

(1962) 07 CAL CK 0023
In the Calcutta High Court
Case No : Civil Revn. No. 1640 of 1960

Gillanders Arbuthnot and Co. Ltd.

APPELLANT

Vs

The Commercial Tax Officer and Another

RESPONDENT

Date of Decision : 16-07-1962

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 2
Constitution of India, 1950 — Article 286(1), 286(2)

Citation : AIR 1964 Cal 477 : 68 CWN 1

Hon'ble Judges : B.N. Banerjee, J

Bench : Single Bench

Advocate : E.R. Meyer, Debi Prasad Pal and Sanjib Kumar Dutt, for the Appellant; N.C. Chakraborty, D.N. Basu and Kalyanbrata Roy, for the Respondent

Judgement

B.N. Banerjee, J.—The petitioner, a Company incorporated under the Indian Companies Act, is a dealer registered under the Bengal Finance (Sales Tax) Act, 1941. At all material times the petitioner Company was the selling agent of Sone Valley Portland Cement Co., Ltd., having its factory at Japla, in the State of Bihar, and the Managing Agent of Indian Copper Corporation Ltd., having its factory at Ghatsila, also in the State of Bihar.

2. Between April 1, 1955 and March 31, 1956, the petitioner company says, it sold diverse quantities of Cement to various parties in different parts of India, including West Bengal, from the Cement factory at Japla and also made similar sales of copper ingots, brass and yellow metal sheets, from the copper factory at Ghatsila.

3. Cement, it is not disputed, was a controlled commodity during the material period. By an order, dated 18-8-1948, made under the West Bengal Cement Control Act, 1948; it was provided that none shall dispose of or agree to dispose of cement except In accordance with conditions contained in the written order of the Director of Consumers Goods, West Bengal or the Regional Honorary Cement Adviser to the Government of India, or any officer authorised by the Director or

the Adviser as the case may be. The procedure for sale of cement during the relevant period was that purchasers used to obtain authorisations or permits from the authorities for purchase of cement. The permits used to contain reference to the factory wherefrom cement was to be obtained. On the basis of such authorisations or permits purchasers used to place orders with suppliers, like the petitioner company indicating the manner of delivery. Under the orders the petitioner Company was required to deliver cement either ex-factory at Japla or despatch cement booked with railways from Japla to different purchasers at different places in India, including those in the State of West Bengal.

4. The petitioner company says that during the period April 1, 1955 to March 31, 1956, it sold cement to various customers in the State of W. B. of the total value of Rs. 17,14,764/14/-and in the same financial year, during September 7, 1955 to March 31, 1956, sold to customers in Weft Bengal cement of the total value of Rs 8,81,912/8/-. Out of the last mentioned sum, sale to non-registered dealers amounted to Rs. 2,54,272/5/0.

5. During the period from April 1, 1955 to March 31, 1956, the petitioner company sold diverse quantities of copper ingots, brass and yellow metal sheets stored at the factory at Chatsila, to various customers in India, including those in West Bengal, for example, to the Director General of Supplies and Disposals, the Damodar Valley Corporation and the South Eastern Railway. The procedure followed in sales to the Director General of Supplies and Disposals was that on acceptance of tender and no completion of inspection for approval, goods used to be despatched by railway to different consignees, named in the contract, in different parts of India including those in West Bengal, and the relevant railway receipts were forwarded to the respective consignees. Deliveries were effected F. O. R. Ghatsila and despatched to various states as a direct result of the sale. Similar was the procedure adopted for sales to Damodar Valley Corporation and the south Eastern Railway.

6. During the period April 1, 1955 to March 31, 1956, the petitioner company sold, copper ingots, brass and yellow metal sheets to customers in West Bengal, of the total value of Rs. 1,00,68, 821/2/6 p. and in the same financial year, during September 7, 1955 to March 31, 1956, sold to customers in West Bengal the same goods of the total value of Rs. 56,06,361/7/-. Out of the last mentioned sum, sale to non-registered dealers in West Bengal amounted to Rs. 13,04,302/6/-.

7. The petitioner company states that as a direct result of such sales there was movement of goods from the State of Bihar to the State of West Bengal in terms of the sale and that sales fell within the category of sales taking place in course of inter-State trade or Commerce.

8. For the aforesaid sales effected by the petitioner Company, it filed returns before the Commercial Tax Officer and in such returns claimed exemption from assessment, inter alia, in respect of the aforesaid two sums of Rs. 2,54,272/5/-

and Rs. 13,04,302/6/-, on the ground that such sales having been made in course of inter-state trade or commerce between the period of September 7, 1955 to March 31, 1956 were exempt from taxation, being even beyond the scope of the application of the Sales-tax Laws Validation Act, 1956.

9. The Commercial Tax Officer does not dispute that the goods had been actually delivered from Japla or Ghatsila to West Bengal as a direct result of the sales for the purpose of consumption in West Bengal (see paragraph 4 of the affidavit-in-opposition) but nevertheless he rejected the contention of the petitioner with the following observations :-

"In my opinion the dealer has confused between the applicability of the Explanation (2) to Section 2 (g) and the Explanation to Article 286(1) of the Constitution of India, He has decided that the two provisions relate to the same subject-matter inter-state sale. But it is not so. The two provisions are quite independent. The one under Article 286(1) no doubt refers to interstate sale and the Supreme Court has dealt with only the provision in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . The other one Explanation (2) to Section 2 (g) has no connection with the Constitution of India and has totally independent applicability. The context whether a sale is an inter-state sale or not, cannot arise in connection with this Explanation. This relates exclusively to inter-state sales liable to taxation under the state law. This will be apparent from the fact that in spite of the decision of the Supreme Court in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, the Explanation (2) to Section 2 (g) has not been held to be bad in law by any judicial forum of competent jurisdiction.

The result is that Explanation (2) to Section 2 (g) being concerned exclusively with inter-state sales the state of West Bengal is competent to tax any sales, falling under such Explanation and the decision of the Supreme Court in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, being concerned exclusively with inter-state sales has no application to sales falling under Explanation (2) to Section 2 (g).

I am not convinced by the dealer's arguments that an authoritative definition of "sale in the course of inter-state trade or commerce" existed prior to the enforcement of the liability under the Central Sales Tax Act, 1956, i.e., 1st July, 1957.

Accordingly, no deduction from G. T. can be allowed for sales F. O. R. Bihar Factories falling under Explanation (2) to Section 2 (g) even for the sales after 8-9-55. Such sales throughout the period of assessment fall under Explanation (2) to Section 2 (g) and not explanation to Article 286(1) as existing at that term. Thus the sales are not affected by the provisions of Section 27 of the State Act."

10. Aggrieved by the order aforesaid the petitioner moved this Court for a Writ in the nature of certiorari for quashing the order, for a writ in the nature of

prohibition restraining the respondent from taking further step in the matter and for a writ in the nature of mandamus directing the respondents to cancel the order and obtained the present Rule.

11. It is necessary for me to probe a little into the history of law as to Sales-tax on interstate trade or commerce at this stage, in order to understand the argument made on behalf of the petitioner in this Rule.

12. Under the Government of India Act 1935, power was given to provinces to levy "taxes on the sale of goods and on advertisements". Section 297 of the Government of India Act merely forbade Provincial Legislatures or Governments from assuming power to pass laws or from taking executive actions to prohibit or restrict the entry into or export from their own provinces of goods of any class or description or from discriminating against goods produced or manufactured outside their provinces. There was no provision in the Government of India Act which restricted or prohibited the provinces from levying taxes on inter-State transactions. Accordingly provinces began to levy tax on sale of goods even though one or two ingredients of sale had taken place within their respective provinces. Sales-tax was first introduced to Madhya Pradesh in 1938, in the form of "petrol tax". Bengal enacted the Bengal Finance (Sales Tax) Act in 1941. By 1948, general Sales-taxes became prevalent in almost all the States.

13. The theory on which provinces used to levy taxes on sales of goods outside the province was known as the theory of "territorial nexus". In the case of *Poppatlal Shah Vs. The State of Madras*, the Supreme Court said that it would be quite competent for a province to enact legislation to impose taxes on transactions concluded outside the province, provided that there was a real territorial nexus between such transaction and the taxing province. Over emphasis on the nexus theory, resulting in multiple taxation of the same sale transaction, prior to the Constitution, is well summarised in the majority opinion of the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . The Supreme Court found that acting on the principle of territorial nexus, provincial legislatures,

" * * * picked out one or more ingredients constituting a sale and made them the basis of their sales tax legislation. Assam and Bengal made amongst other things, the actual existence of goods in the province at the time of the sale the test of taxability. In Behar the production and manufacture of the goods in the province was made an additional ground. * * * In Central Provinces and Behar * * * it was sufficient if the goods were actually "found" in the province at any time after 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."

14. In order to remedy the chaotic position and remove the possibility of multiple taxation, culminating in the burden on the consuming public being made more

onerous, the Constitution, by Article 286(1), had made provision for freedom of inter-state sales to the following effect:-

"(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.

(2) Except in so far as parliament may by law otherwise" provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the Commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

15. The Article intended to prevent multiple taxation on inter-State sales, however, gave power to the States under the explanation to Article 286(1)(a) to tax a Sale or purchase if (i) the goods had been actually delivered within that State as a direct result of such transaction of sale or purchase and (ii) such delivery took place for the purpose of consumption of the goods within the State. The explanation gave a notional or fictional definition of sale in a particular State, although under the general law the transfer of the goods took place, outside the taxing State, in another state. The explanation was to the provision of Clause (1) (a) of Article 286. The language employed in framing the explanation made its purpose and intendment difficult of ascertainment. On account of its infelicitous and involved language, the explanation was sought to be projected to inter-State trade and commerce as well and the mischief, which Article 286 of the Constitution sought to curb, became unbridled. At one stage the Supreme Court itself favoured that type of interpretation of the explanation and in the case of

The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, , the majority decision of the Supreme Court was, of the view that:-

"The effect of the Explanation in regard to inter-State dealing is, in our view, to invest what, in truth, is an inter-State transaction with an intra- State character in relation to the State of delivery and Clause (2) can therefore have no application,"

The Explanation as was understood or misunderstood at the beginning encouraged States to levy tax on those sale transactions where goods were delivered in their respective areas for the purpose of consumption therein.

16. The Bengal Finance (Sales Tax) Act, 1941, contained a definition of "sale" which used to read as follows:-

" "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledged

Explanation 1. -- A transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Explanation 2. -- Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Bengal at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Bengal;"

17. Shortly after the Constitution had come into effect that definition was changed or amended by the Bengal Sales Tax (West Bengal Amendment) Act 1950, and the amended definition read as follows:-

"Sale" means any transfer of property in goods for money consideration and includes a transfer of property in goods supplied in the execution of a contract but does not include a mortgage, hypothecation, charge or pledge; and any grammatical variations of the expression "sale" shall be construed accordingly.

Explanation 1, --- A transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale;

Explanation 2. -- A sale shall be deemed to have taken place in West Bengal if the goods are actually delivered in West Bengal as a direct result of such sale for the purpose of consumption in West Bengal notwithstanding the fact that under the general law relating to the sale of goods the property in the goods has by reason of such sale passed in another State;"

18. Also by the Adaptation of Laws Order, 1950, there was introduced Section 27

to the Bengal Finance (Sales Tax) Act, which read as follows :-

"(1) Notwithstanding anything contained in this Act, --

(a) a tax on sale or purchase of goods shall not be imposed under this Act --

(i) where such sale or purchase takes place " outside the State of West Bengal;

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India;

(b) a tax on the sale or purchase of any goods shall not, after the 31st day of March, 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The Explanation to Clause (1) of Article 286 of the Constitution shall apply for the interpretation of Sub-clause (i) of Clause (a) of Sub-section (1)."

19. The difficulty that resulted from this type of enactment was realised by the Supreme Court in a subsequent decision, namely, in (S) The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . The Supreme Court pointed out the harassment to traders in the following language:-

"All big traders will have to get themselves registered in each State, study the Sales-tax Act of each State, conform to the requirements of all State Laws which are by no means uniform and, finally, may be simultaneously called upon to produce their books of account in support of their returns before the officers of each State * * * * * The harassment of the trader is quite obvious and needs no exaggeration."

The Supreme Court also clarified the meaning and purpose of the explanation to Article 280(1) (a) in the following language:-

"That Explanation is for the purposes of Sub-clause (a)", i.e., for the purpose of explaining which sale or purchase is to be regarded as having taken place outside a State. By saying that a particular sale or purchase is to be deemed to take place in a particular State the Explanation only indicates that such sale or purchase has taken place outside all other States. The Explanation is neither an exception nor a proviso but only explains what is an outside sale referred to in Sub-clause (a). This it does by creating a fiction. That fiction is only for the purposes of Sub-clause (a) and cannot be extended to any other purpose. It should be limited to its avowed purpose. To say that this Explanation confers legislative power on what, for the sake of brevity has been called the delivery State is to use it for a collateral purpose which is not permissible. Further, it is utterly illogical and untenable to say that Article 286 which was introduced in the Constitution to place restrictions on the legislative powers of the States, by a side wind, as it were, gave enlarged legislative powers to the State of delivery by an explanation sandwiched between two restrictions. This construction runs counter to the entire scheme of the Article and the Explanation and one may see

no justification for imputing such indirect and oblique purpose to this Article. Had the Constitution makers so desired they could have done so in a more direct and straightforward way. To hold that the Explanation has, besides its declared purpose, another hidden purpose of conferring or enlarging legislative power is to build up a fanciful argument merely on the infelicitous and involved language used in the Explanation although it is distinctly not the purpose of the Explanation and although it does not purport substantively and proprio vigore to confer any legislative power on any State. Its only purpose is to explain what an outside sale is so that, by one stroke, as it were, it takes away the taxing power, in respect of sales or purchases of the kind referred to in the Explanation, of all States other than the State where such sales or purchases are, by the Explanation, to be deemed to have taken place. This view of the Explanation was taken in the dissenting judgment in the case of *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, . The view that the Explanation is only for the purposes of Sub-clause (a) of Clause (1) and cannot be carried over to Clause (2) was also taken in the dissenting judgment in the *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, : "The aforesaid decision was made by the Supreme Court on September 6, 1955. By that decision the Supreme Court overruled the *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, , in so far as it had permitted the importing State to tax a transaction of sale or purchase when the goods were transferred in course of inter-State trade or commerce.

20. The *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , while it put an end to the difficulties by making inter-State Sales immune from taxation, also gave rise to a few complicated problems in its wake. Various importing States had imposed sales tax on inter-State sales by nonresident dealers either under the mistaken interpretation of the explanation to Article 286(1)(a) or under the encouragement received from the decision in the *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . When the Supreme Court pointed out the illegality thereof in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , realisation of such tax became and to have always been unauthorised and the States were faced with large claims for restitution of the amounts illegally realised, involving a threat to their economic stability. Quite a large number of dealers also had similarly collected sales-tax from the purchasers in course of inter-State trade or commerce, but were no longer liable to pass on the collection to the Sales-tax authorities and thus stood in a position to make an illegal gain out of it. To meet the contingency, the President promulgated Ordinance III of 1955, which was followed by the Sales-tax LAWS Validation Act (VII of 1956). Section 2 of the Act reads :-

"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 interstate trade or commerce; and all such taxes levied or collected or purporting to have been validly levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law."

21. By virtue of the enactment the levy or collection of taxes already made by the various States during the period from April 1, 1951 to September 6, 1955, was legalised. Further the law of a State authorising the imposition of tax on sale or purchase of any goods which had taken place in course of inter-State trade or commerce during the period between April 1, 1951 and September 6, 1955 was validated for the aforesaid period. In the case of *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, the Supreme Court also declared to the aforesaid effect.

22. The judgment in the *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , created another type of difficulty which required speedy remedy. The inter-State buyers were put in a position of privilege enabling them to make their inter-State purchases without payment of Sales-tax. This had the risk of diverting trade into artificial channels and thus leading to economic waste. Further, the decision adversely affected the financial resources of States. This aspect was considered by a Taxation Enquiry Commission which made certain recommendations. Mainly basing on its recommendation the Constitution was amended by the Sixth Amendment Act of 1956 and the Central Sales Tax Act was also enacted in the same year by the Parliament.

23. The Constitution (Sixth Amendment) Act, 1956, which came into force from September 11, 1956, amended Article 286 and the amended Article reads as follows:-

"(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.

* * * * *

(2) Parliament may by law "formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

24. The 6th Amendment Act also amended Lists I and II of the Seventh Schedule of the Constitution. It inserted in the Union List (List I) entry 92-A which reads as follows:-

"Taxes on the sale or purchase of goods other than newspaper when such sale or purchase takes place in the course of inter-State trade and commerce."

25. It amended entry 54 of the State List (List II) and after the amendment the said entry stands as follows:-

"Taxes on the sale or purchase of goods other than newspapers subject to the provision of entry 92-A of List I."

26. The Central Sales Tax Act became effective from January 5, 1957. The object of the Act was (i) to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside the State or in the course of import into or export from India, (ii) to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and (iii) to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale and purchase of such goods of special importance shall be, subject. Section 3 of the last mentioned Act gave a definition of the expression sale or purchase of goods said to take place in course of inter-State trade or commerce in the following language:-

"When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce; A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase--

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

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

Explanation I -- Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of Clause (b) be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. -- Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State." By Section 4, the Act also gave a definition of sale said to take place outside a State in the following language:-

"When is a sale or purchase of goods said to take place outside a State --

(1) Subject to the provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with Sub-section (2) to take place inside a

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

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

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

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation. -- Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of the sub-section shall apply as if there were separate contracts in respect of the goods at each of such places."

27. After the passage of the Central Sales Tax Act the West Bengal State Legislature amended Section 27 of the Bengal Finance Sales Tax Act by West Bengal Act XIX of 1957 by omitting from, Section 27 (b) the words "excepting so far as Parliament may by law otherwise provide" and by deleting sub-clause (2) to Section 27 altogether. It also jettisoned the old Explanation 2 to Section 2 (g) of the Bengal Finance (Sales Tax) Act, which had become unworkable, and substituted a new Explanation 2 to Section 2 (g) by the Bengal Finance (Sales Tax) (Amendment) Act, 1959, which reads as follows:-

"A sale shall be deemed to take place in West Bengal if the goods are within West Bengal --

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

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller, whether the assent of the buyer to such appropriation is prior or subsequent to the appropriation:

Provided that where there is a single contract or sale in respect of goods situated in West Bengal as well as in places outside West Bengal, provisions of this Explanation shall apply as if there were a separate contract of sale in respect of the goods situated in West Bengal."

28. This is in short the legislative history of the attempted taxation of inter-State trade and commerce, (with particular reference to West Bengal) which the Constitution sought to prevent but which the State Sales Tax Act tried to grab.

29. Keeping in view the above provisions of the law, I have to consider the arguments advanced by Mr. Meyer in support of the Rule. He contended that the transactions both in cement and in copper ingots and brass and yellow metal sheets took place in course of inter-State trade or commerce because it occasioned movement of goods from State of Bihar to West Bengal and other

places outside Bihar and were not liable to be taxed after September 6, 1955, that is to say, after the protection imposed by Sales-tax Laws Validation Act, 1956 had expired. This argument was sought to be repelled on behalf of the respondents, by the contention that the transactions were not made in course of inter-State trade or commerce, but were really sales in West Bengal within the meaning of the Explanation to Section 2 (g) of the West Bengal Finance (Sales Tax) Act and as such the respondents had a right to tax the sales.

30. In order to evaluate the contending arguments, it is necessary for me to determine what amounts to sale or purchase taking place in course of inter-State trade or commerce. In the case of *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , the Supreme Court did not decide what was exactly meant by inter-State trade or commerce, or by the phrase "in the course of it" because in that case it was the common ground that the sales and purchases made by the appellant company, which were sought to be taxed by the State of Bihar had actually taken place in the course of inter-State trade or commerce. In the same year, however, the Supreme Court gave an illustration of what amounted to transaction in the course of inter-State trade or commerce in the case of *Mohanlal Hargovind Das v. State of Madhya Pradesh*, AIR 1953 SC 786. Bhagawati, J., in delivering the judgment observed:-

"It was in fact admitted by the respondents in their return that the petitioners imported tobacco from the State of Bombay in large quantities. The Bombay suppliers processed tobacco in their godown situated within the State of Bombay and supplied the finished tobacco to the petitioners in Madhya Pradesh. The petitioners imported this finished tobacco into Madhya Pradesh, from these suppliers who were carrying on business in the State of Bombay and there was of necessity, as a result of these transactions, the movement of goods across the border. As a result of these transactions entered into by the petitioners with these suppliers the finished tobacco, which was supplied to the petitioners moved from the State of Bombay to the State of Madhya Pradesh and these transactions were, therefore, in course of the inter-State trade or commerce."

31. The essential characteristic of inter-State trade or commerce, therefore, consists in the movement of goods from one State to another across the border. This characteristic of sale in course of inter-State trade or commerce is also emphasised in the Central Sales Tax Act. Doubt may still arise whether the scope of Article 286(2) and the Explanation to 286(1)(a) of the Constitution overlaps each other. Under the Explanation sales also there may be movement of goods across the border from one State to another, yet then the fictional situs of sale, takes them out of the category of outside sales and converts them into sales within the taxing State, This aspect appears to have been considered in a decision of the Supreme Court, in the case of *India Copper Corporation Ltd. v. State of Bihar*, AIR 1961 SC 347. In the latter case Ayyangar, J., observed :-

"The next question is, does a sale take place "outside" the State, where as a result of the contract of sale, the property in the goods passes to the purchaser

within the State; in other words, is a sale completed by the passing of property within the State not "inside" a State for the mere reason that as a direct result of the sale the goods are delivered outside the State. The answer depends on the meaning to be attributed to the words "a sale or purchase which has taken place outside the State" occurring in the body of Article 286(1). The expression "outside the State" is capable of being understood in more senses than one. It could be understood as comprehending cases where no element or ingredient which constitutes a sale takes place within the State; in other words as applying solely to those cases where there exists no territorial nexus between the State imposing the tax and the sale. Obviously this could not have been intended to be incorporated in Article 286(1) because the tax in such cases would be beyond the legislative power of the State under Entry 54 of the State List read with Article 246 of the Constitution. The expression "outside" has therefore to be understood not at a sale so "outside" as not to have any territorial connection between the State in question and the sale, but in a somewhat narrower sense. The real difficulty arises in ascertaining the precise content of the narrower sense in which the word is used as meaning a sale in substance "outside" the State, though there might be some elements of the sale which if the exemption under Article 286(1)(a) were not enacted, would enable a State to levy a tax on the sale on the ground that it was within the legislative power of the State under Article 246 read with Entry 54.

As already pointed out, the situs of a sale is not easy to determine and several factors which constitute a completed transaction of sale including the delivery of the goods, lay claim to be considered as in themselves constituting sufficient next to justify their being treated as determining the locus of a sale. Thus, merely by way of illustration the place where the goods are at the time of the contract of sale, the place where the contract of sale is concluded, the place where the property in the goods passes and that in which the delivery takes place compete for recognition as constituting the locus of a sale. Before the Constitution, these and other similar factors were treated as affording sufficient territorial connection to endow the State in which any of the events occurred with legislative competence to tax the sale. This led to a multiplicity of the taxation of the same transaction of sale by a plurality of States, with the result that the consumer was hard hit and trade itself, and national economy suffered in the process. It has been pointed out that Article 286(1)(a) was designed to counteract that state of affairs.

If a single State was designed to have the power to tax any particular transaction of sale the question that next falls to be considered is the determination of that State in regard to which it could be predicated that the sale in question was not "outside" that State or in other words, the determination of the particular State in regard to which it could be said that the sale was "inside" that State. The key to the problem is afforded by two indications, in the Article itself: (1) the opening words of Article 280(1) which speak of a sale or purchase taking place and (2) the non-obstante Clause in the Explanation which refers to the general law

relating to "sale of goods under which property in the goods has, by reason of such sale or purchase, passed in another State". These two together indicate that it is the passing of property within the State that is intended to be fastened on, for the purpose of determining, whether the sale in question is "inside" or "outside" the State, and therefore, subject to the operation of the "Explanation" that State in which property passes would be the only State which would have the power to levy a tax on the sale. As was explained in the recent decision of this Court in *Burmah Shell Oil Storage and Distributing Co. of India, Ltd. and Another Vs. The Commercial Tax Officer and Others*, ;

"By sale here (Article 286(1)(a)) is meant a completed transaction by which property in the goods passes. Before the property in (he goods passes, "the contract of sale is only executory" and the buyer has only a chose in action." the Constitution thinks in terms of a completed sale by the passing of property and not in terms of an executory contract for the sale of goods".

Notwithstanding that is not an "outside" sale, the power of the State to tax might be negated by the operation of the Explanation which by its non-obstante Clause shifts the situs of the sale and renders the sale transaction one within the delivery-cum-consumption State, i. e., as the State in which the sale transaction must be deemed to take place. Where the terms of the Explanation are satisfied, the sale transaction will, by a legal fiction created by it, be deemed to take place "inside" the State of delivery and therefore "outside" the State in which the property passes. The conclusion reached therefore is that where the property in the goods passes within a State as a direct result of the sale, the sale transaction is not outside the State for the purpose of Article 286(1)(a), unless the Explanation operates. We need also add that the power of the State to impose the tax might still not be available unless the transaction in question is unaffected by the other bans imposed under Sub-clauses (1) (b) (2) and (3) of Article 286. The submission therefore of learned Counsel for the appellants that in respect of non-Explanation sales the State of Bihar has no power to levy a tax by reason of such sales being "outside" the State within Article 286(1)(a) must be rejected."

32. The position, therefore, is that if the transaction falls within the notional definition of sale as in the Explanation to Article 286(1)(a), it does not fall within Article 283(1)(a) and if the transaction, being an Explanation-sale, is to be deemed to be sale inside the taxing State, there happens to be no sale or purchase in the course of Inter-State trade or commerce.

33. Mr. Nirmal Chandra Chakrabarty, for the respondent, strongly relied on a judgment of the Mysore High Court in *Cement Marketing Co. of India Private Ltd. v. State of Mysore*, (1960) 11 STC 411 (Mys) and contended that regard being had to the nature of the transactions which were sought to be taxed, they did not really fall within Article 236(2) of the Constitution but fell within Article 286(1)(a)

Explanation. In the case above-referred to the assesseees, who were distributors of cement, had a branch office at Mysore and were registered as dealers under the Mysore Sales Tax Act 1948. The assesseees supplied cement to the public and also to the Director General of Supplies and Disposals, Government of India, or to such persons authorised by the said officer for consumption within the State of Mysore. The question was whether the levy of Sales Tax on the transactions by the State of Mysore during the period September 7, 1955 to March 31, 1936 was valid in view of the provision of Article 286 of the Constitution. In respect of supplies of cement to the public it was found that the assesseees accepted the offers from the buyers, collected the sale price from them and directed one of the factories situated outside the State of Mysore, to supply the cement to them. The goods were loaded in the Railway wagons at the Railway sidings of the factory and were despatched to the buyers inside the State. In respect of supplies of cement to the Director-General of Supplies and Disposals it was found that orders were placed with the assesseees in Mysore, who directed one of the factories, outside the State of Mysore, to supply the cement F. O. R., ex-works and that the goods were actually delivered to the Director-General or to his authorised agent within the State of Mysore and the entire quantity of cement so supplied was actually utilised for works in the State of Mysore. Their Lordships of the Mysore High Court held that the transaction relating to the sale of cement both to the public and the supply department were not inter-State transactions, but were sales that took place within the State of Mysore and therefore, liable to be taxed under the Mysore Sales Tax Act 1948. Hombe Gowda, J., (with whom S. R. Das Gupta, C. J., agreed) observed as follows:-

(a) "It is clear from the explanation to Article 286(1)(a) of the Constitution of India and the explanation to Section 27 of the Mysore Sales Tax Act that if actual delivery of goods takes place as a direct result of sale or purchase in the State and that such delivery be for the purpose of consumption within the State, there will be no bar for the State levying sales tax on the transaction. The question for consideration is whether the transaction relating to the sale of cement to the public made by the petitioners subsequent to 7th September 1955, for the period from 7th September, 1955 to 1st April, 1956, can be considered to be sales in the State of Mysore so as to entitle the State of Mysore to levy a tax on them."

(b) "The contention of Sri Srinivasa Iyengar is that in spite of the fact the first petitioners accepted the offer of a buyer, collected the sale price of cement from him and physical delivery of the goods was effected within the State of Mysore, since the cement was supplied from one of the factories of the second petitioners situated outside the State of Mysore, the goods were directly despatched to the purchaser, the transactions are sales in the course of inter-State trade."

(c) "The point whether a delivery to a carrier amounts to a delivery to the purchaser as contemplated in Article 286(1)(a) of the Constitution of India was considered by their Lordships of the Supreme Court in (S) The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . His Lordship Venkatarama

Ayyar, J., in the course of his judgment repelled an argument similar to the one that is advanced before us with the following observations:-

"It was then contended that the sales proposed to be taxed did not take place in Bihar as the goods were actually delivered as contemplated by the explanation not there but in Bengal. The argument is that the words "actual delivery" in the explanation are used in contrast to constructive or symbolic delivery as meaning physical delivery of goods, that u/s 39(1) of the Sale of Goods Act, 1930 (Act III of 1930) the common carrier is the agent of the purchaser, and that therefore, delivery of the goods to the railway authorities in Bengal was actual delivery thereof to the purchaser in Bengal, Section 39(1) is as follows :-

"Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer."

It is difficult to see what there is in this section to support the contention that delivery to a common carrier is actual delivery to the purchaser. The section does not say so. On the other hand, it proceeds - on the assumption that there was, in fact, no delivery to the purchaser, actual or otherwise, a thing deemed to be something only, when as a fact it is not that, and then enacts on that basis a fiction that delivery to a common carrier shall be deemed prima facie to be delivery to the buyer. What is the purpose of this fiction? It is, as will be clear from Section 39(2), to fix on whom the loss is to fall in case the goods are lost or damaged in course of transit. But where no such question arises, the fiction has to be ignored, and the matter will have to be decided on the factual basis whether the goods were actually delivered.

A reference to Section 51(1) of the Sale of Goods Act is very instructive, It runs as follows:-

"Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee."

In this Clause the word "delivery" is used to denote both the delivery of goods by the seller to the common carrier and the delivery to the purchaser by the common carrier. They cannot both be actual deliveries, as goods sold under a sale can actually be delivered only once. If the delivery of the goods to the common carrier was actual delivery, then what is the nature of delivery when the purchaser took possession of the goods from the common carrier? It is also physical delivery of the goods, and is therefore, actual delivery on the appellant's own definition. 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". 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."

(d) "As already stated, it is undisputed that the delivery of cement to the buyers or the purchasers was made within the State of Mysore. I am, therefore, unable, to accept the contention of Sri Srinivasa Iyengar that since the cement was put into the railway wagons at the railway sidings of the factories situated outside the State of Mysore and despatched to the purchasers, the transactions partake the nature of inter-State transactions and, therefore, the State of Mysore has no right to levy any sales tax on such transactions. This is the view that we took in Writ Petn. No. 312 of 1957, *Sree Sitaram and Co. v. State of Mysore*, and I am not persuaded to change it. It may also be mentioned here that the former High Court of Mysore took the same view in *In the matter of the Deputy Commr. of Sales Tax, Bangalore* AIR 1957 Mys 14; I am, therefore, clearly of the opinion that there is no substance in the contention advanced by Sri Srinivasa Iyengar that the several transactions relating to the sale of cement by the first petitioners to the public within the State of Mysore are in the nature of inter-State transactions and cannot, therefore, be subjected to any levy of tax by the respondents."

34. The reliance on the Mysore judgment is not very much helpful to Mr. Chakrabarty. The Mysore case was decided on its particular facts. In the facts and circumstances of this case, it may not be possible to take out all transactions outside Clause (2) of Article 286 and to hold them subject to the mischief of the Explanation to Article 286(1)(a) of the Constitution. Nobody has considered in this case whether each of the transactions fell within the category of Explanation-sales or within the category of inter-State trade or commerce or within the category of sales outside the taxing State. That is a question of fact to be objectively ascertained on evidence and cannot be determined on abstraction of legal principles. The Commercial Tax Officer fell into two patent errors in making the impugned order. His idea that Section 2 (g) of the Bengal Finance (Sales Tax) Act, defining sale, may be taken into account divorced from its connection with Article- 286 of the Constitution and the amendment thereof (which was caused by the interpretation of the Article from time to time made by the Supreme Court) is a somewhat supercilious idea, not to be expected from an officer of responsibility vested with quasi-judicial authority. His further idea that the impact of the decisions of the Supreme Court was not felt or was not to be felt on explanation to Section 2 (g) of the Bengal Finance (Sales Tax) Act is equally erroneous. What sales and purchase are notionally to be taken to be sales inside the State, although in the general sense taking place outside the State, have to be objectively determined by the tests as in the explanation, as further explained by the Supreme Court either in the *The Bengal Immunity Company Limited Vs.*

The State of Bihar and Others, or India Copper Corporation Ltd., case, AIR 1961 SC 347 (Supra). The order of the Commercial Tax Officer lacks in this factual test and in the absence of this foundation of fact the rest of his observations are unhelpful abstraction of legal principles.

35. For the reasons aforesaid, I have to hold that this case has not been correctly decided on correct legal principles. I have therefore, to quash the order of assessment made by Commercial Tax Officer. The case will now go back to the Commercial Tax Officer to be decided in the light of the observations contained in this Judgment. The Commercial Tax Officer shall examine each item of the transactions, claimed by the petitioners to have been made in course of inter-State trade and commerce, and find out for himself whether they fall under Article 286(2) of the Constitution or under the Explanation to Article 286(1)(a) or under the substantive provision of Article 286(1)(a) of the Constitution, If he finds that the sales took place outside the State or in course of inter-State trade or commerce, then he must not rope in the transactions for the purpose of taxation.

36. Let a Writ of Certiorari accordingly issue. This Rule is made absolute to the extent indicated above without any order as to costs.