

(1958) 05 GAU CK 0003
In the Gauhati High Court
Case No : Sales Tax Reference No. 3 of 1957

Birendra Nath Guha

APPELLANT

Vs

Commissioner of Taxes

RESPONDENT

Date of Decision : 05-05-1958

Acts Referred:

Constitution of India, 1950 — Article 286, 3
Sales of Goods Act, 1930 — Section 18, 19, 20, 21, 22

Citation : AIR 1958 Guw 119 : (1959) 10 STC 327

Hon'ble Judges : H. Deka, J;G. Mehrotra, J

Bench : Division Bench

Advocate : K.P. Khaitan, P.D. Himatsingha, S.L. Sarma and M.L. Barjatya, for the Appellant; S.M. Lahiri, Advocate-General and D.N. Medhi, Government Advocate (Senior), for the Respondent

Judgement

G. Mehrotra, J.—This is a reference u/s 32, Sub-section (3), of the Assam Sales Tax Act, 1947 (Assam Act XVII of 1947) by the Member, Sales Tax Board, Assam, Shillong, by which the following questions of law have been referred to us for decision:-

(1) Was reliance on Section 23(2) of the Indian Sale of Goods Act, 1930, in order in applying Section 2 (12) of the Assam Sales Tax Act, 1947 ?

(2) Whether the delivery of wooden sleepers at the different railway stations within the State of Assam for despatch to stations outside the State of Assam was complete at different railway stations in the State of Assam and constituted a "sale" for the purpose of the Assam Sales Tax Act, 1947 (Assam Act XVII of 1947) and for that matter was the turnover therefrom taxable

(3) Whether, in view of the facts and circumstances of the case, the assessments and levy of sales tax under the Assam Sales Tax Act, 1947 (Act XVII of 1947) were illegal under Article 286(1)(a) and/or Article 286(2) of the Constitution of India ?

2. The Member, Sales Tax Board, Assam, who will hereinafter be called Member, submitted a statement of the case along with his opinion. In his opinion, the questions Nos. (1) and (2) should be answered in the affirmative and the question No. (3) in the negative.

3. The facts relevant for the determination of the questions are that Sri Birendra Nath Guha, partner of the business known as Messrs B. N. Guha & Co., hereinafter called the applicant was registered as a dealer under the Assam Sales Tax Act, 1047, the registration number being DHU-985. The applicant carried on business in the name and style of B. N. Guha & Co., and was the sole proprietor thereof. His principal business consists in the purchase of sal sleepers and sale thereof to the railway department of the Government of India, as well as to private railway and public bodies. On 4th of February, 1954, the applicant entered into an agreement with the President, Eastern Group Sleepers Control, acting for and on behalf of the President of India to supply and deliver to the State, wooden sleepers to the number, description and quantity at the price or prices and at the times and places and in the manner detailed in Schedule IV appended to the agreement. , It is not disputed that the price at which the sleepers were to be supplied at each of the places given in the Schedule also included the Provincial sales tax. The applicant submitted his return of turnover for the return periods ending on 31st March, 1954, and 30th September, 1954, to the Superintendent of Taxes, Dhubri, within whose jurisdiction the place of his business is situate. In these returns, for the periods ending on 31st March, 1954, sales to the tune of Rs. 65,947-5-0 and for the period ending on 30th September, 1954, sales to the tune of Rs. 32,982-11-0 were shown to have taken place in the State of Assam. The sales of sleepers to the extent of Rs. 4,88,360-10-0 and Rs. 1,54,932-13-9 for the two periods respectively were not shown in the return as they were alleged to have taken place, outside the State of Assam. The assessing authority on the 18th May, 1955, assessed the applicant on the turnover which was found on examination of cash books, ledgers, copies of bills, booking instructions, being total turnover for sleepers supplied to the different railways under the terms and conditions of the aforesaid agreement. Being dissatisfied with the assessment, the applicant filed two appeals u/s 30 of the Act before the Assistant Commissioner of Taxes who rejected them by his order, dated 4th October, 1955. Thereafter, two petitions for revision, u/s 31 (2) of the Act were filed before the Commissioner of Taxes in Assam and on 3rd June, 1957, they were dismissed. The Commissioner apart from other questions held that as soon as the sleepers were passed and branded in Assam and delivered to a carrier the appropriation of the goods to the Contract was complete within the meaning of-Section 23(2) of the Indian Sale of Goods Act, 1930 and that as the sale according to him was completed by such delivery within the State of Assam to the buyer, it was excluded from the provisions of the explanation to Article 286(1)(a) of the Constitution. Being dissatisfied with that order, the applicant made two applications for reference to this Court of certain questions of law, which have been mentioned above for decision, before

the Board of Taxes of Assam. We shall first take up the first question which has been referred for decision and in order to appreciate that, it is necessary to refer to some of the clauses of the agreement. These clauses will also be relevant in considering the other two questions referred to us.

4. The agreement purports to be one for the supply of wooden sleepers as will be evidenced from the preamble to the agreement which is as follows :-

Whereas the contractor has agreed to supply and deliver to the State wooden sleepers to the number and of the description and quality and at the price or prices and at the times and places and in the manner detailed in the Schedule.

5. In the body of the agreement also it is laid down that the petitioner agreed that he will duly supply and deliver the said sleepers to the number and of the description given in the Schedule. The conditions of the contract are numerous and set out in part 2 of the agreement. The time is the essence of the contract and provision has been made for granting an extension in condition 2. Condition 3 (a) reads as follows :-

The prices named in the Schedule shall cover everything required to be done by the contractor in terms of the specification and conditions of contract including all loading and handling charges connected with the inspection and delivering of the sleepers on rail and taxes and impositions in respect of the sleepers till they are delivered and finally accepted under the terms of this contract.

3(b) then provides that in the event of wagons not being available within a month after passing the contractor shall stack and earth the passed sleepers.

6. Then Clause 4 provides for an appointment of a person or persons authorised to inspect, pass or brand sleepers by the President of the Eastern Group Sleeper Control or the Sleeper Control Officer.

7. Clause 5 (a) reads as follows:-

The sleepers shall be offered for examination and passing within the boundaries of the railway stations mentioned in the Schedule unless permission is given in writing by the Sleeper Control Officer, Eastern Group, to the contractor to offer them for inspection at other stations or sites. No change in the delivery station mentioned in the Schedule shall be made without the written consent of the Sleeper Control Officer and on the written application of the contractor before the sleepers are offered for inspection. Such application shall contain reasons for the requested change. In such cases the contractors shall bear the cost of any extra freight charges involved. No application from Nepal suppliers who wish to change their delivery stations will be considered unless it is countersigned by the Forest Adviser to the Government of Nepal, Khattmandu.

Clause 5 (b) provides that:-

All sleepers offered for inspection shall be cleared of mud dirt and shall be spread with the heart side up in long lines on longitudinal supports, on two supports for

broad gauge and special size sleepers and one for metre gauge and narrow gauge sleepers. There shall be a gap of at least three feet between two parallel lines. Sleepers spread on the ground will not be inspected. Obviously bad sleepers shall be removed before inspection while the re-spreading of previous rejections is forbidden. The plastering of the ends of sleepers before inspection is also prohibited.

10.Clause 5 (c): "All special size sleepers shall have their dimensions clearly painted in the centre of the sap side. The order of these figures shall be length, breadth and depth. Special size sleepers shall be spread in groups according to their size and not mixed haphazardly ".

Clause 5 (d) : Sleepers shall be inspected one by one.

Clause 5 (e): The Sleeper Passing Officer- may decline to inspect any sleepers not spread or marked in accordance with the instructions contained in Clauses 5 (a), (b), (c) and (d) above.

Clause 5 (f): Immediately after the branding of passed sleepers the contractor, or his agent shall have a dot of white paint put on each sleeper near the Sleeper Passing Officer's brand.

Clause 5 (g): The contractor shall make all arrangements with the railway concerned for the lease of an adequate plot or plots of land at stations where he desires to offer sleepers for inspection and bear the charges thereof .

Clause 8 then provides that the contractor shall supply at his own expense all labour and implements required for examination and passing of the sleepers.

Clause 9 provides for the powers of the Sleeper Passing Officer.

Clause 10 provides that the Sleeper Control Officer shall give the contractor a passing certificate of the number passed and rejected at such station in accordance with the provisions of the agreement.

8. Paragraph 11 (a) provides as follows:-

After passing the contractor shall apply to, and obtain from, the Sleeper Control Officer, Eastern Group, his orders as to the despatch of the passed sleepers which will then be disposed of by the contractor either by handing over to the consignee or by loading into railway wagons and booking under Risk Note " B" by rail to the consignee to whom the sleepers are allotted.

11(b) then provides for what will happen to the sleepers which will remain undisposed of according to paragraph 11 (a) and which are held in custody for a period exceeding three months.

11(c) then provides that the railway receipt and the original and two copies of the challan shall be sent to the Sleeper Control Officer and one copy of the challan direct to the consignee immediately after despatch of the sleepers. Any demurrage accruing from delays in the despatch of these documents shall be

recoverable from any money due to the contractor.

11(e) provides that the supply of wagons shall in no way be considered to be the responsibility of the Sleeper Control Officer or his staff. 11 (f) provides that on arrival at destination the consignee shall check the number of sleepers and report on any shortages or the receipt of defective sleepers. Any sleepers complained of within two months after arrival at destination shall be liable to re-inspection by the Sleeper Control Officer or an officer appointed by him. In all cases the Sleeper Control Officer shall be the final authority as to whether such sleepers are in good order and conform to the specification or not. The Sleeper Control Officer may, at his discretion and without re-inspection, decide to accept passed sleepers complained against by a consignee that may not, in his opinion, correspond exactly with the specification and in such cases may determine the reduced prices thereof and the contractor shall accept such prices, or replace them if he refuses to do so; but notwithstanding this provision the Sleeper Control Officer shall not be debarred from purchasing any sleepers at the risk and cost of the contractor as mentioned in Clause 11 above.

11(g) then provides that in the case of passed sleepers booked by rail the contractor shall immediately after loading apply for and obtain from the despatching station master a "tally receipt" for the number loaded. Such sleepers as are acknowledged by the consignee as possessing the passing mark of the Sleeper Passing Officer and the private mark of the contractor will be deemed fully delivered subject, however, to the right of the consignee to have such sleepers re-inspected by the Sleeper Control Officer, or his representative, and all sleepers rejected by the Sleeper Control Officer shall be deemed to be non-delivered and all sleepers are to be at the risk of the contractor until fully delivered and finally accepted at destination.

11(h) provides that any sleeper received by the consignee without the brand mark of the Sleeper Passing Officer and the private mark of the contractor shall be liable to be rejected and the Sleeper Control Officer may auction these and any sleepers rejected by him on re-inspection at the best price obtainable by him and until sale such sleepers shall lie at the contractor's risk. The contractor shall be entitled to receive credit for the net proceeds of the sale only after deducting the expenses mentioned in Clause 11 (j) below.

11(i) provides that if there is any shortage in the number of sleepers received by the consignee in any particular consignment, i.e., covered by a single railway receipt, the contractor shall be paid for all sleepers shown on the tally receipt provided all sleepers received by the consignee are passed sleepers and have not been rejected by the Sleeper Control Officer but if any part of such consignment consists of unpassed sleepers they shall be rejected and included in the shortage and the contractor shall be held responsible for the total shortage in that consignment and shall not receive any payment for such shortage.

11(j) then provides that the cost of any sleepers rejected at destination as per

Clauses 11 (b), 11 (f) and 11 (h) above, if already advanced plus the railway freight charges on them at public rates of carriage and expenses of sale, handling and unloading shall be deducted from any money due to the contractor under this or any other contract or on any other account whatsoever. " The orders and directions of the Sleeper Control Officer in respect of any matter arising out of Clauses 11 (a), 11 (b), 11 (c), 11 (d), 11 (e), 11 (f), 11 (g), 11 (h), 11 (i) and 11 (j) shall be final and conclusive between the parties hereto.

9. Paragraph 14 provides as follows:

It must be expressly understood that all on account or advance payments are in no way to be considered as relieving the contractor in any way from the liability he may incur under the terms of the contract. This has express reference to Clause 11 (g) above.

10. Section 18 of the Indian Sale of Goods Act provides that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

11. Section 19 then deals with the cases when the property will be deemed to pass in cases of sale of specific or ascertained goods. Clause (1) of Section 19 broadly lays down that in cases of ascertained goods the property will pass when they are intended to pass. Clause 2 says that the intention is to be gathered from the terms of the contract. Clause 3 then provides that in the absence of any intention being clear from the terms of the contract the principle underlying Sections 20 to 24 will be considered for ascertaining the intention of the parties. Section 23 which is material provides as follows :

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

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

12. This section comprises of two parts: The first part provides that the property in the goods passes to the buyer as soon as the goods are appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The second part provides that in the absence of any appropriation by assent if ,in pursuance of the contract the seller delivers the goods to the buyer or to the carrier for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract, and the title to the goods passes on such

an appropriation.

13. Section 24 then deals with the cases where the goods are sent on approval. Question No. (1) only says whether the provision of Section 23(2) of the Indian Sale of Goods Act can be considered in applying Section 2(12) of the Assam Sales Tax Act. Section 2(12) of the Assam Act defines the sale. The argument is that the sale as defined in the Assam Act is complete when the title to the property passes. Section 23(2) of the Indian Sale of Goods Act can be looked into in order to ascertain when the title to the goods will pass and thus Section 23(2) can be considered in applying Section 2 (12) of the Assam Act. The contention raised by the learned counsel for the assessee was that this argument overlooks Section 18 under which in the case of sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. The other sections therefore will be attracted only to contracts relating to sale of ascertained goods. The contention raised however on behalf of the State is that Section 18 only provides that the title will pass in the case of the contract for the sale of unascertained goods when the goods have been ascertained and the goods will be deemed to have been ascertained when the goods are appropriated under the contract. Section 23 provides the principle for determining when the appropriation of the goods to the contract takes place and therefore reading Sections 18 and 23 together it can be found when the goods will be deemed to have been ascertained. There is nothing in the Act to warrant the contention that Sections 20 to 23 will not apply to contract of unascertained goods. In this view of the matter it may be relevant to consider Section 23, Sub-section (2), in order to apply Section 2(12) of the Assam Sales Tax Act. It was then contended that on the facts of the present case both the clauses of Section 23 are attracted. In the first place, under the terms of the agreement as the goods are to be passed in Assam and thereafter despatched to outside stations the appropriation takes place as soon as the goods are passed in Assam. This process takes place with the mutual concurrence of the seller and the buyer as will be evidenced by the agreement; and thus Clause (1) of Section 23 applies. It was next contended that even if no such consent can be ascertained from the agreement as soon as the goods are handed over to the carrier in the absence of anything in the contract by which it can be inferred that the vendor retained the right of disposal of the goods, the goods were appropriated u/s 23, Sub-section (2) of the Act. Reliance in this connection was placed on the 2 cases of the Patna High Court- Birendra Nath Guha and Co. Vs. State of Bihar, This case undoubtedly is an authority for the proposition that under the terms of the present agreement the goods stood appropriated when they were passed within the State of Assam and also there was no condition in the agreement to the effect that the vendor had retained the right of disposal even though the goods were handed over to the carrier for transmission but, in Our opinion, having regard to the provisions of Section 3 (1A) of the Assam Sales Tax Act which in effect takes out these sales from the definition of "sale" in Section 2(12) which are of inter-State character, Section 23(2) will not be material for the purpose of

ascertaining the question of the applicability of Section 2(12) of the Assam Act to the present transaction. If the definition of the word "sale" under Section 2 (12) is taken to cover within its scope sales of inter-State character on the ground that the title to the goods passes, by taking into consideration Section 23 of the Indian Sale of Goods Act within the State of Assam, to the extent the provisions will be ultra vires and in order to bring the provisions of Assam Act in conformity with the provisions of the Constitution, Section 3(1 A) was enacted. Section 3(1A) has thus the effect of taking out of the definition of sale u/s 2(12) the sales which are of inter-State character. Dealing with such class of sales, Section 23(2) of the Sale of Goods Act will not be relevant, in applying Section 2 (12) of the Assam Sales Tax Act. We would accordingly answer this question in the negative. Moreover, delivery to a carrier would no doubt be an appropriation in cases where the buyer authorises the despatch of goods through that agency but the appropriation involved in such act need not be unconditional. Having regard to the terms of the agreement in the present case it was not unconditional. But in cases where the delivery of goods to the carrier is the only fact relied upon for constituting appropriation and so the transfer of property, it has to be unconditional.

14. Now coming to question No. (2), under the Assam Sales Tax Act sale has been defined as follows:-

"Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods by any person for cash or deferred payment or other valuable consideration, and includes a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge. It also includes a transfer of goods on hire-purchase or other instalment system of payment, notwithstanding the fact that the vendor may retain the title in the goods as a security for payment of the price.

15. Section 3 of the Act as amended by Assam Act XII of 1954 is as follows:-

Subject to the provisions of this Act and with effect from the commencement of the Assam Sales Tax (Amendment) Act, 1954, every dealer whose gross turnover from sales which have taken place either wholly in Assam or both in and outside Assam during the twelve months immediately preceding the date of such commencement exceeded Rs. 12,000 (hereinafter referred to as "the taxable quantum") shall be liable to pay tax under this Act on sales which have taken place or deemed to have taken place in Assam on and from the date of such commencement.

16. Question No. (2) which has already been indicated above is formulated on the assumption that the sleepers were delivered at railway station in Assam for being despatched to stations outside the State of Assam and whether in such a state of affairs the sale can be said to have taken place within Assam. Even if such a sale is said to be covered by the definition of the word "sale" under the

Assam Act the question will still remain as to how far they will be hit by the provision of Articles 286(1) and 286(2) of the Constitution. Apart from Article 286 of the Constitution, Section 3(1A) of the Assam Act also provides that nothing in Sub-section (1) shall, except in cases covered by the first proviso to Sub-section (12) of Section 2 of this Act, be deemed to render any dealer liable to tax on the sale of goods where such sale takes place (i) outside the State of Assam; (ii) in the course of the import of the goods into, or export of the goods out of, the territory of India; or (iii) in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide. This provision clearly takes out the sales which are in the nature of inter-State sales from the purview of the definition of sale and it will therefore have to be seen whether sales where the goods are handed over to the carrier in Assam for being sent to the consignee outside the State of Assam can be regarded as inter-State sales so as to be outside the definition of the sale in the Assam Act. In the case of *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, it was observed by Venkatarama Iyer, J., as follows : -

The fact is that while for some purposes delivery to the common carrier is treated as delivery to the purchaser, there is delivery in fact and in its popular sense only when the purchaser obtains possession of the goods and it is this that is connoted by the words "actual delivery" under Article 286(1). When Section 51(1) refers to delivery to buyer or his agent, it refers to actual delivery, and delivery to common carrier is regarded as constructive, having regard to Section 39(1). The section, it will be noticed, proceeds on the footing that a common carrier is not the agent of the buyer with reference to actual delivery. He is the agent of the purchaser for transmission of the goods to him.

17. In the common law of England this position was well-established and was thus stated by Parke, B., in *Games v. Griffin* (1837) 2 M&W. 623:

The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a "constructive delivery to the vendee"; but the vendor has the right if unpaid, and if the vendee be insolvent, to retake the goods before they "are actually delivered to the vendee", or someone whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession.... The actual delivery to the vendee or his agent, which puts an end to the transit or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of the goods; or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination.

18. It was again observed at page 754 of the Supreme Court Report as follows:-

It must accordingly be held that the expression "actual delivery" in the Explanation to Article 286(1)(a) means delivery of the goods to the purchaser or his agent, and delivery to the common carrier is not actual delivery.

19. It will be clear from these observations referred to above that in order to make a sale complete within the State the actual delivery is to take place within the State and any goods where the actual delivery takes place outside the State the sale is one of inter-State character and is taken out of the purview of the definition of the sale in the Assam Act. From clause 11 (a) of the agreement also, it is clear that after the despatch order has been obtained with regard to the passed sleepers the goods are to be disposed of either by handing over to the consignee or by loading into the railway wagons and booking under Risk Note "B" by rail to the consignee to whom the sleepers are allotted. This clause clearly draws a distinction between the loading after handing over the goods to the carrier and actual handing over to the consignee. If the delivery to the carrier in the eye of law would have amounted to actual delivery to the agent of the consignee, the first alternative would have been complied with as soon as the goods were handed over to the carrier and there was no further obligation on the vendor to arrange for its loading in the railway wagons but still in the present case what we find is that the goods were actually loaded on the railway wagons by the vendors and it was their responsibility to arrange for the wagons. It is therefore clear that the delivery which was contemplated under the agreement was the actual delivery and delivery to the carrier was not regarded as actual delivery to the vendee. Reliance has been placed on a Patna decision in the case of Birendra Nath Guha and Co. Vs. State of Bihar, It is enough to point out at this stage that the case is distinguishable from the present case and in any case, so far as it lays down anything contrary to the observations of the Supreme Court referred to above it cannot be regarded as good law. We shall however deal with this case in detail when considering question No. (3). In the result therefore our answer to question No. (2) is in the negative.

20. Coming to question No. (3) it may be divided into two parts. The first part deals with the question whether the levy of the sales tax under the Assam Sales Tax Act in the circumstances of the present case was hit by Article 286(1)(a) or 3(1A)(i) and the second part deals with the question whether the levy of the tax is hit by Article 286(2) of the Constitution and Section 3(1A) (iii) of the Assam Act. So far as the first part of the question is concerned, we are of opinion that it must be answered in the affirmative. The Member of the Board seems to be of the opinion that the delivery was complete as soon as the goods were handed over to the carrier for transmission to the delivery stations outside the State of Assam. The sale was thus concluded within the State of Assam and the provisions of Article 286(1) are thus excluded. The argument is that if legally the delivery is complete within the State of Assam the sale is of intra-State character and not inter-State character. It is not necessary to go into this question very elaborately. The point seems to have been more or less concluded by a series of decisions of the Supreme Court. In dealing with questions (1) and (2) we have

quoted in extenso the various provisions of the agreement and it cannot be said that by the passing of the goods actual delivery was made to the agent of the vendee nor can it be said that by handing over the goods to the carrier there was delivery and sale of goods within the State of Assam was thus concluded. The sale from its very nature consists of various elements, the contract, the existence of the goods, the passing of the title to the goods and the actual delivery of the goods. Prior to coming into force of the Constitution there was a lot of confusion as regards the power to levy sales tax. The following observation made by the Chief Justice in the case of *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, will make the position clear:-

In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say they picked out one or more of the ingredients constituting a sale and made them the basis of their sales tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution-makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax-burden on the consumer.

21. As observed by Das, Ag. C.J., in the case reported in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, the Constitution-makers in order to avoid chaos and confusion that was brought about in inter-State trade or commerce by indiscriminate exercise of taxing power by the different Provincial Legislatures founded on the theory of territorial nexus between the respective Provinces and the sales or purchases sought to be taxed, enacted Article 286 in the Constitution. It was to cure the mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any provincial barrier that Article 286 of the Constitution was adopted.

22. In the case reported in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, it was clearly laid down that Article 286 represents a compromise between somewhat conflicting objectives, namely, on the one hand, the necessity of strengthening State finances so as to enable the

States to meet the growing demands on their resources in fulfilling their multi-sided responsibilities in the achievement of a welfare State ; and, on the other, the promotion of national unity and the building of the whole country as one economic unit within internal barriers. In that case, however, it was held that the State in which goods were delivered for consumption could tax such sale's and such sales were outside the purview of Article 286(2). This part of the majority judgment was overruled in the later case of *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, but the decision so far as it lays down that Article 286(1) prohibits the taxation of inter-State sales by all States except the State in which goods are actually delivered for consumption therein was not overruled but was in effect accepted. Prior to the coming into force of the Constitution under the Government of India Act the question whether the State had power to tax a sale or purchase having inter-State elements depended entirely on the question whether there was sufficient territorial connection between the taxing State and the sale or purchase sought to be taxed. There was no definite and conclusive test that could be applied to all cases as to what would constitute sufficient territorial connection to confer a taxing power on a State. This led to a position of great uncertainty as to which out of several States with which a sale or purchase could be said to have territorial connection had the power to tax it. This uncertainty has been removed by Article 286. The situs of such a sale has been fixed at the place where it is delivered for consumption and has been taken out of the territorial jurisdiction of the other States where any of the other elements of the sale may exist. Whether the sales covered by Article 286(1)(a), explanation, are subject to Article 286(2) is not the question before us. In this view of the matter the present sale being of an inter-State nature even if the title to the goods passed in the State of Assam these sales were not taxable as the goods were admittedly despatched for delivery outside the State of Assam. The provisions of Article 286(1) have been incorporated in the Assam Act also in Section 3(1A) (i) and the first part of question No.(3), therefore, is answered in the affirmative.

23. In this connection, it was also argued by the Advocate-General that in the present case the explanation to Article 286(1)(a) will not apply and consequently if the sale is covered by the definition of the sale in the Assam Act it is liable to be taxed. According to his argument there are two conditions essential for the applicability of the explanation to Article 286(1)(a). Firstly, that the actual delivery of the goods should take place as a direct result of sale or purchase in another State, and secondly, that such a delivery should be for the purpose of consumption in that State. In the present case neither of the two conditions have been fulfilled and therefore these sales are not covered by the explanation to Article 286(1)(a). In our opinion, there is an obvious fallacy in this argument. The explanation fixes the situs of the sales which are of inter-State character for the purpose of taxation and the sale by virtue of the explanation will be deemed to have taken place in the State in which the goods are delivered for the purpose of consumption therein. For every other State, it will be an outside sale and not

liable to be taxed. In this view of the matter even assuming that the contention of the Advocate-General that the delivery did not take place for consumption in the States to which goods were despatched and the sales cannot be regarded as having taken place in those States by virtue of the explanation to Article 286(1) (a) it will not give power to this State to tax these sales as they are still outside sales in relation to this State. Apart from it, in our opinion, both the two requisites of the explanation have been satisfied. As regards the question of "delivery" the words used in the explanation are actual delivery and the delivery contemplated in the explanation is not a constructive delivery to the carrier but actual delivery which undoubtedly in the present case took place at the station to which the goods were consigned. As to the second requirement of consumption in that State, it was argued that there was nothing in the agreement to indicate that the goods were actually consumed therein or that they were not brought again into the State of Assam for consumption. There are twofold answers to this : Firstly, reference to the question has been framed on the assumption that the goods were despatched and consumed outside the State of Assam, and secondly, according to the terms of the agreement the goods after they have been passed are to be despatched to the outside stations according to the allotment made by the proper authorities. Allotments are made having regard to the requirement and necessity of each station. The goods thus must have been delivered to the allottee State for the purpose of consumption therein. Reference may also be made to an unreported decision of the Supreme Court in *Sales Tax Officer, Cuttak v. B. C. Patel and Co.* Since reported in *Sales Tax Officer, Cuttack and Another Vs. B.C. Patel and Co.*, (Civil Appeal No. 230 of 1956).

24. Coming to the latter part of question No. (3) relating to the applicability of Article 286(2) to the present sales it cannot be disputed that the words "in the course of inter-State trade or commerce" connote an idea of movement of the goods. When a sale can be said to have taken place in the course of import or export within the meaning of Article 286(1)(b) has been decided in two cases of the Supreme Court: *State of Travancore-Cochin v. Bombay Co., Ltd.* AIR 1952 S.C. 366 and *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, Applying the principles laid down in those cases the present sales are undoubtedly sales held in the course of inter-State trade or commerce. Reliance was placed by the Advocate-General on the case of *Indian Coffee Board v. State of Madras* [1956] 7 S.T.C. 135(Mad) . That was a case where on the terms of contract the sale was held to be completed by delivery within the State of Madras to the purchaser or his agent. In the present case we have already discussed the terms of the agreement and in our opinion the handing over of the goods to the carrier did not constitute delivery to the buyer or his agent. In this case, the question that the sale was an outside sale under Article 286(1)(a) was not considered. It has now been settled by the decision of the Supreme Court in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, that all sales in the course of inter-State trade or commerce whether they are covered by explanation to Clause (1) (a) or not will be

governed by Clause (2) and hence they will be immune from State taxation until and unless Parliament by law otherwise provides. The provisions of Article 286(2) have been incorporated in Section 3 (1A) (iii) of the Assam Act. These sales even though covered by explanation to Article 286(1)(a) would be affected by the provisions of Article 286(2) and Section 3 (1A) (iii) of the Assam Act unless the ban can be said to have been removed by the Parliament. After the decision of the Supreme Court an Ordinance was promulgated by the President known as Sales Tax Laws Validation Ordinance, 1956. This was subsequently re-enacted as Sales Tax Laws Validation Act, 1956 (Act 7 of 1956). The material Clause (2) of the Act runs as follows :-

Notwithstanding any judgment, decree or order of any Court, no law of a State imposing or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951, and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law.

25. This validates the levy or collection of taxes levied or collected between a certain period irrespective of the fact that the sale has taken place in the course of inter-State trade or commerce. The purpose of this Ordinance and the subsequent Act was to validate the levy and collection of tax by the delivery State and not to validate the levy or collection of tax by the States which are not delivery States. Sales where the situs has been fixed by explanation to Article 286(1)(a) but were still made immune from taxation being in the course of inter-State trade and commerce have been relieved of the immunity. But the Validating Act does not apply to outside sales which may be hit both by Articles 286(1)(a) and 286(2). Under the Sales Tax Act of some of the States including the State of Assam sales which have taken place outside the State will be deemed to have taken place inside the State if such goods have as a direct result of such sale been actually delivered in that State for the purpose of consumption therein. In such cases the sales are both under the explanation to Article 286(1) (a) and the Sales Tax Act of those States intra-State sales and not outside sales and any prohibition to the taxation of such sales by, Article 286(2) has been removed by the Validating Act. The case of *Daldas Parmanand Vs. P.S. Talwalkar and Others*, was also of this nature. In the result therefore the sales which are outside sales and are not covered by explanation to Article 286(1)(a) are also hit by Article 286(2) and the Validating Act does not affect such sales. Our answer to this part of question No. (3) is therefore in the affirmative. The parties will bear their own costs.

Deka, J.

26. I agree.