
(1957) 03 BOM CK 0020

In the Bombay High Court

Case No : Miscellaneous Application No. 2362 of 1956. Appeal No. 16 of 1957

Daulatram Rameshwarlal

APPELLANT

Vs

B.K. Wadeyar

RESPONDENT

Date of Decision : 25-03-1957

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 11, 12A
Constitution of India, 1950 — Article 226

Citation : AIR 1958 Bom 120 : (1957) 59 BOMLR 599 : (1957) ILR (Bom) 747 : (1957) 8 STC 617

Hon'ble Judges : Chagla, C.J;S.T. Desai, J

Bench : Division Bench

Advocate : J.C. Bhatt, S.V. Gupte and R.J. Joshi, for the Appellant; Advocate-General, for the Respondent

Judgement

K.T. Desai, J.—Messrs. Daulatram Rameshwarlal, the petitioners herein, are dealers registered u/s 11 of the Bombay Sales Tax Act, 1953. They have been granted an authorisation under the provisions of section 12A of the Act. They have filed this petition against the Sales Tax Officer, IV Division, Bombay, praying for a writ in the nature of certiorari or any appropriate writ, direction or order under Article 226 of the Constitution against him calling for the records of the case and for quashing and setting aside the order passed by him on 21st September, 1956, being Exhibit "B" to the petition and the notice issued by him, dated 27th September, 1956, which is Exhibit "A" to the petition. The petitioners further pray for a writ in the nature of prohibition or any appropriate writ or direction or order under Article 226 of the Constitution against the respondent prohibiting him from taking any steps or directing any other officer to take any steps, proceedings or action against the petitioners pursuant to the said order and the said notice and from taking or doing or causing to be done any further acts in pursuance of the said order and the said notice. The petitioners have further prayed for the issue of a writ in the nature of mandamus or any appropriate writ or direction or order under Article 226 of the Constitution

ordering the respondent to cancel the said order and the said notice and to accept the contention of the petitioners that the sales and purchases mentioned in the petition were immune from taxation and to revise the said order and the said notice on the footing of the immunity of the said sales and purchases from taxation.

2. The facts giving rise to the petition, briefly stated, are as follows :-

The petitioners in the course of their business purchased cotton and castor oil for export and made declarations to the effect that the said goods were meant for export and were being purchased therefor. The petitioners state that at the time of the said purchases they gave to their vendors certificates in Forms "J" and "K" prescribed by Rule 13 of the Bombay Sales Tax (Registration, Licensing and Authorisation) Rules, 1954. Form "J" inter alia provides as follows :- ".....the goods purchased by meare intended for being despatched by me or by registered dealers to whom I sell the goods, to an address outside the State of Bombay." Form "K" provides that the goods purchased were intended for resale by the purchaser. These certificates were required to be given in order to enable the vendors to claim exemption from the payment of sales tax u/s 8 of the Bombay Sales Tax Act, 1953. The petitioners further state that thereafter they sold the goods purchased by them for the purpose of export. The petitioners state that the contracts which they in their turn entered into for the sale of the said goods were in the form annexed as Exhibit "C" to the petition. These contracts are material for the purpose of deciding the questions raised in the petition as regards payment of sales tax by the petitioners. The price referred to in the contract is F.O.B. The term as regards payment is as follows :- Payment at Bombay against presentation of documents". Under the caption "Remarks Licence", it is provided as follows :- "Under buyers export licence." The petitioners state that during the period of assessment, i.e., 1st April, 1954, to 31st March, 1955, which is the relevant period for the purpose of this petition, they effected sales inter alia of cotton of the total value of Rs. 68,493-2-6 on F.O.B. basis and had effected sales inter alia of castor oil of the total value of Rs. 6,47,509-1-6 on F.O.B. basis. It is in respect of these sales that the petitioners claimed exemption from payment of sales tax. That claim has been disallowed. They further stated that they had effected purchases of the value of Rs. 5,63,500 for the purpose of enabling them to sell the goods for export. They claimed exemption from payment of purchase tax in respect of such purchases. That claim also has been disallowed by the Sales Tax Officer. The assessment order is dated 21st September, 1956. The notice of demand following thereon is dated 27th September, 1956. The petitioners say that under Article 286(1)(b) of the Constitution it is provided that 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 in the course of the import of the goods into, or export of the goods out of, the territory of India. They further state that u/s 46 of the Sales Tax Act, 1953, it is expressly provided that "nothing in that Act or the rules made or deemed to have been made thereunder shall be deemed to impose or authorise

the imposition of tax on any sale or purchase of any goods where such sale or purchase takes place in the course of the import of the goods into the territory of India, or the export of the goods out of such territory" and that the provisions of that Act and the said rules are liable to be read and construed accordingly. The petitioners contend that the sales effected by them and the purchases made by them are sales and purchases "in the course of the export of the said goods out of the territory of India" and that the said sales and purchases are exempt from sales tax and purchases tax respectively under the said Act. The question that I have to determine is whether the sales and purchases referred to by the petitioners are sales and purchases effected in the course of export of the said goods. Article 286 of the Constitution came up for consideration before the Supreme Court in what is known as the First Travancore case [1952] 3 S.T.C. 434: [1952] 3 S.C.R. 1112 and in what is known as the Second Travancore case [1953] 4 S.T.C. 205 : [1954] 5 S.C.R. 53. It is the latter judgment which is material for the purpose of this case. In dealing with provisions of this article, Patanjali Sastri, C.J., observes at page 62 as follows :- "What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words "import into" and "export out of" in this context do not refer to the article or commodity imported or exported. The reference to "the goods" and to "the territory of India" make it clear that the words "export out of" and "import into" mean the exportation out of the country and importation into the country respectively. The word "course" etymologically denotes movement from one point to another, and the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation A sale in the course of export out of the country should similarly be understood in the context of clause (1)(b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities It is, however, contended that on this principle of connected or integrated activities a purchase for the purpose of export must be regarded as covered by the exemption under clause (1)(b). We are unable to agree.

The phrase "integrated activities" was used in the previous decision to denote that "such a sale" (i.e., a sale which occasions the export) "cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction." It is in that sense that the two activities - the sale and the export - were said to be integrated. A purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done "in the course of the export of the goods out of the territory of India", any more than the other two activities can be so regarded."

3. In the course of that judgment, at page 68 it has been further observed as follows :-

"It would seem, therefore, logical to hold that the course of the export out of, or of the import into, the territory of India does not commence or terminate until the goods cross the customs barrier"

4. In summing up their conclusions, at page 69 it is stated as under :-

"(1) Sales by export and purchases by import fall within the exemption under article 286(1)(b).

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State power of taxation extends to such transactions."

5. Having regard to these observations, I have to consider whether on the facts of this case it could be said that the sales that had been effected by the petitioners have been sales in the course of export, i.e., whether the sales have taken place whilst the goods had crossed the customs barrier and were in the export stream. The petitioners themselves are not the exporters of goods. They have merely sold the goods for the purpose of export. The exporters of the goods are the purchasers from the petitioners. A transaction of purchase by the exporter for the purpose of export in the State is not within the exemption. The sale in the State to the exporter for the purpose of enabling the exporter to export the goods would not equally be within the exemption. From Exhibit "C" it is clear that the goods were to be exported under the export licence of the buyers. It is provided by section 5(2) of the Exports (Control) Order, 1954, as under :-

"It shall be deemed to be a condition of every licence

(a) * * *

(b) that the goods for the export of which the licence is granted shall be the property of the licensee at the time of the export."

6. It is clear from these provisions that before any goods could be exported under any licence, they must be the property of the licensee. The property in the goods must pass to the licensee before they cross the customs barrier. Under the contracts of sale entered into by the petitioners it is expressly provided that the goods have to be exported under the buyers export licence unless they have become the property of the buyers before they cross the customs barrier. The sale by the petitioners to the exporter, who is the licensee, must take place before the goods enter the export stream, i.e., the sale must take place within the State. The provisions of the Bombay Sales Tax Act, 1953, would be attracted to such a sale and sales tax would be leviable in respect thereof. It has been

strenuously urged on behalf of the petitioners that the contract being an F.O.B. contract the property in the goods would not pass until at least the goods are put on board a ship. It is further contended that as payment is to be made against presentation of documents, until the documents are presented and payment is received the property in the goods would not pass. It is urged that as at the time when the documents are presented for payment, the goods must necessarily have entered the export stream, the transaction must be regarded as a transaction in the course of export. I do not accept any of the aforesaid contentions. The contract provides merely for the price being F.O.B. Before the goods are placed on board a ship, they must cross the customs barrier. Before the goods cross the customs barrier, the property in the goods must pass to the exporter, otherwise it would not be legally possible to export the goods under the licence of the exporter. The bill of lading which has been tendered in this case itself shows that the goods are shipped not by the petitioners but by the exporters who have purchased the goods from the petitioner. The goods having been shipped by the buyers, the property in the goods must have passed to the buyers before the goods are so shipped by the buyers. Merely because the payment is deferred and has to be made against presentation of the documents, it cannot be said that the property in the goods has not passed.

7. The customs procedure is set out at page 19 of the Hand Book of Export Trade Control. It is the exporter who is required to deliver personally or through his agent to the export department of the Custom House at the port of export the shipping bill and the export licence. It seems to me that the contention of the petitioners that the property in the goods passed after the goods entered the export stream is without any foundation. If the petitioners have done any acts for the purpose of exporting the goods under the licence of the exporter they have done so as the agents of the exporter. In my view, the sales by the petitioners to the exporters took place within the State and that the petitioners' contention in this connection is without any foundation.

8. The petitioners have strongly relied upon a case reported in *Gandhi Sons Ltd. v. The State of Madras* [1955] 6 S.T.C. 694. The Judges in that case have followed the decision of the Supreme Court in the *Second Travancore case* [1953] 4 S.T.C. 205 they observe that the crucial question to be considered was whether the sellers continued to be the owners of the goods upto or beyond the time when the goods, so to speak, entered the export stream. After referring to the judgment of the Supreme Court in the *Second Travancore case* [1953] 4 S.T.C. 205, on the facts of that case, they held that the property in the goods did not pass to the buyer until the relevant bills of lading were presented to the buyers or in any event at least not until the goods were put on board the vessels. They further held that the goods had started on their journey to a foreign destination at the moment when the title in the goods passed to the buyer and that there was a sale in the course of export. That cannot be said on the facts of this case.

9. Having come to the conclusion that the sales effected by the petitioners are sales within the State I hold that sales tax is leviable in respect thereof under the Bombay Sales Tax Act.

10. I will now deal with the contentions of the petitioners as regards the purchases effected by them. The main contention of the petitioners, as set out in the petition, is that the purchases effected by them are in the course of export of the goods out of the territory of India. According to the judgment of the Supreme Court in the Second Travancore case [1953] 4 S.T.C. 205, even the purchases in the State by the exporter himself for the purpose of export are not within the exemption. The petitioners are not exporters. The purchases made by the petitioners in order to enable them to sell the goods so purchased to the exporters can in no sense be said to be purchases in the course of export. They are all purchases made within the State and are liable for payment of purchase tax. Mr. Gupte, the learned counsel for the petitioners, however, sought to argue that under the provisions of section 10, purchase tax can be levied in case where a certificate under clause (b) of section 8 has been furnished in respect of such goods when the purchasing dealer does not show to the satisfaction of the Collector that the goods have been despatched by him or by a person to whom he has sold the goods to an address outside the State of Bombay within a period of six months from the date of purchase by the dealer furnishing the certificate. He says that he had purchased these goods from a registered dealer and that he had furnished a certificate in respect of such goods to the registered dealer in Forms "J" and "K" as required by section 8(b) of the Bombay Sales Tax Act. He further contends that the goods had been despatched by him to an address outside the State of Bombay within a period of six months from the date of purchase and that these goods are exempt from purchase tax. He further contends that the Sales Tax Officer has wrongly required the production of N Form before he would exempt these goods from the purchase tax, and that the action of the Sales Tax Officer is not warranted by law and is liable to be set aside. Rule 13(5) which requires a certificate in Form "N" to be submitted provides as under :-

"(5) Where a dealer holding an authorisation sells any goods purchased by him under such authorisation to a registered dealer intending to despatch such goods to an address outside the State of Bombay, he shall obtain, and produce whenever so required by the Collector or the assessing authority, a certificate in Form N from such registered dealer."

11. The certificate in Form N is required to be issued by a registered dealer purchasing goods from a dealer holding an authorisation under clause (b) of section 8 of the Bombay Sales Tax Act, 1953. It provides that the goods are to be despatched by the person issuing the certificate to an address outside the State of Bombay. Mr. Gupte contends that the petitioners had not sold any goods purchased by them to a registered dealer and that they could not be required to produce a certificate in Form N. Mr. Gupte is right when he says so. But in order

to entitle the petitioners to claim any exemption from payment of purchase tax they have to satisfy the requirements of section 10. They have not sold goods to a registered dealer. The only ground on which they claim exemption is that they themselves have despatched the goods. I have held that it is not they but the exporters who have despatched the goods with the result that their claim for exemption from the payment of purchase tax also fails.

12. Mr. G. N. Joshi, the learned counsel for the respondent has in his reply pointed out to me that the petitioners were not entitled to urge any contentions other than those set out in their petition, and that it was not open to the petitioners to make out a case for exemption from payment of purchase tax under the provisions of section 10 of the Sales Tax Act, 1953. Mr. Gupte has not applied for an amendment of the petition and on a strict view of the matter Mr. Gupte is not entitled to raise the aforesaid contention. I have, however, dealt with the contention in my judgment as the same has been argued at some length before me without objections at that time when the arguments were advanced by Mr. Gupte.

13. In the result, the petition fails and is dismissed with costs and the Rule issued herein is discharged. The matter has lasted for over five hours before me. I fix the costs at Rs. 450.

14. The petitioners appealed.

JUDGMENT

Chagla, C.J.

15. The appellants deal in cotton and castor oil. They are registered dealers u/s 11 of the Sales Tax Act, and they have also received the necessary authorisation u/s 12A. On the 29th of September, 1956, a notice of demand was served upon them calling them to pay a sum of Rs. 25,448-9-9. The notice dealt with the period from 1st April, 1954, to 31st March, 1955. As the notice indicated, the assesseees were liable to pay sales tax and purchase tax in respect of certain quantities of castor oil and cotton sold by the appellants to the firm of Godimotla Ghina Appalaraju. The matter came up before Mr. Justice K. T. Desai, and he took the view that the demand made was justified and dismissed the petition of the appellants, which had been filed to challenge this notice of demand.

16. The question briefly is this : The sale with which we are concerned and which is sought to be taxed under the Sales Tax Act is a sale effected by the appellants with the firm of Godimotla Ghina Appalaraju (hereinafter referred to as "the exporters") under certain contracts, a specimen of which has been annexed to the petition. The contention of the appellants is that the sale is exempted by the provisions of Article 286 of the Constitution, inasmuch as the sale was effected in the course of export of the goods outside India. Every one of the contracts shows that the goods were sold by the appellants to the exporters F.O.B. It also shows that the exporters were to make payment against presentation of the

documents, and also shows that the goods were covered by the buyers' export licence. On these provisions of the contract, the material question that we have to determine is : When did the property in these goods pass ? because, as well shall presently point out, it has been laid down by the Supreme Court that if a sale is effected after the goods have entered the export stream or have passed the customs barrier, then such a sale attracts the provisions of Article 286 and is exempt from taxation.

17. Before we look at the authorities, it will perhaps be better if we look at the principle of the matter. A sale by A to B of certain goods, which goods could be diverted by B for domestic use or which goods could be sold by B in the State itself could not be covered by the exemption under Article 286 because such goods would not be in the export stream. They would still be outside the stream because they could be diverted and never reach the stream so as ultimately to be exported outside India. It is, therefore, that the Supreme Court has emphasised the fact that it is only that sale which takes place after the goods are incapable of being diverted that attracts the application of Article 286 of the Constitution.

18. Now, what is the position here ? The contract is an F.O.B. contract, and the price is to be paid by the exporter to the sellers only on presentation of bills of lading. Therefore, two important and salient facts emerge from this : one that the delivery of the goods is not obtained by the exporter till after the goods have crossed the customs barrier and the price is not received by the sellers, the appellants, till they gave the delivery of goods across the customs barrier, because it is not disputed that the bills of lading could only be prepared after the customs duty on the goods had been paid and they had passed the customs barrier. Now, the question of passing of property is normally a question of intention, and the intention of the parties must be gathered from the terms of the contract. It is true that if the goods are appropriated to a contract, the property will pass. But the appropriation must be unconditional, and if the appropriation is not unconditional, then the property will only pass when the condition is satisfied. In the contract before us it seems to us that it is clear that there was no unconditional appropriation of the goods by the appellants towards the contract. The appropriation was conditional upon the payment being made by the exporters on the presentation of the bills of lading, and, therefore, it is clear that the sellers wanted to keep the power of disposal over the goods till they had received the payment from the exporters. This fact is borne out rather emphatically by the circumstances that although the bills of lading were to be made out in the name of the exporters, the bills of lading were to be retained by the appellants, and the appellants would not part with the bills of lading till payment had been made to them by the exporters. Now, the Advocate-General has suggested two reasons why we should hold that the property had already passed in the goods before the goods crossed the customs barrier, and the first circumstance upon which considerable emphasis is laid by the Advocate-General is that the bills of lading in this case were taken out in the name of the exporters

and not in the name of the sellers, and the Advocate-General says that if the intention was that the property should not pass, then one would have found a provision in the contract that the bills of lading should be made out in the name of the sellers. Now, we see no difference between a provision in the contract that the bills of lading should be made out in the name of the sellers and a provision that the exporter was to get the bills of lading, although they were in his name, only after he paid the price of the goods. In the first case, on the price being paid, the seller would have to endorse the bill of lading in favour of the exporter. In the latter case, he would have physical control over the bills of lading till the price was paid. In either case the exporter would not be able to make any use of the bills of lading till he had paid the price. In a F.O.B. contract, delivery is ordinarily given by means of shipping documents, and, therefore, in both the cases we are contemplating that the delivery would only be given against payment. In one case the delivery would be given on the shipping documents being endorsed over by the seller to the exporter, and in the other case the delivery would be given by the sellers by the bills of lading being physically handed over to the exporter. Therefore, there is not much substance in the distinction sought to be made by the Advocate-General.

19. The other circumstance on which strong reliance has been placed by the Advocate-General is that under the Export Trade Control Rules, the goods for the export of which a licence is granted shall be the property of the licensee at the time of the export. This is a circumstance which has also impressed the learned Judge, and what is suggested is that only an owner of the goods can obtain a licence and only an owner can export the goods under the licence, and, therefore, it is urged that the exporter was the owner of the goods, that the property had passed and that the appellants were not the owner of the goods. Now, in the first place, we are not dealing with anything in *pari materia* when we compare the language used by the Export Trade Control Order and the rules made thereunder and the question of passing of the property for the purpose of deciding whether Article 286 has application or not. But even if they were in *pari materia*, all that the export rule requires is that the exporter who has obtained the necessary licence should be the owner of the property at the time of the export. This rule does not deal with the niceties of the time at which property passes. It deals particularly with the question that the goods which are on the high seas and which are being exported to a country outside India should be the goods of the exporter, who has obtained the necessary licence from the Government. This is admittedly the fact here. There is no doubt that the appellants agreed to sell the goods in question to the exporters so that the exporters should export them under their licence. It is equally true that the goods had become the property of the exporters. While we are concerned here with the point of time at which the goods became the property of the exporter, the Export Licence Rule is not concerned with that question at all. Therefore, although it may be true for the purpose of Export Control Order that the goods at the time of export were the property of the exporter, it may be equally true for

the purpose of deciding the question under Article 286 that the goods became the property of the exporter only after they crossed the customs barrier. Therefore, this particular circumstance does not assist the Advocate-General in the contention that the property in the goods had passed before they crossed the customs barrier.

20. One test, which is a fairly simple and easy test, and which is almost infallible test in these matters is to consider whether the exporter could have diverted the goods which he had purchased to any purpose other than the purpose of export. Could he have resold the goods within the State ? or could he have utilised these goods for his own domestic purpose ? and the answer to that question must obviously be in the negative. Inasmuch as the exporter only gets delivery of the goods by means of the documents of title after they have crossed the customs barrier, it is impossible to suggest that he could have made any other use of these goods except exporting them outside India.

21. Now, turning to the authorities we have first the decision of the Supreme Court reported in *State of Travancore-Cochin v. S. V. C. Factory* [1953] 4 S.T.C. 205 : 5 S.C.R. 53 and the basis of this part of the judgment of the Supreme Court is to be found in the citation from an American case, *Empressa Siderurgica v. Merced* 337 U.S. 154, which passage appears at page 65 of the Report :

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainly that the goods are headed for their foreign destination and will not be diverted to domestic use" and the conclusions of the Supreme Court are summed up at page 69 in three propositions. It is conceded by Mr. Bhatt, who had appeared for the appellants, that his case does not fall either under the first or the second head, and his contention is that it falls under the third head, and the Advocate-General says that when we look at the language of the third head, it does not clearly apply to the facts of this case. The third head is : "Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier are within the exemption, assuming that the State power of taxation extends to such transactions."

22. And the Advocate-General says that here we are not dealing with the case of an exporter transferring shipping documents, but here we have a case of a seller transferring shipping documents to an exporter. In our opinion, this is not the correct way of reading the proposition laid down by the Supreme Court. This proposition must be read in the context of the judgment, and as we have pointed out, what the Supreme Court has emphasised is a sale which is effected after the goods have crossed the customs barrier. It is that sale which comes within the exemption of Article 286 and it is that sale which cannot be subjected to a sales tax under a law passed by the State. Therefore, for the purpose of this proposition, the appellant must be looked upon as an exporter because he is transferring shipping documents for a price after the goods are beyond the customs barrier and in this sense the case of appellants does fall under this

head. But there is a clear and direct authority of the Madras High Court in *Gandhi Sons Ltd. v. The State of Madras* [1955] 6 S.T.C. 694. In a very well considered judgment, the Madras High Court on almost identical facts came to the conclusion that a sale effected under those circumstances would be exempt from tax by reason of the provisions of Article 286 of the Constitution, and the facts there, if anything, were stronger than the facts before us. In that case there were three contracts, two C. & F. and one F.O.B., and the goods were packed and marked with the initials of the buyer. The bill of lading in the case of each contract was taken in the name of the buyer and yet inasmuch as the price was to be paid on presentation of the bill of lading, the Madras High Court held that the property passed after the goods had entered the export stream, and, therefore, the sale was not liable to tax and at page 702 Rajagopala Ayyangar, J., correctly disposes of the question :

"The crucial question to be considered in this connection is whether the sellers continued to be the owner of the goods upto or beyond the time when the goods, so to speak, entered the export stream", and at page 704 the learned Judge refers to a Judgment of Lord Wright in *Smithy and Co. v. Bailey and Co.* [1940] 3 All E.R. 60, where the learned Judge discusses the course of a business under a C.I.F. contract and Lord Wright says that in this course of business, the general property in the goods remains in the seller until he transfer the bills of lading. Now, in our opinion, this also applies to the F.O.B. contracts before us. The same view of the law was taken in a subsequent judgment of the Madras High Court in *Louis Dreyfus and Company Ltd. v. The State of Madras* [1956] 7 S.T.C. 720. As against this, the Advocate-General has relied on an Income Tax case decided by the Supreme Court in *The Commissioner of Income Tax, Madras Vs. Mysore Chromite Limited*, . The question that the Supreme Court was considering was whether a certain sale had taken place in British India or outside British India for the purpose of tax, and what was argued was that since the assessee company placed the goods on board the steamer named by the buyer, the goods became ascertained and the property in the goods passed immediately to the buyer, and Mr. Justice Das, as he then was, rejected this contention and asked the question as to whether there was an unconditional appropriation of the goods by merely placing them on board the ship, and the answer given by the learned Judge is this : "It is true that the price and delivery was F.O.B. Madras but the contracts themselves clearly required the buyers to open a confirmed irrevocable bankers' credit for the requisite percentage of the invoice value to be available against the documents. This clearly indicated that the buyers would not be entitled to the documents, that is, the bill of lading and the provisional invoice, until payment of the requisite percentage was made upon the bill of exchange. The bill of lading is the document of title to the goods and by this term the assessee company clearly reserved the right of disposal of the goods until the bill of exchange was paid."

23. Therefore, the learned Judge clearly held that the property did not pass till the bill of exchange was paid and till then the assessee company, the seller, reserved the right of disposal of the goods. But what is pointed out by the

Advocate-General and what is emphasised by the Advocate-General is that in this case the bill of lading was taken in the name of the sellers, the assessee company, and according to the Advocate-General it was because of this circumstance that the Supreme Court came to the conclusion that it did. Now, there is no indication whatever in this judgment that it was that factor that induced the Supreme Court to take the view that the property in the goods had not passed till the bill of exchange was paid. The point that the Supreme Court was emphasising was that the assessee company, the sellers, had reserved the right of disposal until the bill of exchange was paid. The case is precisely the same here. The appellants have reserved the right of disposal of these goods till the price was paid, and as we have already pointed out, the fact that in the case before the Supreme Court the bill of lading was made out in the name of the sellers and in the case before us it was made out in the name of the exporters, has no relevancy to the question that we are considering. In our opinion, therefore, with great respect to the learned Judge below the sale in question which is sought to be brought to tax is a sale exempted under Article 286 of the Constitution, and, therefore, it cannot be brought to charge.

24. There is one other matter of minor importance compared to what we have been considering, which has also been challenged before us by Mr. Bhatt on behalf of the appellants, and that is his liability to pay purchase tax. That liability has been imposed upon him by reason of section 10(b) of the Act, and the scheme of that section must be understood in the light of section 8(b) and the second proviso to that sub-section. Now, section 8(b) provides for what is to be deducted from the turnover which is liable to tax and sub-clause (b) is in these terms :-

"Sales of goods to a dealer who holds an authorization and furnishes to the selling dealer a certificate in the prescribed form declaring inter alia that the goods so sold to him are intended for being despatched by him, or by registered dealers to whom he sells the goods to an address outside the State of Bombay".

25. Now, when the goods were sold to the appellants, they have given a certificate to their seller and the certificate was that the goods which were purchased by them were intended for being despatched by them or by a registered dealer to whom they sell the goods to a place outside the State of Bombay. Therefore, the seller of the appellants is exempt from paying sales tax on these goods which are sold (a) to a dealer who holds the necessary authorization and (b) who gives a certificate that the goods were not intended for local use but were intended for being despatched by him outside the State of Bombay or if they were not to be despatched by him, or if they were not despatched by him, then they would be despatched by a registered dealer to whom he has sold the goods. Now, the second proviso to clause (b) is :-

"Where any goods to which this clause applies are not shown to the satisfaction of the Collector to have been despatched by the purchasing dealer, or by a person to whom he has sold the goods, to an address outside the State of

Bombay within a period of six months from the date of purchase by the dealer furnishing the certificate, the said dealer shall be liable to pay a purchase tax under clause (b) of section 10 on the purchase of such goods".

26. Inasmuch as the seller of the appellants escapes sales tax by reason of certain representations made by the appellants, the scheme of this proviso is that if those representations did not turn out to be correct, then the appellants would pay the purchase tax in lieu of the sales tax which his seller would have paid but for the representation. But the ingenious argument that is put forward by Mr. Bhatt is that whereas under sub-clause (b) the certificate requires that the goods must be despatched by the appellants or by a registered dealer to whom they sell the goods, when we look to the proviso (2) even though the goods might be sold by the appellants to a person who is not a registered dealer, so long as that person despatches the goods outside the State of Bombay, there is no liability upon them to pay the purchase tax. In this particular case the exporters are not registered dealers. Therefore although they despatched the goods outside the State of Bombay, not being registered dealers the representations made by the appellants in the certificate given to the purchaser were not carried out.

27. Now, when we turn to the charging section 10(b) it provides :-

"Where a certificate under clause (b) of section 8 has been furnished in respect of such goods and the purchasing dealer does not show to the satisfaction of the Collector that the goods have been despatched by him or by a person to whom he has sold the goods to an address outside the State of Bombay within a period of six months from the date of purchase by the dealer furnishing such certificate" then the purchase tax would be levied. Now, it is true that as we are dealing with a taxing statute and section 10(b) is the charging section, it must be strictly construed and Mr. Bhatt's contention is that here again the expression used is the despatch of the goods by "a person" and not by a registered dealer, and inasmuch as that condition has been satisfied, the appellants are not liable to purchase tax. In our opinion, we cannot ignore or overlook the preamble to section 10(b) and if we cannot ignore or overlook that preamble, then we must construe the expression "a person" in the light of this preamble, and if we have to construe the expression "a person" in the light of the certificate which the appellants were bound to furnish, then the proper canon of construction requires that the person in this context must be read to mean a registered dealer. The whole object of obtaining a certificate from the appellant is to see that the goods are despatched by them or by a registered dealer and if that is the object, it is difficult to accept the contention that although the representation made by the assessee has not been carried out, by reason of the use of the expression "a person", the assessee is entitled to escape the purchase tax levied u/s 10(b). We must, therefore, agree with the learned Judge so far as the appellants' contention under this head is concerned.

28. The result will be that the Sales Tax Officer will be directed not to enforce the

demand notice for payment of general sales tax with regard to the sale aggregating to Rs. 2,68,553-3-0, which is of cotton and aggregating to Rs. 6,47,509-1-6 of castor oil, both these sales being covered by the F.O.B. contracts which we have considered in this appeal.

29. As the appellants have substantially succeeded, we direct that the respondent must pay to the appellants, half the costs of the appeal and with regard to the costs below, the border of costs made by the learned Judge will be set aside and we direct that the respondent should pay Rs. 250 to the appellants as costs.

30. Appeal allowed.