

(1964) 07 BOM CK 0003

In the Bombay High Court

Case No : Reference Application No's. 21, 22 and 23 of 1962 and Sales Tax
Reference No's. 3, 4 and 8 of 1964

Hirji Kalyanji Wadera

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-07-1964

Acts Referred:

Central Provinces and Berar Sales Tax Act, 1947 — Section 23(7), 27A
Constitution of India, 1950 — Article 286(1), 286(2)

Citation : (1965) 16 STC 502

Hon'ble Judges : Y.S. Tambe, J;N.L. Abhyankar, J

Bench : Division Bench

Advocate : J.M. Thakar, H.M. Thakar, P.D. Thakar, C.J. Thakar and M.S. Gupta,
for the Appellant; S.M. Hajarnavis, Assistant Government Pleader, for the
Respondent

Judgement

Abhyankar, J.—This order will govern the disposal of all the three references made by the Sales Tax Tribunal, Bombay, in respect of the same assessee Shri Hirji Kalyanji, at whose instance identical questions of law have been referred to this Court.

2. The petitioner Hirji Kalyanji does business of supplying and selling bidi leaves to purchasers who were dealers outside the then State of Madhya Pradesh. The petitioner was doing business at Gondia, and the chargeable accounting periods out of which the references arise are :

(1) from 7-11-1953 to 26-10-1954;

(2) from 27-10-1954 to 14-11-1955; and

(3) from 15-11-1955 to 2-11-1956.

3. The references in this order are to paper-books in Sales Tax References Nos. 8 of 1964, 3 of 1964 and 4 of 1964. In Sales Tax Reference No. 8 of 1964 common orders have been passed by the authorities. The Sales Tax Officer, who was the

primary assessing authority, determined the total turnover at Rs. 3,43,475 after having increased the returned turnover by 10 per cent. From this the officer deducted for that year sales to registered dealers and also sales by way of export u/s 27A of the C.P. and Berar Sales Tax Act, 1947. In respect of this latter category of deduction, sales amounting to Rs. 1,20,943 were deducted. For the next chargeable accounting period the Sales Tax Officer determined the sales liable to deduction by way of export amounting to Rs. 2,13,502 and for the last period, the officer determined sales amounting to Rs. 3,18,052 as export sales. Though the words "export sales" have been used by the Sales Tax Officer, in fact the reference is to sales outside the State of Madhya Pradesh, which were claimed as beyond the taxing power of the State on account of the provisions of Article 286(1)(a), read with Explanation to clause (1) of the Constitution.

4. The petitioner was not satisfied with the determination of the taxable turnover and he preferred an appeal which was heard and decided by the Assistant Commissioner of Sales Tax in each case. After the appeals were filed, that officer issued a notice purporting to be under rule 28 of the C.P. and Berar Sales Tax Rules, in Form No. XXV, intimating that the appellate authority intended to pass an order which may adversely affect the assessee. Thus, the position with respect to the proceedings before the first appellate authority was that whereas the assessee claimed total deduction of all sales which were in respect of bidi leaves despatched outside the State of Madhya Pradesh, the appellate authority wanted to enhance the taxable turnover by disallowing the deductions given to the assessee by the Sales Tax Officer in each case. We are not concerned with other contentions raised by the petitioner which now do not survive.

5. The first appellate authority came to the conclusion that the assessee was not entitled to any deduction in respect of sales which were evidenced by despatch of goods outside the State. The deductions made by the Sales Tax Officer were disallowed. The result was that there was a substantial increase in the tax which was assessee on the petitioner. The petitioner filed a second appeal permissible under the Act. The second appellate authority accepted the contention of the petitioner in respect of a portion of sales by way of despatches in which the consignor and the consignee was the assessee himself, but that authority disallowed other sales, refusing to treat them as outside sales.

6. The matter was further agitated in a revision application before the Sales Tax Tribunal, but the Tribunal confirmed the order of the second appellate authority. Being aggrieved by the order of the Tribunal, the assessee moved the Tribunal for reference to the High Court certain questions of law which arose out of the order passed by the Tribunal in revision. The Tribunal therefore has referred the following questions for decision by this Court in exercise of the powers u/s 23(7) of the C.P. and Berar Sales Tax Act, 1947. The questions are :-

"(1) Whether on the facts and circumstances of the case the Tribunal is right in rejecting the contention of the applicant that the first appellate authority had no jurisdiction to consider a point which was not raised by the assessee in his

appeal ?

(2) Whether on the facts and circumstances of the case the Tribunal is justified in law on the ground of absence of prejudice in rejecting the dealer's contention that the first appellate authority was wrong in disallowing the entire deduction in contravention of the terms of the notice that was issued under rule 58 of the C.P. and Berar Sales Tax Rules, 1947 ?

(3) Whether on the facts and circumstances of the case the Tribunal is justified in law in coming to the conclusion that within the meaning of Article 286(1)(a) read with the Explanation (Constitution of India) the goods were not actually delivered outside the State as a direct result of sales for the purposes of consumption in that State ?

(4) Whether on the facts and circumstances of the case and having regard to Article 286(2) (Constitution of India), the Tribunal is justified in law to reject the contention of the dealer that the sales were in the course of inter-State trade or commerce ?"

7. After some discussion the learned counsel appearing for the assessee has stated that he does not want to press for answers to questions Nos. (1), (2) and (4). It is not therefore necessary to decide these questions for answer. The only question therefore that survives for answer by this Court is whether on the facts and circumstances of the case the Tribunal was justified in coming to the conclusion that the goods were not actually delivered outside the State of Madhya Pradesh as a direct result of sales for the purpose of consumption outside the State, and therefore saved within the meaning of Article 286(1)(a) read with Explanation to clause (1) of the Constitution.

8. On this question the Sales Tax Officer in a very brief order observed as follows :

"From the copy of R.R. (railway receipt) it appears that in some of the cases the assessee was consignor and consignee and in some of the cases the purchasing dealer acted as consignor and consignee. The assessee stated that as there was scarcity of wagons in the name of one person he has to obtain indent in the name of the servant and at times in the name of purchasing dealer also. As the purchasing dealers were consignor and consignee and the delivery was given at the godown of the dealer, I estimate about Rs. 1,20,943-2-9 as export and the rest are the transactions liable to tax. Thus the actual claim of export allowed u/s 27A of the Sales Tax Act comes to Rs. 1,20,943-2-9".

9. Similar amounts have been indicated in the case of two previous years.

10. The first appellate authority has not only disallowed the exemptions granted by the Sales Tax Officer in each case but has treated all the goods despatched as outside the Explanation. In other words, that authority has treated all the transactions covered by the despatch as inside the State. In paragraph 3 of its order the first appellate authority has noticed the contention of the assessee that

in all these cases the goods were actually delivered to the purchasers out of the State for the purpose of consumption in the delivery State as a result of sales that took place between the assessee and the purchasing dealers. It rejected this contention on the grounds which can be gathered with some difficulty from the findings in paragraph 4 of the order. That authority has referred to three circumstances from which it has come to the conclusion that the actual delivery did not take place outside the State of Madhya Pradesh. These circumstances are :

(1) That the duplicate bills in support of the sales show that they mention the purchasers' names and show "Haste" purchaser or his agent.

(2) In the case of other bills the purchaser or his agent have signed the bills by way of acknowledgment of the receipt.

(3) One of the conditions printed on the bills states that after the goods left the godown of the assessee the purchasing dealer will be responsible for any losses or damage in transit.

11. From these facts the first appellate authority inferred that the goods were approved either by the purchaser or his agent who must have come to Gondia for the despatch and approved the goods before they were loaded in the wagons. It also observed that in a few cases the railway receipts were handed over to the purchasers or their agents after endorsing them in their favour, but the conclusion to which the learned authority came was that the goods must be held to have been actually delivered to the buyers at the despatching stations, and on this view the first appellate court refused to treat the sales as Explanation sales or sales outside the State.

12. The matter was then taken to the second appellate authority by the assessee. With respect to this contention about the liability of these despatches, the second appellate authority observed as follows :-

"I have gone through the bill books produced by the appellant as well as railway receipts register and it is found that the appellant had despatched goods worth Rs. 57,102-5-0 in his own name. Consequently deduction u/s 27A is allowed in respect of sales worth Rs. 57,102-5-0. The despatches made by the appellant in the names of his servants or relatives or in the names of purchasers are not allowed for exemption u/s 27A as in the case of such despatches, it is held that the goods which were specific and in a deliverable state were appropriated to the contract in the State of Madhya Pradesh and the property in the goods passed to the purchasers in the State of Madhya Pradesh and the sales thereof became complete in the State of Madhya Pradesh, being intra-State sales."

13. With regard to the contention raised before it by the assessee that even in the case of sales where despatches were made in the names of relatives or purchasers the second appellate authority observed as under :-

"..... the essential condition for exemption under Article 286(1)(a) is that the

goods sold should have been actually delivered into the outside State as a direct result of the sales of the vendor who claims the deductions; when the goods are despatched in the names of relatives or purchasers the condition precedent of "direct result of the sale" is violated. The relatives or purchasers are not persons who came into the picture of "direct result of the sale" as it is possible that relatives or purchasers can alter the despatch or the destination according to their will. Accordingly it is held that despatches made in the names of relatives or purchasers or even so-called servants do not qualify for exemption under Article 286(1) as the cases argued by the learned Advocate do not bear on this question."

14. The second appellate authority then referred to the decision of the Madras High Court in *Mohammad Ishok v. State of Madras* [1955] 6 S.T.C. 230 and concluded as follows :-

"It is therefore held that in case of sales of goods when the goods sold were not actually delivered by the appellant to the purchasers in the State in which the goods were intended to be consigned to, question of allowing deduction under Article 286(1)(a) does not arise."

15. The assessee pursued his further remedy by filing a revision application before the Sales Tax Tribunal. The Tribunal seems to have disposed of this important question in an extremely brief manner, when it dealt with it in paragraph 5 of its order. The only observation made by the Tribunal is to the following effect :-

"In the instant cases on the record it cannot be held true that the goods were actually delivered outside the State as a direct result of the sales for the purposes of consumption in that State."

16. As far as we are able to find, no reasons are given for coming to this conclusion.

17. In support of this application the learned counsel for the assessee has urged before us that the following facts must be taken to have been accepted by the authorities which dealt with the case.

(a) That the manner and mode of transactions in respect of despatches where the consignor and the consignee were the same, were identical with the manner and mode of transactions in respect of despatches when the consignment is in the name of either the purchaser or the servant of the dealer.

(b) That the railway receipts were delivered to the purchasers either at Gondia or sent by post to the purchasers.

(c) That the conclusion that actual delivery was given within the State of Madhya Pradesh is drawn by inference and as a matter of construction in law and not as a result of finding of facts so far as the first and the second appellate authorities are concerned.

18. The assessee's contention therefore is that the view which found favour with the Sales Tax Authorities that the requirements of the Explanation to Article 286(1)(a) of the Constitution for bringing a sale into the category of an inside sale are satisfied the moment it is shown either that there was transfer of property in goods or there was notional delivery to the carrier by endorsing or delivery of the railway receipts, is erroneous, and that unless it was established as a fact that goods were actually delivered in the sense of physically being handed over to the purchasers within the State of Madhya Pradesh as it then was, the sales would not come within the mischief of the Act. Strong reliance is placed for this proposition on a recent decision of their Lordships of the Supreme Court in *Bajarang Jute Mills Ltd. v. State of Andhra Pradesh* [1964] 15 S.T.C. 430. The following placitum in the report summarises the decision :-

"To attract the Explanation to Article 286(1)(a), the goods have to be actually delivered as a direct result of the sale for the purpose of consumption in the State in which they are delivered ... But the expression "actually delivered" in the context in which it occurs can only mean physical delivery of the goods, or such action as puts the goods in the possession of the purchaser; it does not contemplate mere symbolical or notional delivery, e.g., by entrusting the goods to a common carrier, or even delivery of documents of title like railway receipts."

19. The facts leading to that decision show that *Bajarang Jute Mills* were engaged in the manufacture of jute goods and had their factory in the State of Andhra. For securing regular supply of jute bags for its factories for the bagging of cement, the Associated Cement Company entered into a contract with the mills. As and when jute bags were needed, the company issued despatch instructions calling upon the mills to send jute bags by railway to the factories outside the State of Andhra. Pursuant to these instructions the mills obtained the railway receipts in the name of the company, and against payment of price delivered the railway receipts to the agent of the company within the State of Andhra. On these facts the High Court of Andhra held that as the railway receipts were delivered to the agent of the buyer within the State of Andhra and the price was also realized from the agent within the State, the goods must be deemed to have been delivered to the buyer within the State, and the appellant (the mills) was liable to pay sales tax to the State on the price of the goods. Reversing this decision it was held in the Supreme Court that as the goods were sent under railway receipts to places outside the State of Andhra and actually delivered outside for the purpose of consumption in those States, the State of Andhra had no authority to levy tax in respect of such sale transactions.

20. The learned counsel for the assessee draws analogy from the facts of the case which went to the Supreme Court and applies it to the case of the assessee. According to the learned counsel, even assuming that some of the railway receipts were handed over to the purchasers at Gondia or that they were endorsed, it has been found by the second appellate authority, which was a final court of fact, that all despatches were made at the instance of the dealer. In

other words, that finding involves a conclusion that the goods were never delivered in the physical sense to the purchaser within the State of Madhya Pradesh, the despatch work having been undertaken and executed by the assessee. The assessee had produced bills showing expenses in respect of the despatches of leaves, whether the consignment was obtained in the name of the dealer or in the name of the purchaser or his servant. It is therefore claimed that in the absence of clear finding by any of the authorities such as the first appellate authority or the second appellate authority, which were authorities to come to decisions of facts, there was no material before the Sales Tax Tribunal to come to the conclusion that the actual delivery had not taken place outside the State of Madhya Pradesh as it then was. In our opinion, this contention is well-founded and must be accepted.

21. It will be seen that the Sales Tax Officer no doubt found that delivery was given at the godown in respect of some of the goods. There is a clear averment to that effect in the order of the Sales Tax Officer, but this finding was attacked in the first appeal as well as in the second appeal, and neither of these two appellate authorities has found as a fact that any of the goods were actually delivered to the purchasers either at Gondia or at any other despatching stations. The only conclusion to which the first appellate authority came was that there was appropriation of goods and the property in goods must have passed to the purchaser inside the State of Madhya Pradesh. On that footing that authority drew the conclusion that the goods must therefore be held to have been actually delivered to the buyers at the despatching stations. Similarly, the second appellate authority came to the same conclusion on the ground that specific goods in a deliverable state were appropriated to the contract when the goods were within the State of Madhya Pradesh and the property in goods passed to the purchaser in the State of Madhya Pradesh and therefore the sale became complete as soon as such appropriation was made. Unfortunately, the Tribunal has not applied its mind to this aspect of the case and has merely made an ipse dixit stating that it could not be held true that the goods were actually delivered outside the State as a direct result of the sale for the purposes of consumption outside the State.

22. We have therefore come to the conclusion that there was no material or evidence on record for any of the authorities to come to the conclusion that the goods were actually delivered within the State of Madhya Pradesh in respect of any of the transactions covered by the despatches whether the consignment was in the name of the dealer or the purchaser or any of the servants of the dealer or the purchaser. If the goods were not actually delivered within the State and the actual delivery was outside the State for the purpose of consumption outside the State, it is difficult to hold that such sales are excluded from the category of Explanation sales or such sales are not sales outside the State.

23. The learned counsel appearing for the department, however, contended that it was not enough for the assessee to show that actual delivery had not taken

place within the State. It had further to be shown that wherever delivery was taken, it was for the purpose of consumption in that State or in that area. In our opinion, the department is not entitled to raise any such contention, firstly because no such contention was raised, no facts have been found and no such question has been agitated or referred to us. The only question that has been referred to us is whether on the facts and circumstances of the case it could be held in law that the goods were not actually delivered outside the State as a result of sales for the purpose of consumption in that State. It does not seem to have been doubted or disputed at any stage of the proceedings that, whether delivery was inside the State or outside the State, the sale was for the purpose of consumption outside the State. We are not therefore called upon to decide the question now being raised by the department in the manner indicated above.

24. We have therefore come to the conclusion that the answer to question No. (3), which was the only question that required to be answered, is in the negative. The answer is that there was no justification in law for the Tribunal to come to the conclusion that the goods were not actually delivered outside the State as a direct result of sale for the purpose of consumption in that State within the meaning of Article 286(1)(a) of the Constitution.

25. As the assessee succeeds, we order that the department shall pay the costs of the assessee. The assessee will be entitled to the refund of the deposit in all the three cases before the Tribunal. Only one set of costs.

26. Reference answered accordingly.