] 11 S.T.C. 655, the question arose about the relative applicability of Section 3(a) and Section

3(b) of the Act of 1956. Sinha, C.J., Imam and Shah, JJ., took one view while Sarkar and Das Gupta, JJ., took a different view on the question.

In the instant case we are not concerned with the rival views as to the scope of Section 3(a) and Section 3(b). But what is important to notice is

that all the learned Judges have accepted the view that a sale or purchase could be said to have occasioned import only if there is a condition or

stipulation in the contract providing for the movement of the goods into the territory of India. Shah, J., delivering the majority judgment, after

reviewing the prior state of the law, and the necessity for the amendment said at pages 666-667 that the movement of the goods must be as a

direct result of a covenant or incident of the contract of sale or purchase. Sarkar, J. (delivering his dissenting judgment) took the same view on this

aspect. He put the matter thus at page 679:

We take Clause (a) of Section 3 first. That clause contemplates a sale which occasions the movement of goods from one State to another. The

words "sale occasions the movement" should create no difficulty. It is apparent

from the Explanation in Section 2(a) which will be set out later, that they mean "moved by reason of the sale". The question then arises, when does a sale occasion the movement of goods sold? It seems clear to us that a sale can occasion the movement of the goods sold only when the terms of the sale provide that the goods would be moved; in other words, a sale occasions a movement of goods when the contract of sale so provides.

23. In *Endupuri Narasimham & Son v. State of Orissa* [1961] 12 S.T.C. 282, the question arose under the Orissa Sales Tax Act of 1947 with

regard to sales prior to the Central Sales Tax Act of 1956. The Supreme Court held that the initial purchase of goods by the dealer inside the

Orissa State, though for the express purpose of being sold and despatched to dealers outside the State could not be regarded as purchase in the

course of inter-State trade in the view that local purchases inside the State of Orissa were distinct and separate from sales which were effected to

outside purchasers. Venkatarama Aiyar, J., while reiterating his earlier view in *Bengal Immunity Co. case*³, for the Condition in the contract for the

movement of the goods from one State to another, observed as follows:

In order that a sale or purchase might be inter-State, it is essential that there must be transport of goods from one State to another under the

contract of sale or purchase. In *Bengal Immunity Company Limited v. State of Bihar* [1955] 6 S.T.C. 446 occur the following observations which

are apposite:

A sale could be said to be in the course of inter-State trade only if two conditions concur: (a) A sale of goods, and (2) a transport of those goods

from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State

trade.

24. This view has been followed in all the subsequent decisions of the Supreme Court.

25. In *Singareni Collieries v. State of Andhra Pradesh* [1961] 12 S.T.C. 765, the question arose after the Central Sales Tax Act of 1956. On an

examination of the relevant case law the position was summed up as follows at page 778:

It is manifest that in order to constitute inter-State trade or commerce, it is not sufficient if there is a sale and transportation of goods across the

State's frontiers. There should be a related connection between sale and the movement of goods. In other words, it should be stipulated between

the parties that deliveries should be outside the State.

26. Applying these tests the learned Judges negatived the claim of the assessee on the ground that they transported the goods to various places

outside the State not as a condition or stipulation of the contract of sale. With respect to the learned Judges we think this is the correct legal

position under the Central Sales Tax Act of 1956.)

27. I shall now refer to the two recent judgments of the Supreme Court in which the same view was reiterated and applied. In the first case,

Cement Marketing Co. v. State of Mysore [1963] 14 S.T.C. 175, the assessment related to the period April 1955 to 31st March, 1956, prior to

the Central Sales Tax Act. In that case the first appellant (the Cement Marketing Co.) was the sales manager of the second appellant (Associated

Cement Co. Ltd.) who was manufacturing cement and was having factories in different parts of India outside the State of Mysore. As per the

control and restrictions customers who have to secure their supply would get (a permit so called) an authorisation, authorising the first appellant to

sell and supply cement in quantities and from the factories mentioned in that authorisation. The buyer would then place this order with the first

appellant who would instruct its Bombay office to despatch the cement to the buyers in accordance with the instructions contained in the permit. It

happened that the deliveries of the cement took place inside the State of Mysore for manufacture of tiles in the State of Mysore. The High Court

took the view that as the first appellant collected the price from the intending purchasers inside the State of Mysore and then directed one of the

factories of the second appellant to supply the cement to the purchaser and as the actual delivery to the purchaser was within the State of Mysore

the transactions were not inter-State sales but were intra-State sales. The Supreme Court did not accept this view of the nature of the transactions

but held that the contract itself involved the movement of the goods from the factory to the purchaser, i.e., across the border from one State to

another, and therefore it was an inter-State sale. Kapur, J., delivering the judgment observed as follows at page 180:

In the present case the contract itself involved the movement of goods from the

factory to the purchaser, i.e., across the border from one State to another, because the factories were outside the State of Mysore and therefore transactions were clearly transactions of sale of goods in the course of inter-State trade or commerce. Taking the nature of the transaction and preliminaries which are necessary for the sale or purchase of cement it cannot be said that the sale itself did not occasion the movement of goods from one State to another.

28. After referring to the observations of Shah, J., in *Tata Iron & Steel Co. v. S.R. Sarkar* [1960] 11 S.T.C. 655, the learned Judge observed as

follows at page 183:

As stated above under the contracts of sale in the present case there was transport of goods from outside the State of Mysore into the State of

Mysore and the transactions themselves involved movement of goods across the border. Thus if the goods moved under the contract of sale, it

cannot be said that they were intra-State sales. It was not the volition of the first appellant to supply to the purchaser the goods from any of the

factories of the second appellant. The factories were nominated by the Government by authorisations which formed the basis of the contract

between the buyer and the seller.

29. In this connection it may also be noticed that Kapur, J., at page 182, has observed that in Section 3 of the Central Sales Tax Act the

Parliament has accepted the principle governing inter-State sales as laid down in *Mohanlal Hargovind's case* [1955] 6 S.T.C. 687.

30. The next decision to be referred to is *State Trading Corporation v. State of Mysore* [1963] 14 S.T.C. 188, in which the Bench consisted of

the same learned Judges as in the previous decision, *Cement Marketing Co. v. State of Mysore* [1963] 14 S.T.C. 175, and in which also

judgment was delivered on the same day, 28th August, 1962. In this case also the incidents of the contract were the same and delivery of cement

had to be effected by movement of goods from one State into the other State, except this difference that the period covered was after the Central

Sales Tax Act came into force. At page 199 Sarkar, J., delivering the judgment observed that the test for finding out whether the sale has

occasioned the movement of the goods from one State to another was to determine whether the movement of the goods was as a result of a

covenant or incident of the contract of sale. It was held that as the authorisation of the permit itself contained the condition that cement from one

State has to be transported into the State of Mysore, there was a clear case of the sale itself occasioning the movement of the goods.

31. From the foregoing it will be clear that in the instant case the movement of the goods from London was clearly as a result of and in pursuance

of the express covenant in the contract. The contract is not that the assessee should supply certain quantity of London manufactured steel, the

I.C.F. being indifferent as to how the assessee procured the goods, whether by importing the steel from London or locally purchasing the steel

which has already been imported from London.

32. The learned Government Pleader contended that this transaction should be split up into two component parts: import of the goods by the

assessee from London on his own initiative and then a subsequent sale in the State of Madras. This contention, in our opinion, is not correct on

facts. There is no evidence in this case regarding the arrangement entered into between the assessee and the London manufacturer and there is no

evidence as to when title to the goods passed from the manufacturer to the assessee. The assessee may enjoy some credit with the foreign

manufacturer and title to the goods might have passed in London itself before or at the time of the shipment. But these are all matters not germane

to the issue as the question is whether the sales tax is leviable on the transaction of sale entered into between the assessee and the Government.

Even if the property in the goods passed inside the State after the steamer arrived, that would not make any difference as the passing of property

inside the State is no longer of any relevance in determining the true character of a sale or purchase.

33. It only remains to refer briefly to the decisions relied on behalf, of the State. Learned Government Pleader first drew our attention to the

decision in *Dhanalakshmi Mills Ltd. v. State of Madras* [1960] 11 S.T.C. 306. In that case the assessee, a spinning mill at Tiruppur in the State of

Madras, entered into a contract with the Bombay dealers for supply of cotton. The Bombay dealers placed the orders with their suppliers in Africa

and the latter shipped the goods from Africa to Port Cochin. The assessee in the meanwhile obtained the necessary transport licence, The shipping

documents were in the name of the Bombay dealers who sent them to their clearing agents at Port Cochin who cleared the goods through the customs and despatched the goods by rail to the assessee at Tiruppur, who took delivery of the goods after honouring the railway receipts by payment through the bank. The learned Judges, on the facts of that case, took the view that the relationship between the assessee and the importer at Bombay was that of buyer and seller, and that the sale was only after the import of the goods even though the contract to sell preceded the order to the exporter abroad to ship the goods to India. It must be mentioned at the outset that this crucial aspect of the matter, the condition or covenant in the contract obliging the movement of the goods from Africa to Cochin does not appear to have been relied upon and, as we understand the judgment, the argument was advanced only on the question as to whether there was a direct sale by the African merchant to the assessee or whether there was one sale from the African dealer to the Bombay dealers and then another sale from the Bombay dealers to the assessee. The facts in that case are distinguishable and further the State cannot rely upon this case after the clear pronouncements of the Supreme Court in *Cement Marketing Co. v. State of Mysore* [1963] 14 S.T.C. 175 and *State Trading Corporation v. State of Mysore* [1963] 14 S.T.C. 188. Learned Government Pleader next drew our attention to the decision of the Supreme Court in *Gokal & Co., Ltd. v. Assistant Collector of Sales Tax* [1960] 11 S.T.C. 186. A careful examination of the ratio decidendi of that decision shows that it does not advance the contention of the State. In that case *Gokal & Co. (P.) Ltd.*, a private company carrying on business at Bombay entered into two contracts in March-April, 1954, with the Government of India, for selling to the latter two consignments of sugar, 9,500 long tons of sugar of Peruvian origin and 25,000 metric tons of sugar of Continental origin. To fulfil the terms of the contracts the petitioner placed requisite orders with the dealers in foreign countries. The goods were shipped and even while the vessels were on the high seas the Government of India received the shipping documents pertaining to the consignments of sugar purchased by them and paid the price to the assessee. After the goods reached the Port they were unloaded and taken delivery of and cleared by the Government of India after paying the requisite customs duties. In this case too no argument was advanced based

upon this crucial aspect of the contract itself containing a covenant or condition obliging the movement of the goods from the foreign territory into

the territory of India. Subba Rao, J., delivering the judgment referred to the First and the Second Travancore cases [1952] 3 S.T.C. 434 and

[1953] S.T.C. 205 and followed the principles enunciated therein on the question of the contract occasioning the movement of the goods. No

argument was advanced based upon the further test formulated by Venkatarama Aiyar, J., in Bengal Immunity Co. case [1955] 6 S.T.C. 446. The

reasoning at pages 203-204 shows that the argument advanced on behalf of the State was that even though the shipping documents were

transferred to the Government on payment of the price, the property in the goods did not pass, in view of certain special conditions in the contract.

It is only from this perspective that the matter was approached by the Supreme Court, and Subba Rao, J., on an examination of the conditions of

the contract, came to the conclusion that the conditions did not prevent the passing of the property though the goods were on the high seas. We

are therefore of the opinion that this decision, far from helping the department is helpful to the assessee, having regard to the facts of that case and

the ultimate decision therein. Reference may be made to the following observations in that decision at page 205 which, in our opinion, applies to

the instant case supporting the contention of the assessee:

Under the contract every safeguard for securing the goods of agreed specifications was provided for in the earlier clauses and therefore there was

no reason for postponing the passing of the property in the goods to the buyer till the goods were actually delivered in the Port.

34. It must be noted that this decision dealt with the assessment before the Central Sales Tax Act of 1956 came into force and the Supreme Court

had no occasion to consider Sections 3 and 5 of that Act.

35. The learned Government Pleader next relied upon the decision of the Bombay High Court in *Milkhiram (India) Private Ltd. v. State of*

Bombay [1963] 14. S.T.C. 18. In that case the assessment year was before the Central Sales Tax Act of 1956 came into force. The assessee

there entered into a contract with the Government for sale of a large quantity of Cuban sugar on the terms and conditions contained in a letter

addressed to the assessee by the Government. After the goods had been shipped

by the foreign customers the assessee received the bill of lading and other shipping documents and a bill was submitted to the Government for payment of the C.I.F. value along with the shipping documents and the assessee also received payment from the Government in accordance with the bills submitted by him. At the time of the clearance when the goods arrived in Bombay, the goods were inspected and weighed before the authorised officer of the Government and were delivered to the Government by the assessee ex-docks after clearance. The contract also provided that if on arrival in India the imported sugar did not conform to the weight, quality and packing standards prescribed in the contract the Government would be free to take over the said sugar at a rate to be fixed by it and that the assessee should dispose of the said sugar in accordance with the instructions to be issued by the Government of India. The assessee contended that the sale made by them to the Government of India took place when the goods were on the high seas and as such it was not liable to sales tax. This contention was not accepted and the Bench of the Bombay High Court held that the contract was after the sale of the goods ex-docks after they had been cleared through the customs barrier and that the property in the goods passed from the assessee to the Government only after the goods crossed the customs frontier. We have examined with care the rival contentions urged before the High Court and the reasonings of the learned Judge. Here again we must observe that this case is not of much assistance to the State as this aspect of "the contract containing a stipulation or covenant for the movement of the goods" was not relied upon nor considered by the learned Judges, The main scope of the arguments of the contending parties are contained in pages 22 to 25 and it shows that the only point that was stressed was whether title to the goods passed when the goods were on the high seas. At page 28 the learned Judges summed up the position thus:

In our opinion, a scrutiny of all the terms of the contract in the case before us does indicate an intention that the parties to the contract intended that the property in the goods should pass only when the goods were delivered ex-docks in Bombay and not at any earlier stage.

36. In view of the later decision of the Supreme Court the State cannot rely upon this decision in support of their argument. In the case of inter-

State sales or in the case of sales in the course of import or export the question of passing of property is not the decisive factor even in cases which

arose before the Central Sales Tax Act of 1956. Vide observations in the judgment of Patanjali Sastri, C.J., in the First Travancore case [1952] 3

S.T.C. 434 .

37. Learned Counsel also drew our attention to two unreported judgments of this Court, one by Srinivasan and Venkatadri, JJ., in T.C. 100 of

1962 and the other by Jagadisan and Srinivasan, JJ., in T.C. 24 of 1960. The first case dealt with a case of import of certain axle box bodies from

Belgium. A perusal of the judgment shows that the argument of counsel in that case proceeded on different lines altogether. There it was argued

that the title to the goods which were shipped from Belgium passed to the Director-General of Supplies and Disposals even while the goods were

on the high seas. But on an examination of the terms of the contract and the facts of the case, that argument was not accepted. The learned Judges

also held that on the facts of that case there was no appropriation of the goods towards the contract. It does not appear that the attention of the

learned Judges was drawn to the two decisions of the Supreme Court in Cement Marketing Co. v. State of Mysore [1963] 14 S.T.C. 175 and

State Trading Corporation v. State of Mysore [1963] 14 S.T.C. 188.

38. We are of the opinion that this case does not advance the contention of the State because as observed by us earlier, in the case of an inter-

State or an import sale, passing of property is an irrelevant consideration. Yet the whole argument of counsel in that case was focussed only on that aspect.

39. In the second case, T.C. 24 of 1960, the assessee was a dealer in rice at Karaikal and he entered into a contract for the supply of rice to the

B. & C. Mills Ltd., Madras. The assessee's agent at Madras cleared the consignments of rice sent from Karaikal and delivered the same to B. &

C. Mills which made payment by cross cheques in favour of the assessee sent to Karaikal. As Karaikal was a foreign territory the argument on

behalf of the assessee was that it was a sale in the course of import. On examining the facts of the case the learned Judges negatived this contention

in the view that there was no obligation on the part of the assessee to import the goods from Karaikal, that the assessee could well have made his

supplies from local purchases in Madras itself, and that it was a simple case of a vendor importing goods on his own, for performing a contract of

local sale. In this view of the facts, that case can have no application to the instant case. Referring to the decision in Gokal's case [1960] 11

S.T.C. 186 the learned Judges observed as follows:

It would be seen that on the facts there is a considerable difference between the facts of that decision and the facts in the present petition. It is easy

to see that in that case the sale itself occasioned the import, because the goods contracted to be supplied were goods of foreign origin which were

imported for the very purpose of fulfilling that contract by taking the necessary import licences from the appropriate authorities and the property in

the goods themselves was transferred to the buyers by delivery of documents of title when the goods were on the high seas.

40. These observations far from helping the contention of the State, are helpful to the assessee.

41. The contract in the instant case is clear. In what manner the assessee obtained the dominion of the goods in London before the shipment is an

irrelevant consideration. The substance of the transaction is that the assessee has obtained possession of the goods in London, shipped them in

London, and on arrival in Madras cleared the shipments and delivered the goods. In my opinion, the assessee occupies exactly the same position

as a foreign merchant resident in London, shipping the goods from London and sending some representative of his to Madras to clear the goods

and effect delivery, which beyond doubt will be a sale in the course of import.

42. We may in this connection refer to the decision of the Supreme Court in Mohanlal Hargovind Das v. State of M.P. [1955] 6 S.T.C. 687, in

which a dealer in Madhya Pradesh carrying on the business of making beedies and selling them, imported finished tobacco from dealers in

Bombay, rolled the tobacco into beedies and sold them both inside the State and outside. The question arose whether the assessee was liable to

sales tax in respect of the finished tobacco which was imported from Bombay into the State of Madhya Pradesh under the Central Provinces and

Berar Sales Tax Act of 1947. The Supreme Court held that it was an inter-State sale and therefore exempt from the levy of sales tax. It was

observed as follows at page 691:

The petitioners imported this finished tobacco into Madhya Pradesh from these suppliers who were carrying on business in the State of Bombay

and there was of necessity, as a result of these transactions, the movement of the goods across the border. As a result of the transactions entered

into by the petitioners with these suppliers the finished tobacco which was supplied to the petitioners moved from the State of Bombay to the State

of Madhya Pradesh and these transactions were, therefore, in the course of inter-State trade or commerce.

43. These observations would apply a fortiori to the instant case of import from London. Indeed the learned Government Pleader could not

controvert the position that if in the instant case instead of London the contract had provided for manufacture of the steel in any of the steel

factories in India, like Rourkela or Durgapur, and delivery at Madras, it would clearly be an inter-State sale and the Madras State cannot levy

sales tax. It is obvious that the fact that goods were to be manufactured in and despatched from London cannot make any difference.

44. For the foregoing reasons the revision petition is allowed. No costs.

Ramakrishnan, J.

45. I had the advantage of perusing the judgment of my learned brother. My learned brother has found that not merely did the sale in this case take

place in the course of import into India, but he has also determined that the sale took place outside the State of Madras by reason of the fact that

the appropriation of the goods to the contract of sale took place in the United Kingdom. While I agree with his conclusion that the revision case

should be allowed, I think it best to confine the reasons therefore to the finding for which the materials in this case afford ample basis--that the sale

in question was in the course of import into India and was therefore not taxable in Madras State, by reason of the ban in Article 286(1)(b) of the

Constitution.

46. I will refer to the contract of sale in this case very briefly. It is a contract for the supply of 3,055.57 tons of M.S. Sheets subject to certain

specified conditions, to the Integral Coach Factory, Madras. The preamble to the contract states that the contract is in regard to the import of

3,055.57 tons of M.S. Sheets from the Continent against the invitation to the tender for the Integral Coach Factory, Madras, by the Ministry of

Heavy Industries, Iron & Steel Control, Government of India. The first condition under the heading "quality" provides that the materials must be manufactured by the process as stipulated in the specifications mentioned, against each size in the schedule attached. Cast number must be stamped on each piece or in metal tags attached to each bundle. Inspection test certificate must accompany each consignment. The second clause regarding price states that the price shall be C.I.F. Madras as per schedule. The price would include all extras for quality, size, packing, guarantee for durability etc. Clause 3 provides that shipment of the entire tonnage as promised must be completed by December 1957 commencing from June 1957. In the case of failure to ship the materials in full within the aforesaid date, and unless the Iron and Steel Controller is satisfied that the failure was due to reasons beyond the control of the importers, the Government of India will be entitled to recover from the seller a sum of 2 per cent. for every week or part thereof as liquidated damages. The Government of India also reserved the right to purchase elsewhere without notice to the seller, on his account and at his risk and cost, such materials as had not been shipped within the above date. The seller had to submit to the Iron and Steel Controller advance information of all expected shipments of steel indicating the name of the vessel, the port of arrival and the categories and quantities of steel. Under clause 4 under the heading "delivery" the materials as soon as they were received in the jetty (of the harbour) should be delivered ex-jetty to the Deputy Controller of Stores, Integral Coach Factory, Madras, and no demurrage incurred at the port upto the point of landing would be reimbursed by the consignee. In Clause 5 under the heading "inspection and its charges" it is stated that the materials shall be inspected by the D.G.I., S.D., London, and the inspecting officers shall have the right to be present during all stages of manufacture and shall be afforded all reasonable facilities for satisfying themselves that the materials are being manufactured in accordance with the specifications laid down in the schedule attached. Inspection charges for the inspector nominated by the Iron and Steel Controller shall be paid by the seller in the first instance and will be reimbursed later by the consignee. In clause 6 under the heading "payment" it is stated that on completion of delivery of each consignment, the seller will submit his 100 per cent. bill at full landed cost, based on the C.I.F. price to the Deputy Controller of

Stores. (The, seller was also required to intimate the name of the manufacturers to the Director-General of Inspection, Supplies and Disposals,

London, for the inspection, of the Stores. The schedule gives the specifications that the sheets should be of Siemens Martin manufacture.

47. The terms of the contract indicate that the seller, Messrs Bengal Corporation Private Ltd., Netaji Subhas Road, Calcutta, had undertaken that

the goods would be manufactured outside India, would conform to the specifications in the schedule, that the goods, after such manufacture, would

be shipped between June 1957 and December 1957 to the Madras Port and that before shipment the nominee of the buyer namely, D.G.T., S.D.,

London, should inspect the goods to satisfy himself that the materials were in conformity with the specifications. He had also the right to be present

during the stages of manufacture of the goods outside India, and the expenses for his inspection would be paid by the seller and later on

reimbursed by the buyer. It is therefore clear, that the contract had to be executed, by the Bengal firm, by securing a manufacturer in the U.K. to

manufacture the goods according to the specifications and then get them shipped to the Madras Port before a specified date. The buyer--the

department of the Government of India--had nothing to do with the contract between the Bengal firm and the manufacturer in U.K. At the same

time, the manufacture in U.K. and the shipping from U.K. after the manufacture, formed essential parts of the contract between the buyer and the

seller.

Under Section 5(2) of the Central Sales Tax Act:

A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or

purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs

frontiers of India.

48. The predicate ""occasions"", which is used in this section in connection with the import or export, has been the subject-matter of judicial

interpretation by decisions of the Supreme Court. In *State Trading Corporation v. State of Mysore* [1963] 14 S.T.C. 188, the Supreme Court laid

down that a sale occasions the movement of goods from one State to another within Section 3(a) of the Central Sales Tax Act, 1956, when the

movement "is the result of a covenant or incident of the contract of sale". The Supreme Court followed its earlier view in *Tata Iron and Steel Co.*

Ltd. v. S.R. Sarkar [1960] II S.T.C. 655, This meaning of the word "occasions" as used in Section 3(a) will apply also to the same Word in

Section 5(2) of the Act. In the present case, it is an essential part of the contract of sale that the goods should be manufactured according to the

specifications by a manufacturer outside India and that the goods had to be inspected by the nominee of the buyer at all stages of the manufacture

to satisfy himself that even the manufacture was in accordance with the specifications. It will not suffice if the seller, to satisfy the contract, buys

from the market in India goods of the specifications in the schedule. The goods had necessarily to be manufactured in U.K. Nor would it. satisfy

the condition in the contract if the seller arranged for the manufacture of such goods in India. If that were to satisfy the requirements of the contract,

there would not be any clause about inspection during the stage of manufacture by D.G.I., S.D., London, or for shipment after manufacture. It is,

therefore, clear that the buyer proposed, and the seller accepted that for the, execution of the contract the goods should be manufactured in the

United Kingdom, and shipped from the United Kingdom to the Madras Port. Such shipment was also an essential feature of the contract, because,

in the event of nonshipment between June, 1957, and December, 1957, the buyer was free to place orders for similar goods elsewhere and claim

from the seller damages for non-fulfilment of the contract. Therefore, this is a very clear case where the movement of the goods from the U.K. to

the Madras Port was the result of a covenant as well as of an incident of the contract of sale; therefore the sale was in the course of import into the

territory of India, and is not taxable by the Madras State.

49. I will refer to the question of appropriation very briefly. It is well-known that appropriation for the purpose should be unconditional within the

meaning of Section 23 of the Sale of Goods Act, 1930. The goods in the instant case are no doubt unascertained or future goods. For the purpose

of Section 4(2)(b) of the. Central Sales Tax Act, in the case of unascertained or future goods, a sale or purchase of the goods shall be deemed to

take place inside a State if the goods are within the State, at the time of their appropriation to the contract of sale by the seller or by the buyer,

whether assent of the other party is prior or, subsequent to such appropriation. In the present case; one way of looking at the matter is to treat the inspection and approval by the D.G.I., S.D., London, as amounting to appropriation. Another is to treat the shipment of the goods as indicating the stage of appropriation. On the other hand, the learned Government Pleader contends that under the terms of the contract neither of these two stages represented the stage of unconditional appropriation and that the appropriation must be deemed to have taken place only after arrival at the Port of Madras in India, at the time of delivery to the Deputy Controller of Stores, Integral Coach Factory, Madras. The learned Government Pleader also referred to the decision of the Supreme Court in Commissioner of Sales Tax, Eastern Division, Nagpur v. Husenali Adamji & Co. [1959] 10 S.T.C. 297, where a question of appropriation of goods in the case of inter-State sale came up for consideration. It is not necessary to contrast here the facts in that decision. But what is important to bear in mind is that the question as to where the appropriation of goods to the contract of sale took place in an unconditional manner u/s 23 of the Sale of Goods Act, has to be determined in the light of the terms of the contract in each case, and it will require careful investigation to find out what exactly the contract stipulated in the matter of appropriation.

50. In my opinion, in the circumstances of this case, it is not necessary to decide this question. Section 3 of the Central Sales Tax Act defining when a sale takes place in the course of inter-State trade or commerce was enacted by Parliament. in exercise of the powers granted under Article 269(3) of the Constitution. In the same way, Section 4(1) and Section 4(2) of the Central Sales Tax Act have been enacted in pursuance of the power granted to the Parliament under Article 286(2) of the Constitution for defining when a sale takes place inside a State, and therefore outside all other States. Likewise, Section 5 of the Central Sales Tax Act defining when a sale takes place in the course of import or export has been enacted in pursuance of the power granted to the Parliament under Article 286(2) of the Constitution. Section 4 of the Act which defines when a sale becomes one inside a particular State, is expressly made subject to the provisions of Section 3 which define what are sales in the course of inter-State trade or commerce. Therefore, when by applying Section 3 to a given case, if the sale is found to have taken place in the course of

inter-State trade or commerce, there will be really no occasion to apply Section 4 of the Central Sales Tax Act to determine whether that sale has

taken place inside a particular State, and whether the sales tax law of that particular State can levy tax on it. It must be assessed only under the

Central Sales Tax Act. Similarly, when by applying sections of the Central Sales Tax Act, a sale is found to have taken place in the course of

import into or export out of India, then also there will be no occasion to find out whether the sale took place inside a particular State or outside it,

within the meaning of Section 4 of the Central Sales Tax Act. In such cases Article 286(1) of the Constitution takes the sale automatically out of

the taxing power of all the States in India, as well as of the Central Sales Tax Act. The Andhra Pradesh High Court in a recent decision in

Guduthur Thimmappa & Son v. State of Andhra Pradesh [1964] 15 S.T.C. 299 observed:

The learned Counsel for the petitioner contends that Section 4 is not subservient to Section 5 as in the case of Section 3, but that Section 4 has an

independent operation and that if the situs of the sale is within the State of Andhra Pradesh there is no scope for invoking Section 5. We must

demur to this proposition.

51. It appears that Section 4 has to be treated as subject to Section 5 and where Section 5 applies, there is no more need to decide whether

Section 4 will apply.

52. For the reasons given in the foregoing paragraphs, I allow the revision case and set aside the assessment on the disputed turnover. No order as

to costs.