
(1958) 04 MAD CK 0008
In the Madras High Court

India Coffee and Tea Distributing Company, Ltd.	APPELLANT
Vs	
The State of Madras by Collector of Madras	RESPONDENT

Date of Decision : 04-04-1958

Acts Referred:

Madras General Sales Tax Act, 1939 — Section 2(b)

Citation : (1960) 1 MLJ 311

Hon'ble Judges : Ramachandra Iyer, J; Ramachandra Aiyar, J

Bench : Division Bench

Judgement

Ramachandra Iyer, J.—The plaintiff M/s. Indian Coffee and Tea Distributing Company Ltd., has filed these appeals against the Judgment of

Ramaswami, J., in two suits, C.S. Nos. 51 and 163 of 1951. The appellant is a company registered under the Indian Companies Act with its head

office at Bombay carrying on business at Madras. The main business of the Company is stated to consist of the sale of tea and rubber in India and

outside on behalf of resident and non-resident principals. In respect of tea and rubber sold by the company during 1947-48 as commission agents

the Deputy Commercial Tax Officer, Mannady, Madras, assessed the turnover at Rs. 43,03,171-15-6. Rs. 22,14,764-11-8 of the turnover

represented the price of the goods sold on behalf of the resident principals and the balance Rs. 20,88,407-3-10 represented sales on behalf of

foreign principals. Out of this Rs. 19,68,064-11-7 represented the price of goods exported outside India. The Deputy Commercial Tax Officer

assessed the plaintiff to sales-tax on the entire sum of Rs. 43,03,171-15-6. The company preferred an appeal against this order of assessment to

the Commercial Tax Officer, North Madras. The appellate authority validated the licence in favour of the plaintiffs as agent of known principals

and in consequence exempted that portion of the turnover which represented the value of the goods sold on behalf of the resident principals,

confirmed the original assessment in regard to the balance of Rs. 20,88,407-3-10 and levied a tax of Rs. 21,207-6--2. The Company contested

the correctness of this order in a revision petition to the Board of Revenue but the attempt was not successful. C.S. No. 51 of 1951 out of which

O.S.A. No. 29 of 1955 arises was filed by the appellant against the State of Madras represented by the Collector of Madras for a declaration that

the assessment made by the Commercial Tax Officer was illegal and void. For the year 1948-49, the Deputy Commercial Tax Officer Mannady

Division, Madras, assessed the appellant to sales-tax on a turnover of Rs. 36,69,741-3-3. The plaintiff preferred an appeal to the Commercial Tax

Officer, North Madras, against this order of assessment. The appellate authority reduced the tax by Rs. 700 but otherwise confirmed the order of

assessment. In an application for a revision of the order, the Board of Revenue exempted the sales effected on behalf of the resident principals by

validating the licence retrospectively on payment of penalty, and the assessment in pursuance of the order of the Board of Revenue was ultimately

made by the Deputy Commercial Tax Officer on a turnover of Rs. 21,40,743-0-0 at Rs. 33,449-1-9. For the year 1949-50 the Deputy

Commercial Tax Officer determined the turnover of the plaintiff at Rs. 2,96,750-15-6. On appeal to the Commercial Tax Officer the sales on

behalf of the resident principals were exempted by validating the licence retrospectively on payment of the penalty and the turnover was reduced to

Rs. 25,470-12-0 and a tax on Rs. 397-15-6 was levied. That assessment was also confirmed by the Board of Revenue. The Company filed C.S.

No. 163 of 1951 out of which O.S.A. No. 30 of 1955 arises for a declaration that the assessment for the years 1948-49 were illegal and void.

The case of the plaintiff was that they were only acting as commission agents for certain principals and they could not be deemed to be and

assessed as dealers, that the sales did not take place within the State of Madras and that the turnover in respect of tea and rubber could not be

assessed as they were agricultural produce and further as the tea that was exported was grown by their principals in their estates they were exempt

from taxation. The State of Madras filed written-statements in the two suits contesting the plaintiff's claim and pleading that the appellant was a

dealer within the meaning of Section 2(b) of the Madras General Sales Tax Act, 1939, that the sales took place at Madras and that the Company were not entitled to the exclusion of sales of tea and rubber as agricultural produce or to an exemption in regard to sales of tea to foreign buyers as those commodities were grown in the estates of non-resident foreign principals. Issues were settled on the pleadings between the parties but no evidence was let in beyond filing the relevant assessment orders and notices that passed between the parties. Ramaswami, J., held that the plaintiffs were dealers within the meaning of the Act though they were only commission agents, that the sales to foreign buyers took place at Madras, that though tea and rubber were agricultural produce the plaintiffs would not be entitled to the exclusion of their sales from the computation of the turnover as the principal for whom the appellant was acting was non-resident foreigner. The learned Judge also held that the tea and rubber were produced outside the State of Madras. On those findings the two suits were dismissed with costs. The plaintiffs have filed the appeals against the judgments.

2. Mr. G.R. Jagadeesan, appearing for the appellant, did not contest the assessment for the year 1949-50 but confined his argument only in regard to assessment for the year 1947-48 and 1948-49. Substantially the contention on behalf of the appellant centered on two grounds of exemption, viz., (1) u/s 2(i) which exempts sale of agricultural produce and (2) u/s 5(v) which exempts sale of tea intended for and delivered outside the State of Madras. On behalf of the State both these claims were contested on the ground that both tea and rubber were not grown by the assessee but only by his non-resident foreign principal.

3. u/s 3(i) of the Madras General Sales Tax Act, 1939, every dealer is to pay a tax for each year on his total turnover. Section 2(i) defines turnover as the aggregate amount for which goods are bought or sold provided that the proceeds of sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest shall be excluded from his turnover. The learned Judge after considering the several authorities on the subject held that tea and rubber would be agricultural produce. But by reason of an amendment to the Act introduced by Act XXV of 1947 tea was excluded from the definition of

agricultural produce in Section 2(a). This amendment came into force on 1st January, 1948. The learned Government Pleader conceded that rubber would be an agricultural produce. But the right to have the sales of rubber and of tea, prior to 1st January, 1948 exempted, is contested on behalf of the Government on the ground, that the appellant was assessed as a dealer, that rubber and tea were grown not in its estate but in the State of its non-resident principal and that therefore the appellant would not be entitled to the exclusion of the sales in the assessment of the turnover. The same objection is taken in regard to the claim for exemption from assessment made by the appellant u/s 5(v) of the Act. Section 5(v) of the Act was repealed by Act I of 1957 but it was in force during all the years of assessments concerned in the two appeals. The provision of that Sub-section was as follows:

The sale of tea grown by the seller or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise shall be exempt from taxation u/s 3, Sub-section (1) if the sale is for delivery outside the State and delivery is actually so made.

The case for the appellant is that as the sales of tea were for export outside the State it would be entitled to the exemption granted by Section 5(v)

even though the tea was grown by and on the estates of its non-resident principal. To enable the appellant to get the benefit of the exemption two

conditions must be satisfied : (1) that the tea should have been grown by and on the land in which the seller had one of the interests specified in the

Sub-section. (2) The sale should be intended for delivery outside the State and delivery should actually be so made. The former condition is

practically the same as the one relevant u/s 2(i). Two questions therefore arise for determination in the appeals viz., whether the appellant, a

commission agent, would be entitled to the exemption contemplated by Section 2(i) and Section 5(v) of the Madras General Sales Tax Act in

respect of the sales of goods which were grown in the estate of and by its non-resident principal; (2) whether the sales sought to be assessed were

for delivery outside the State and delivery was actually so made.

4. Before considering the two questions set out above it is necessary to refer to one matter which the learned Judge decided against the appellants.

The learned Judge held that the land on which tea was grown was outside the

State. We are not able to ascertain from the record as to how this question arose. The claim of the appellant was not resisted by the respondent on this basis. There was no plea, issue or even evidence that the lands on which tea was grown were outside the State of Madras. In all the assessment proceedings it was assumed that the lands were within the State. We should, therefore, proceed on the basis that for the purpose of these appeals the tea and rubber were grown on lands situate in the Madras State.

5. Taking up the first question, the contention on behalf of the State was that a commission agent was a dealer and to enable him to obtain the exemptions u/s 2(i) and Section 5(v) the land on which the rubber and tea were grown should belong to him and that it would not be sufficient if they are grown on the lands of his principal. The learned Judge held that the exemptions could be claimed only by resident estate owners and that even if such exemption could be claimed by the non-resident principal it could not be claimed by his commission agent. For a due appreciation of the controversy it is necessary to determine the position of a commission agent in the scheme of the Act. He would be a dealer within the definition in Section 2(b) and would be liable to assessment by virtue of Section 3(i). Section 8 provides that if a commission agent obtains a licence under the section, he could exclude from his turnover all sales specified in his accounts on behalf of known principals that are carried out in accordance with the terms of his licence. This however, was subject to certain provisions one of them being that the amounts of sales in respect of such transactions should be included in the turnover of the principals except when they are covered by exemptions granted under the Act. In the case of a foreign principal referred to in the Act as a non-resident, these provisions are modified to a certain extent by Section 14-A of the Act which runs as follows:

In the case of any person carrying on the business of buying or selling goods in the State but residing outside it (hereinafter in this section referred as a non-resident) the provisions of this Act shall apply subject to the following modifications and additions namely:

(i) in respect of the business of the non-resident, his agent residing in the State shall be deemed to be the dealer.

(ii) The agent of a non-resident shall be assessed to tax or taxes under this Act at the rate or rates leviable thereunder in respect of the business of

such non-resident in which the agent is concerned irrespective of the amount of the turnover of such business being less than the minimum specified

in Section 3, Sub-section (3).

(iii) without prejudice to his other rights, any agent of a non-resident who is assessed under this Act in respect of the business of such non-resident

may retain out of any moneys payable to the non-resident by the agent, a sum equal to the amount of the tax or taxes assessed on or paid by the

agent.

(iv) Where no tax would have been payable by the non-resident in respect of his business in the State by reason of the turnover thereof being less

than the minimum specified in Section 3, Sub-section (3) he shall be entitled to have the amount of tax or taxes paid by his agent, refunded to him

on application made to the assessing authority concerned or where more than one such authority is concerned,, to such one of the authorities as

may be authorised in this behalf by the State Government by general or special order.

(v) such application shall be made within twelve months from the end of the year in which payment was made by or on behalf of the non-resident

of the tax or taxes or any part thereof.

It is clear from the provisions of this Section that it is really the non-resident principal that is assessed to tax and the agent is deemed to be a dealer

in respect of his business as a convenient representative for assessment, levy and collection of the tax. The assessment is with reference to the sales

on the principal's account and the rates of tax are those applicable to him. The agent is given a statutory right to retain out of monies of the

principal in his hands a sum equal to the tax assessed or paid. u/s 14-A(ii) the agent is made liable to pay the tax irrespective of the fact whether

the amount of turnover of the business was less than the minimum specified in Section 3(3) or not. In case the turnover happens to be less than the

minimum specified in Section 3(3) the principal is given a right to obtain a refund u/s 14-A(iv).The reason for (the rule) excluding the provisions of

exemption u/s 3(3) while assessing the agent appears to be that it might happen that the non-resident principal would be employing more than one

agent and if the agents were allowed to take advantage of the provision as to minimum turnover in Section 3(3) the principal would be able to evade taxation by entrusting his sales to several agents each to the limit of a minimum turnover. This aspect of the matter is referred to in an unreported judgment of this Court in T.R.C. Nos. 38 to 40 of 1955 which held that Sub-section (ii) of Section 14-A has been designed to counteract this possibility. This is consistent only with the principal and not the agent being liable to pay the tax. In the case of a resident known principal Section 8 provides conditions for directly assessing him; in the case of a non-resident principal doing business in the State, a machinery within the State is necessary for assessment and the agent is deemed to be the dealer. But the tax is levied on the principal's business. The assessment and the levy of tax being thus on the principal it is clear on principle he should be enabled to obtain all those exemptions that he would be entitled to obtain had he been resident in the State. Ramaswami, J., was inclined to take the view that Section 14-A(iv) should be read so as to enable the principal to obtain a refund even in cases not covered by Section 14-A(ii) and there being thus a provision for refund Section 14-A by implication disentitled the agent from getting any exemption, it being left to the principal to obtain a refund of the tax paid. We regret we are unable to agree. Section 14-A(ii) deals only with the case of assessment of the agent without regard to the minimum turnover provided for in Section 3(3) and Section 14-A(iv) enables the principal to apply for and obtain refund only in such a case. The matters dealt with u/s 2(i) and Section 5(v) relate to other exemptions from taxation and in the absence of a provision like Section 14-A(ii) in regard to such exemptions there is no scope for assessment in respect of agricultural produce or tea intended for and exported to another State. There is nothing in Section 14-A or in any other provision of the Act to tax the exempted goods in the hands of the agent leaving it to the principal to obtain refund. In the decision in T.R.C. Nos. 38 to 40 of 1955 to which reference has been made already the learned Judges held that there is no provisions anywhere in the Act or in the Rules by which the non-resident principal might be entitled to obtain a refund of the amounts covered by the exemption under the definition of "turnover in Section 2(i) but collected from the agent. In that case the question arose whether a commission agent who acted for a non-resident principal

could claim on behalf of his principal exemption from paying tax on business in respect of an agricultural produce sold by the agent but which was

grown by the principal on his land, and the learned Judges held that he could. Referring to-Section 14-A the learned Judges observed:

In our opinion this is a clear indication that though for the purpose of the machinery of collection the resident agent is treated as an assessee the

person whose tax liability is really sought to be reached is the non-resident principal and that is the entire ratio of the right to refund granted by

Sub-section (iv). This aspect is emphasised by the provision in Sub-section (iii) by which the resident agent is entitled statutorily to retain out of the

monies of his principal the amount which he paid by way of tax. These features, in our opinion, ought to be taken into account in construing the

scope of the fiction created by Sub-section (i) by which the resident agent is treated as a dealer. If it is really a vicarious liability that is fastened on

the resident agent the person who really and ultimately has to pay the tax being the non-resident principal it would be clear that the turnover in the

hands of the agent who is by statutory fiction deemed to be the dealer, cannot be held to include what is statutorily exempted from the computation

of that turnover. The turnover of the agent dealer is the aggregate of the prices realised by the sales of the commodities belonging to the principal.

This agent might be acting for several principals. He is deemed to be "as many dealers" as there are "non-resident principals" for whom he is

dealing. If, therefore, there is an exemption attaching to the goods of one or more of these principals whose sale is included in that turnover it

stands to reason that that exemption would be attracted to the sale of such goods by this agent for really it is the principal's goods that he sells and

it is the sale of those goods that occasions the tax liability.

The learned Judges held that the absence of any provision like Section 14-A(iv) in regard to the assessment of the turnover of an agent is indicative

that the exclusion was intended to be operative even in the first instance while the tax liability of the agent was being ascertained. We entirely agree

with the reasoning and conclusion of the learned Judges. Section 14-A not having provided for a refund in cases other than that dealt with under

Sub-section (iv) of the Section cannot be used to imply a right in the taxing authority to tax the whole of the sales regardless of the exemptions.

We, therefore, hold that the appellant would be entitled to the exemptions u/s 2(i) in regard to the sale of rubber during the period of assessment

and of tea till 1st January, 1948.

6. The second question relates only to the exemption claimed u/s 5(v). In that case the appellant should prove further that the sale of tea was for

delivery outside the State and that the delivery was actually made outside the State. Although the appellant pleaded that he was entitled to the

exemption u/s 5(v) no evidence was let in in regard to the place of delivery. The learned Judge found, a finding which is not challenged by the

learned advocate for the appellant, that the property in the goods passed to the buyer at Madras. The place where property in the goods passed to

the buyer need not necessarily be the place of delivery. The place of delivery is regulated by agreement between the parties. Benjamin in his book

on Sales stated at page 685:

There is no branch of law of sale more confusing than that of delivery. The word is unfortunately used in very different sense and these should be

borne in mind. The word delivery is sometimes used with reference to the passing of the property in the chattel; sometimes to the change of its

possession. In a word it is used in turn to denote transfer of title or transfer of possession.

The learned author then proceeds to point out how even in regard to possession it is employed at the stage of the formation of the contract and at

the time of performance and how that possession during performance of the contract may be constructive or actual. One of the points for

determination in this connection is as to what is meant by actual delivery in Section 5(v). One view is that actual delivery is physical or manual

delivery of the goods. The other view which is contended for by the respondent is that words "actual delivery" in Section 5(v) are used as contra-

distinguished from the intention to deliver and should include symbolical delivery. The learned Government Pleader, therefore, argued that on the

finding of the learned Judge there was a transfer of the bill of lading at Madras which should be deemed to be transfer of the goods at Madras. Re

relied in this connection upon a decision in *Wrighton v. McArthur and Hutchinsons Ltd.* L.R. (1921) K.B. 807. In that case the defendant

company, in order to secure the plaintiff against loss set aside certain specified

goods in two rooms in the defendant's premises which were locked up and the keys were handed over to the plaintiff, no other goods being in those rooms. It was held that possession of the goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up notwithstanding that those two rooms were on the defendant's premises. That case merely held that possession could be given symbolically and is of no assistance to show that when a statute expressly requires delivery of actual possession symbolical possession would be sufficient. The decision reported in *A.M. Mohammed Ishok Vs. The State of Madras*, , was next relied on. That case was concerned with the interpretation of Article 286 of the Constitution under which a sale shall be deemed to have taken place in the State in which the goods were actually delivered as a result of such sale for purposes of consumption in that State notwithstanding the general law relating to the passing of property in the goods. There was a contract for the sale of oil which was to be filled in drums supplied by the foreign buyer. The goods were delivered to the carrier within the State of Madras with railway receipts in the name of the buyers as consignees. Though ultimately the goods were sent to Cochin State the passing of the property in the goods was complete within the State of Madras. The learned Judges held that actual delivery of the goods to the buyer was within the State of Madras and the consumption in the Cochin State cannot imply a second delivery there and that therefore the sales were liable to tax. In this case the goods were actually delivered within the State of Madras and we are not able to appreciate how it can advance the case of the respondent. It has been said that a C.I.F. contract is an agreement for the sale of goods to be performed by the delivery of documents and not a mere sale of documents. The law as to passing of property in the goods by indorsement of a bill of lading has been stated in *Sanders v. Maclean* L.R. (1883) 2 Q.B. 327 , by Bowen, L.J., as follows:

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law-merchant is universally recognised as its symbol and this indorsement and delivery of the bill of lading operates as symbolical delivery of the cargo. Property in the goods passes by such indorsement and

delivery of the bill of lading whenever it is the intention of the parties that the property should pass just as under similar circumstances the property would pass by an actual delivery of the goods, and for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof the bill of lading until complete delivery of the cargo has been made on shore to someone rightfully claiming under it remains in force as a symbol and carries with it not only the full ownership of the goods but also all rights created by the contract of carriage between the shipper and the ship-owner. It is a key in the hands of rightful owner intended to unlock the door of the warehouse floating or fixed in which the goods may chance to be.

These observations merely indicate how delivery can be effected in a C.I.F. contract. Whether all the contracts were C.I.F. contracts and what

kind of delivery was intended or given would depend on the evidence in regard to the transactions. The question may have also to be decided after

taking evidence whether in the interpretation of Section 5(v) in relation to a C.I.F. or F.O.B. contract actual delivery means actual delivery of the

bill of lading. The distinction between constructive and actual delivery has been adverted to in the dissenting judgment of Venkatarama Aiyer, J., in

Bengal Immunity Co. v. State of Bihar (1955) 2 M.L.J. 168 : (1955) S.C.J. 672 who observed at page 285 as follows:

The fact is that while for some purposes delivery to the common carrier is treated as delivery to the purchaser, there is delivery in fact and in its

popular sense, only when the purchaser obtains possession of the goods and it is this that is connoted by the words "actual delivery". When

Section 51(1)(Sale of Goods Act) refers to delivery to the 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. It must accordingly be

held that the expression ""actual delivery"" in the Explanation to Article 286(a) means delivery of the goods to the purchaser or his agent and delivery

to the common carrier is not actual delivery.

The importance of this question does not appear to have been realised when the

case was presented at trial. The contracts have not been produced and no evidence was tendered as to in whose name was the bill of lading taken and as to whether the Banker at Madras was the agent of the buyer or seller. The learned Judge has stated in his judgment that goods ""were shipped F.O.B. Cochin and C.I.F. Foreign Ports"" and that the goods were deliverable in foreign countries. Having regard to the large number of transactions all of which may not be of the same pattern, evidence of a more specific kind with particular reference to the place where the goods were delivered would be necessary before the claim for exemption can be satisfactorily adjudicated. Two questions may arise : (1) what was the kind of delivery contemplated and effected by the parties and this will depend to a large extent on the nature of the contract between the parties; (2) in view of the fact that Section 5(v) contemplates actual delivery questions may arise whether in F.O.B. and C.I.F. contracts a delivery of the bill of lading would amount to actual delivery and where in point of fact was the delivery intended. In the absence of further evidence it is not possible to decide as to whether delivery was intended and where it was actually made and what exactly was the kind of delivery that was bargained for. None of the parties appear to have realised at the time of trial the necessity for the evidence on these matters. The burden of proof is no doubt on the appellant and but for the fact that the entire case proceeded on the footing that the only relevant consideration was the place of passing of property, we would have been reluctant to give a further opportunity to the appellant to let in evidence on the question of delivery. In the circumstances of this case we consider that in the interests of justice an opportunity should be given to the parties to let in evidence on the question as to whether the appellant has made out a case for exemption u/s 5(v) of the Madras General Sales Tax Act. The appellant's right to exemption in regard to sales of tea prior to 1st January, 1948 and of rubber during 1947-48 and 1948-49 is declared and his claim in respect of the assessment for the year 1950-51 is dismissed. The suits will be remanded to the Original Side for fresh disposal in the light of the above observations. There will be no order as to costs.