
(1975) 02 BOM CK 0030
In the Bombay High Court
Case No : S.T.R. No. 44 of 1968

Commissioner of Sales Tax

APPELLANT

Vs

Mckenzie's Ltd.

RESPONDENT

Date of Decision : 17-02-1975

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 34(1)
Constitution of India, 1950 — Article 226, 286(1)

Citation : (1976) 38 STC 391

Hon'ble Judges : M.H. Kania, J; D.P. Madon, J

Bench : Division Bench

Advocate : M.H. Shah and V.C. Kotwal, for the Appellant; S.V. Vaidya, for the Respondent

Judgement

Kania, J.—This is a reference u/s 34(1) of the Bombay Sales Tax Act, 1953 (hereinafter referred to as "the said Act").

2. The facts which have given rise to this reference are as follows : The respondents are dealers registered under the said Act. On 30th January, 1954, the respondents entered into a contract with the Government of India for the supply of certain goods or stores consisting mainly of venetian shutters and shutter parts to the Western Railway. The terms and conditions of this contract are contained in a schedule to the acceptance of tender, a copy of which forms part of the record. From these terms and conditions, it appears that against the heading "place of delivery", it is stated "free delivery in Bombay". Under the heading "terms of delivery", there is another heading "despatch instructions" and against it, the following appears :

"To be delivered to the Inspection Officer (Stores), Western Rly., Mahalaxmi, Bombay, for onward despatch to the District Controller of Stores (CAN), Western Rly., Ajmer."

3. The officer designated as Inspecting Officer was the Works Manager

(Carriage). Workshop, Lower Parel, Bombay. The relevant conditions contained under the heading "special instructions" are to the effect that 100 per cent of the payment would be made on receipt of goods by the consignee in good condition. It was further provided that the contractors (respondents) were to be entirely responsible for the execution of the contract in all respects in accordance with the terms and conditions and any approval which the Inspector might have given in respect of the stores, materials or other particulars and the work or the workmanship involved in the contract (whether with or without test carried out by the contractors or the Inspector) would not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector, it would be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at destination if it was found that the stores supplied by the contractor were not in conformity with the terms and conditions of the contract in all respects. It was further provided that the provision and arrangement of transport and wagons was not the liability of the purchaser and any deterioration of stores after inspection and acceptance by the Inspector and before their receipt by the consignee would be to the account of the contractor. There are certain other terms and conditions of the contract but the same are not material for the purposes of this reference. Under this contract it appears that during the assessment period from 1st April, 1954, to 31st March, 1955, the respondents supplied goods of the value of Rs. 64,849-7-0 to the Western Railway. It was common ground that the goods went out of the then State of Bombay and there is no dispute that they were delivered to the consignee at Ajmer. The Sales Tax Officer assessing the respondents for the said assessment period rejected the claim of the respondents that this amount was not liable to be included in the taxable turnover of the respondents. The respondents went in appeal to the Assistant Commissioner of Sales Tax against the order passed by the Sales Tax Officer. This appeal was allowed in part. But the contention of the respondents that the said sum of Rs. 64,849-7-0 was not liable to be included in the taxable turnover of the respondents was rejected, and it is only that portion of the order, which is relevant for the purpose of the reference before us. Against this decision of the Assistant Commissioner of Sales Tax, the respondents went in revision, but their revision application was dismissed by the Deputy Commissioner of Sales Tax. The respondents then filed a revisional application before Sales Tax Tribunal against the decision of the Deputy Commissioner of Sales Tax. The majority of the Tribunal took the view that the sale of the aforesaid goods was not a sale within the then State of Bombay under the explanation to clause (1) of article 286 of the Constitution of India before its amendment in 1956 and, hence, was not exigible to tax. It is out of this decision of the Tribunal that the present reference has been made to us at the instance of the Commissioner of Sales Tax.

4. The questions, which have been referred to us for our consideration, are as follows :

"(1) Whether, on the facts and in the circumstances of the case and on the proper interpretation of the terms and conditions of the contract between the

parties, the majority of the Tribunal was justified in law in holding that the sales amounting to Rs. 64,849-7-0 had taken place outside the State of Bombay ?

(2) Whether there was any evidence before the majority of the Tribunal to come to the conclusion that the goods held by the respondent moved from the State of Bombay to Ajmer under the contract of sale ?"

5. For consideration of the points raised in this reference, it is necessary to set out certain provisions of article 286 of the Constitution of India prior to its amendment in 1956. The relevant portion of that article read as follows :

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

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation. - For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

6. The submission of Mr. Shah, the learned counsel for the applicant, was that under the said contract goods were to be delivered to the Inspection Officer (Stores) at Bombay, that on such delivery the property in the goods passed to the purchasers and that the sale was complete at that stage. It was further submitted by him that what was done with the goods thereafter by the Inspection Officer was of no relevance and the goods must be considered to have been actually delivered for consumption to the said Inspection Officer at Bombay. We find it somewhat difficult to accept this submission. The despatch instructions, which form part of the conditions of the contract, clearly show that the goods were to be delivered to the said Inspection Officer at Bombay for onward despatch to the District Controller of Stores, Western Railway, Ajmer. In this connection, it was submitted by Mr. Shah that these instructions were merely in the nature of instructions to the said Inspection Officer. This submission, in our view, has to be completely rejected. We fail to see how the instructions to the Inspection Officer could be contained in the contract between the respondents, who are the vendors, and the Western Railways, who are the purchasers. It appears to us that these despatch instructions clearly show that the goods were delivered to the Inspection Officer at Bombay for preliminary inspection and for despatch of the same to the consignee at Ajmer. It further appears to us that despatch of the goods to Ajmer was pursuant to one of the terms of the contract and hence the movement of the goods from Bombay to Ajmer was under a term or covenant of the contract. Great reliance was placed by Mr. Shah on the

provisions in the agreement that the Inspection Officer was at Bombay and that he was entitled to inspect the goods before the same were despatched to Ajmer. This circumstance, in our view, is of no relevance, because one of the terms under the heading "special instructions", to which we have already referred, make it clear that any approval which the Inspector may have given in respect of the goods would not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector, it would be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at their destination at Ajmer if it was found that the goods supplied by the respondents were not in conformity with the terms and conditions of the contract in all respects. This makes it quite clear that the inspection by the Inspection Officer at Bombay was merely in the nature of a preliminary inspection so that the goods, which were not according to the specifications should not be sent at all to Ajmer and the final inspecting authority was the consignee at Ajmer. It is also significant that the respondents were made entirely responsible for the execution of the contract in all respects and it was provided that any deterioration of the goods even after inspection and acceptance by the Inspector at Bombay but before the receipt by the consignee at Ajmer would be to the account of the respondents. It was further provided that the provision and arrangement of transport and wagons would not be the responsibility of the purchaser but of the respondents, which would clearly suggest that the liability in respect of the goods until they reach the consignee remained entirely with the respondents. In this connection, we may usefully refer to the decision of the Supreme Court in *Bengal Timber Trading Co. Ltd. Vs. Commissioner of Sales Tax, Madhya Pradesh*, . In that case, during the assessment period, the appellant supplied for the railways wooden sleepers by rail to consignees outside the State of Madhya Pradesh pursuant to a contract. The prices stipulated in the contract covered everything required to be done by the appellant (contractor) in terms of the specifications and conditions of the contract including loading and handling charges until the goods were delivered and finally accepted. The sleepers had to be offered for examination and passing at the railway station mentioned in the schedule, viz., Dhamtari in Madhya Pradesh. Pending despatch, approved sleepers were to remain in the appellant's custody. The appellant had to despatch the sleepers in accordance with the orders of the Sleeper Control Officer, who was to give the appellant a passing certificate of the sleepers passed. If there was any shortage in the number of sleepers received by the consignee, the appellant was entitled to be paid for all the sleepers shown on the tally receipt obtained from the despatch Station Master in respect of the sleepers loaded on the railway provided such sleepers had been passed and not been rejected by the Sleeper Control Officer. But, if any part of such consignment consisted of unpassed sleepers, they would be treated as rejected and included in the shortage, and the appellant would be held responsible for the total shortage in that consignment. On arrival at destination, the consignee had the right to reinsert the sleepers and sleepers rejected by him were to be treated as non-delivered. It was further provided that the appellant would receive payment for such sleepers only as were approved,

branded and passed by the Sleeper Passing Officer and duly delivered to the consignee in terms of the contract. Although there was a provision for payment of 90 per cent in advance on the Sleeper Control Officer certifying that the sleepers had been received by him and they were checked and found in order, it was understood that on account of such payment the appellants would not be relieved from the liability he might incur under the terms of the contract. The High Court of Madhya Pradesh took the view that the sales were completed in Dhamtari, that the property in the goods passed to the purchaser at that place and that the sleepers were actually delivered to the purchaser at that place, and hence the sale of such sleepers was not exempt from the imposition of sales tax by the State of Madhya Pradesh. On appeal to the Supreme Court it was observed by the Supreme Court that the whole of the contract had to be taken into account and then the intention of the parties as to where actual delivery was to take place thereunder had to be found out. Their Lordships of the Supreme Court have pointed out that in order to find out whether the explanation to article 286(1)(a) was applicable, it was not necessary for the court to consider where the property in the goods had passed nor was it to guide itself by section 39(1) of the Sale of Goods Act, which only raised a prima facie inference as to delivery. It was held by the Supreme Court that there could be no doubt that while the major part of the operations of the contractor (appellant) with regard to delivery were to be performed at Dhamtari, he was not relieved of all liability as to delivery until the goods were finally accepted at the destination by the consignee. Having regard to the provisions of the contract, which we have already referred to earlier, it was held that the place of actual delivery in the light of all the circumstances of the case could only be the destination of the goods and the actual delivery of the goods could only be said to be complete when the goods were accepted at the destination by the consignee. It was held that the sales were covered by the explanation to article 286(1) of the Constitution and, as such, were not taxable by the State of Madhya Pradesh.

7. We find that there are certain essential similarities between the contract, which had come up for construction before the Supreme Court in the above case, and the contracts before us. In both the cases, the provisions of the contract show that the entire responsibility for the goods remained with the assessee until the goods were delivered to the consignee and were accepted by him. Similarly, in both the cases, although there was a preliminary inspection provided for within the State which sought to levy the tax, the provisions of the contracts clearly showed that there would be no final acceptance of the goods until the consignee outside the said State had approved of and accepted the goods. It is true, as submitted by Mr. Shah, that there are differences in the language used in the relevant clauses in these two contracts. This, however, is not of much significance. It is not necessary to use identical language to achieve the same legal effect. In view of this decision, it does appear to us that, in the present case, it could not be said that the goods were actually delivered for consumption within the then State of Bombay and, hence, the sale was covered by the

provisions of the explanation to article 286(1) of the Constitution of India and was not exigible to sales tax by the then State of Bombay.

8. Mr. Shah placed strong reliance on a later decision of the Supreme Court in *C.P. Timber Works v. Commissioner of Sales Tax*[1967] 20 S.T.C. 335 (S.C.). In that case, the appellant (contractor) supplied timber by rail from the Mandla Fort railway station in Madhya Pradesh to places outside the State under a contract with the Director-General of Stores, Supplies and Disposals, Government of India. Under the undisputed course of business between the appellant and the Director, timber logs were kept by the appellant ready and available for inspection at that railway station. After inspection the inspecting authority issued a certificate and put a hammer mark on the timber approved. The timber was then despatched by goods train in full wagon loads on military credit notes to the specified consignees. The appellant sent the railway receipts to the consignee by registered post. The consignee was entitled at the destination to reinsert the goods, check the shortage, if any, and reject the timber not conforming to specifications. The appellant was paid 90 per cent of the price of each consignment on proof of despatch and the balance was to be paid on receipt of the consignment in good condition. The sales tax authorities of the State of Madhya Pradesh assessed the appellant to tax on those sales. The appellant applied to the High Court under article 226 of the Constitution of India for a writ to quash the assessments. The High Court held that the cumulative effect of all the terms of the contract was that the goods were actually delivered at Mandla Fort and dismissed the petition. The Supreme Court rejected the appeal of the appellant against the decision of the High Court. It was submitted by Mr. Shah that on the ratio of this decision it should be held that in the case before us the goods were actually delivered for actual consumption within the then State of Bombay. In our view, this decision is not of any assistance in the case before us. As pointed out by the Supreme Court, there was no evidence in that case to show that the actual delivery of the goods took place outside the State of Madhya Pradesh and it was not the appellant's case before the High Court that any place other than Mandla Fort railway station was intended as the place of delivery. As pointed out in the judgment, clause 11 of the contract provided for the place of delivery. Sub-clause (a) of that clause read "terms of delivery". Against this was the remark "F.O.R. Mandla Fort and other stations to be intimated immediately". There was nothing on the record of the case to show that any such instructions were given for delivery outside the State of Madhya Pradesh and, as pointed out by the Supreme Court, it was not the appellant's case that any place other than Mandla Fort was intimated as the place of delivery. In view of these peculiar circumstances in that case, the ratio of that case has no application to the case before us.

9. The next submission of Mr. Shah was that the burden of proving that the goods had moved from the then State of Bombay to Ajmer in the State of Rajasthan was on the respondents and the respondents had failed to discharge this burden. It was submitted by him that there was no evidence at all before the

Tribunal which could have enabled the majority of the Tribunal to come to the conclusion that the goods held by the respondents moved from the then State of Bombay to Ajmer under the contract of sale. In this connection, we find that under the contract itself, having regard to the despatch instructions, the goods were to be consigned to the District Controller of Stores (CAN), Western Railway, Ajmer. Even from the judgment of Mr. B. C. Dutt, the member of the Tribunal, who delivered a dissenting judgment, it appears that the uncontested position was that on delivery of goods for inspection and after approval by the Inspection Officer at Bombay the goods were sent to Ajmer on railway material consignment notes. Moreover, in his judgment Mr. Dutt has observed as follows :

"..... That the goods ultimately went out of the State of Maharashtra is common ground but the applicants (respondents) maintain that in view of their being held responsible for deterioration, etc., until the goods reached their destination, the sale should be deemed to have been completed outside the State."

10. This makes it quite clear that it was the accepted position that the goods did, in fact, move from Bombay to Ajmer and were actually delivered in Ajmer. The contract provided for such delivery at Ajmer. There can, therefore, be no doubt that the goods moved from Bombay to Ajmer under the conditions of the contract. This submission of Mr. Shah must also, therefore, be rejected.

11. In the result, we answer both the questions referred to us in the affirmative. The applicant to pay to the respondents the costs of this reference.

12. Reference answered in the affirmative.