

(1976) 02 CAL CK 0021
In the Calcutta High Court
Case No : Civil Rule No. 817 (W) of 1970

Indra Narayan Laik and Another	Vs	APPELLANT
Commercial Tax Officer and Others		RESPONDENT

Date of Decision : 19-02-1976

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1977) 40 STC 230

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Nani Coomar Chakraborty, Samarendra Kumar Dutta and Tarak Nath Banerjee, for the Appellant; Samarendra Nath Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—This is an application under Article 226 of the Constitution challenging an order passed u/s 17 of the Bengal Finance (Sales Tax) Act, 1941. The impugned order was passed on 4th May, 1968. The petitioners also challenge a notice of assessment dated 17th June, 1969, fixing a date and time for producing evidence for assessment under the Bengal Finance (Sales Tax) Act, 1941. It is the case of the petitioners that at all material times the petitioners used to carry on business as owners of Bhagran Colliery at village Bhagran, P. S. Salanpur, District Burdwan, along with two others, namely, Narayan Chandra Laik, since deceased and Sujit Kumar Laik. On 29th March, 1963, petitioner No. 1 and the deceased, Narayan Chandra Laik, father of petitioner No. 2, obtained registration certificate under the Bengal Finance (Sales Tax) Act, 1941, from the Commercial Tax Officer, Asansol Charge. On 6th April, 1968, the aforesaid Ajit Kumar Laik and Sujit Kumar Laik retired from the said business with effect from 1st April, 1968 and respondent No. 1 by his order dated 29th April, 1968, accepted petitioner No. 1 and the deceased, Narayan Chandra Laik, as owners liable under the Act. It is the case of the petitioners that by a memorandum of agreement dated 31st October, 1967, petitioner No. 1 and

the deceased, Narayan Chandra Laik along with the aforesaid Ajit Kumar Laik and Sujit Kumar Laik transferred their said business in Bhagran Colliery with effect from 16th October. The first contention of the petitioners relates to the claim arising out of the agreement dated 31st October, 1967. It was contended before the Commercial Tax Officer that in view of the said agreement respondents Nos. 3 and 4 were the transferees of the business and, as such, liable to be proceeded against under the provisions of the Bengal Finance (Sales Tax) Act, 1941. The impugned order dated 4th May, 1968, negatived that contention. The petitioners challenge the propriety of that order. Section 17 of the Bengal Finance (Sales Tax) Act, 1941, provides that where the ownership of the business of a registered dealer is transferred absolutely by sale, gift, bequest, inheritance or otherwise, or transferred by way of lease and the transferee carries on business either in its old name or in another name, the transferee shall be deemed to be the owner of the business and the registration should be deemed to be made in favour of the transferee. Therefore, in order to attract the provisions of Section 17 it is necessary that the ownership of the business of the registered dealer is transferred absolutely. The question in this case is whether by the document of 31st October, 1967, there was transfer of the ownership of the business of the registered dealer absolutely. The said agreement described the petitioners and/or the predecessor-in-interest as the principals and respondents Nos. 3 and 4 as the managing contractors. The recital of the said agreement, inter alia, provided as follows :

And whereas the principals considered and deemed it expedient for the benefit of the principals to appoint managing contractors for purpose of proper and official management thereof; And whereas the managing contractors abovenamed have taken over the business of managing contractors as a going concern from the principals with effect from 16th day of October, 1967 ; And whereas to avoid any future difficulty and dispute it has been agreed that a formal agreement embodying the terms and conditions of appointment of the managing contractors be put into writing by and between the parties.

2. The said agreement was for ten years and stipulated the rights and the obligations of the parties. The said agreement, inter alia, provided by Clause 39 as follows :

39. That by this document no interest in coal land or colliery is being transferred to the managing contractor but he is only a managing contractor for which he is entitled to do all works of the colliery for and on behalf of the principals.

3. Considering the aforesaid agreement the Commercial Tax Officer in the impugned order has come to the conclusion that no interest in coal land or colliery has been transferred to the managing contractors who were only entitled to and authorised to do all the works of the colliery to and on behalf of the principals. Therefore, the ownership of the business was not transferred by the aforesaid document. In that view of the matter, I am unable to accept that the Commercial Tax Officer committed any error of law in passing the impugned

order dated 4th May, 1968. Counsel for the revenue further contended that, in any event, even if there was a transfer, the transferor would still remain liable and he relied on the decision of this court in the case of Kshitish Chandra Sarbajna Vs. The State of West Bengal and Others, . In the view that I have taken on the question whether there was a transfer in terms of Section 17 of the Act it is not necessary for me to examine the question from this aspect any more.

4. The next ground of challenge relates to the notice dated 17th June, 1969, asking the petitioners to appear at the assessment with relevant evidence. The petitioners contend that in view of the provisions of the Colliery Control Order, 1945, there was no contract of sale between the parties. Therefore, Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941, could not be attracted in respect of the transactions that the petitioners had during the relevant period and, as such, the petitioners were not liable to be taxed. The petitioners contend that in respect of all the transactions involved in the notice, the transactions were done in pursuance of the direction of the Coal Commissioner. In this connection my attention was drawn to Clause 12E of the Colliery Control Order, 1945, issued under the Defence of India Rules. The said clause reads as follows :

12E. No person shall acquire or purchase or agree to acquire or purchase any coal from a colliery and no colliery owner or his agent shall despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government.

5. The question, therefore, is whether transactions entered into in respect of the commodities under the Control Orders like the Colliery Control Order, 1945, could be said to be transactions in the nature of sale and, as such, liable to sales tax under the provisions of the relevant sales tax law. In order to be a sale u/s 2(g) of the Bengal Finance (Sales Tax) Act, 1941, there must be a transfer of property in goods on cash or deferred payment or other valuable consideration. This question has come up for consideration in several cases. In the case of North Adjai Coal Co. (P) Ltd. Vs. Commercial Tax Officer and Others, , this question had cropped up and at page 631 of the Reports (pages 519-520 of 17 S.T.C.), the court had to consider Clause 12E of the Colliery Control Order, 1945. The Division Bench of this Court held that the supply of coal by the appellant to the Government of East Pakistan could not be regarded as a sale having regard to the terms of Clause 12E of the Colliery Control Order, 1945. It was further held that the supply of coal was not made pursuant to a contract between the parties but was made under the authority and on the conditions specified by the Central Government as contemplated by Clause 12E of the Colliery Control Order, 1945. Therefore, the transaction could not be regarded as a sale at all as defined in Section 2(g) of the Act and not being a sale under the Act, the transaction could not be taxed under the provisions of the sales tax law. This decision of the Division Bench was taken up in appeal to the Supreme Court. The decision of the Supreme Court is reported in State of West Bengal Vs. North Adjai Coal Co.

Ltd., . The Supreme Court upheld the decision of the Calcutta High Court on the question that the proceeds were exempt from liability to sales tax u/s 5(2)(a)(v) of the Bengal Finance (Sales Tax) Act, 1941, in respect of supply of coal. The Supreme Court held that the sale, if any, in this case, was by virtue of Section 5(2)(a)(v) and, as such, exempt from liability to sales tax as it was a sale in the course of export. Whether in fact there was a sale in view of the provisions of Clause 12E of the Colliery Control Order, 1945, was not raised or canvassed before the Supreme Court. In the case of New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, , the Supreme Court had to consider certain transactions entered into pursuant to the directions issued by the Sugar Controller of India in exercise of authority under the Sugar and Sugar Products Control Order, 1946, despatching sugar to Madras Province. The Supreme Court held that the transactions of despatches of sugar by the assessee pursuant to the directions of the Controller were not the result of any contract of sale. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the Province to purchase goods. He acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left with no volition. He could not decline to carry out the Order. If he did so, he was liable to be punished for breach of the Order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate and sugar was despatched pursuant to the directions of the Controller and not in acceptance of any offer by the Province. The Provincial Government of Madras gave intimation of its requirements of sugar to the Controller and applied for allotment of sugar; thereby the Government was not making any offer to purchase sugar. Evidently the offer could not be made to the Controller because the Controller was not a manufacturer of sugar or his agent. The communication of allotment order to the assessee was again not of any offer made by the Province which it was open to the assessee to accept or decline. Mere compliance with the despatch instructions issued by the Controller, which, in law, the assessee could not decline to carry out, did not amount to acceptance of an offer. The Supreme Court observed that a contract of sale postulated exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition of the assessee. It has been observed in Benjamin on "Sale" that to constitute a valid sale there must be concurrence of the following elements, viz., (1) parties competent to contract ; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised. In the aforesaid case the order of the Sugar Controller was to the following effect:

I, Shashi Kiran, Assistant Sugar Controller for India, having been duly authorised in this regard under Clause 2 of the said Order by the Sugar Controller for India hereby direct you to supply 1,200 tons/maunds of sugar by 31-1-1947, to Bengal in accordance with the despatching instructions of the Director of Civil Supplies,

Bengal, Calcutta.

2. A permit No. 1988 to enable you to despatch sugar in compliance with this order is attached.

6. The Supreme Court analysing the documents and the relevant Control Order came to the conclusion that free trading in sugar was not possible. All the Provinces had to intimate to the Sugar Controller of India from time to time their requirement who was kept informed by the mills about the supply available. The price was controlled and the Controller directed the supply of a certain quantity from a particular mill to an intending Province. After giving his permit and sending a copy of this permit to each party, the Controller passed out of the picture and the mill supplying and the Province receiving the supply arranged the rest of the affair including the issue of despatch instructions. In that case, the Supreme Court found that such supply did not amount to a sale as to come within the purview of the Bihar Sales Tax Act. In the case of *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, , the Supreme Court was dealing with sales under the U. P. Sales Tax Act and the question was whether sales made to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959, were sales within the meaning of "sale" u/s 2(h) of the U. P. Sales Tax Act. The Supreme Court observed that a sale predicated a contract of sale of goods between persons competent to contract for a price paid or promised. The Supreme Court found that Clause 3 of the U. P. Wheat Procurement (Levy) Order, 1959, compelled the licensed dealer to deliver to the Controller or his authorised agent every day 50 per cent of the wheat procured or purchased by him. There was no scope for negotiations. Supply of wheat pursuant to Clause 3 of the Order and acceptance thereof did not result in a contract for sale. Accordingly, the Supreme Court found that there was no sale within the meaning of Section 2(h) in such a case and the person supplying wheat was not liable to pay sales tax on the price for wheat so supplied. On the other hand, in the case of *State of Rajasthan and Another Vs. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur*, , the Supreme Court had to deal with the Rajasthan Sales Tax Act and observed that to render turnover from sale of goods liable to tax under the Sales Tax Act, there must be concurrence of four elements in the sale, namely, (1) parties competent to contract; (2) mutual assent of the parties; (3) thing, absolute or general property in which was transferred from the seller to the buyer; and (4) price in money paid or promised. There the Supreme Court was considering the effect of the Colliery Control Order. The Supreme Court found that under an agreement between the State of Rajasthan and the assessee acting as an agent of a coal company to sell coal, the assessee supplied coal to the State Power House. The price chargeable was fixed under the Colliery Control Order, 1945. It was held by the Supreme Court that there was an agreement of sale between the parties competent to contract and in pursuance of the agreement of sale, property in the goods supplied passed to the purchaser for price agreed to be paid. The transaction was, therefore, one of sale of goods within the meaning of the Rajasthan Sales Tax Act. According to the Supreme

Court, the effect of the Control Order was only to superimpose upon the agreement between the parties the rate fixed under the Order. But, on that account, it could not be said that the relation between the parties, the supplier and the person to whom the coal was supplied, was not contractual. The contract between the parties, was only modified by the statutory provisions. This question was again examined by the Supreme Court in the case of *Salar Jung Sugar Mills Ltd. v. State of Mysore* [1972] 29 S.T.C. 246 (S.C). There the Supreme Court was concerned with the Sugarcane Control Orders and other statutory orders under which a minimum price of sugarcane was fixed and reserved specific areas for the factories. The Supreme Court considered whether there was mutuality present in the transactions and whether there was sale of sugarcane in that case. The Supreme Court held that the orders regulating supply and distribution of goods under Control Orders in a State did not absolutely impinge on the freedom to enter into contract. Delimiting areas for transactions or parties or denoting prices for transactions were all within the area of individual freedom of contract with limited choice. In the case before the Supreme Court the parties were certain and defined; the property in the goods was transferred from the grower to the factory and there was consideration for the transfer. The statutory orders required the parties to enter into agreements and the agreements contained intrinsic evidence that the growers agreed to sell and the factories agreed to buy. There was offer, inspection and appropriation of goods to the contract. The mutual consent was not merely implicit but was explicit. The transaction in that case, according to the Supreme Court, constitutes sale within the meaning of Section 2(t) of the Mysore Sales Tax Act, 1957. Speaking about the effect of these Control Orders, the Supreme Court observed at pages 261 and 262 of the Reports as follows :

These decisions establish that statutory orders regulating the supply and distribution of goods by and between the parties under Control Orders in a State do not absolutely impinge on the freedom to enter into contract. Legislative measures or statutory provisions fixing the price, delivery, supply, restricting areas for transactions are all within the realm of planning economic needs ensuring production and distribution of essential commodities and basic necessities of community. The recent trends in these legal rules delimit the variety of structure of rights and duties which individuals may create by such acts and transactions. The complexity of modern activities and the consequent difficulty of providing for every eventuality have shaken favour for freedom of contract as there was during the nineteenth century. The economic environment has changed. The individual freedom is to be reconciled with adequate performance by the Government of its functions in a highly organised society. Delimiting areas for transactions or parties or denoting price for transactions are all within the area of individual freedom of contract with limited choice by reason of ensuring the greatest good for the greatest number by achieving proper supply at standard or fair price to eliminate the evils of hoarding and scarcity on the one hand and availability on the other.

7. In the present case, the parties are certain. The parties are defined, namely, that the sugarcane grower is delivering and supplying and the factory is accepting the goods. The property in the goods is transferred from the grower to the factory. The transaction is not a gift nor an exchange nor a hypothecation nor a loan. There is consideration for the transfer. Counsel for the appellants contended that there was no mutual assent because the price was fixed, the quantity for supply and delivery was determined, the parties had no choice to go to strangers or outsiders in the open market. In Benjamin on Sale, 8th Edition, at page 68, the law as to mutual assent is stated as this:

The assent need not as a general rule be express. It may be implied from their language or from their conduct; may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carried them away and nothing is said on other side ; the law presumes an agreement of sale for the reasonable worth of the goods. But the assent must in order to constitute a valid contract, be mutual and intended to bind both sides. It must also co-exist on the same moment of time.

8. The assent must be mutual and bind both sides. The proposal by one man must be accepted by another and this acceptance must be unconditional. The assent must be communicated to the other party or some act must be done which the other party has expressly or impliedly offered to treat as a communication. Judged by these standards in the forefront exists the agreement between the parties in the present case. The statutory orders required parties to enter into agreements. The parties did in fact enter into agreements. The agreement contains intrinsic evidence that the growers agreed to sell and the factory agreed to buy goods.

9. In the case of Khas Dharmaband Colliery Co. Private Ltd. v. Member, Board of Revenue, West Bengal [1971] 28 S.T.C. 586 cal, a Division Bench of this Court had to consider whether sale pursuant to the directions issued under the Colliery Control Order, 1945, was sale within the meaning of the Bengal Finance (Sales Tax) Act, 1941 and held that, in the facts of that case, they were sales though entered into under the said Colliery Control Order, 1945. It is clear therefore that simply because the transactions are controlled by virtue of the Colliery Control Order, 1945, the transactions did not cease to become transactions of sale if there was a freedom to enter into contract and if there was mutuality between the parties, the purchaser and the seller. It is true that the Colliery Control Order superimposed certain terms and no transactions can be entered into in derogation of the directions issued by the authority of the Central Government. In this case it has been stated that the transactions in this case were pursuant to the directions of the Coal Commissioner. But even then whether the said directions were of such nature as completely took away the volition or mutuality of the contracting parties or deprived the parties the freedom to enter into contract is not apparent unless the transactions in question are examined and unless the actual directions of the Coal Controller are examined in respect of the

transactions that the petitioners had entered into which are the subject-matter of the present assessment. In the aforesaid view of the matter, in the light of the observations of the Supreme Court, at this stage it is premature to hold that the petitioners did not carry on transactions which were sales under the Bengal Finance (Sales Tax) Act, 1941 and the petitioners were not liable to sales tax. This question will have to be decided in the light of each transaction entered into by the petitioners in the light of the direction issued by the authority under the Colliery Control Order and then the assessing authority will have to decide whether such direction of the Coal Commissioner took away all the freedom of the contracting parties and made the transactions not sale in terms of Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941. In the aforesaid view of the matter, in my opinion, the challenge to the impugned notice at this stage cannot also be sustained. The application therefore must fail. It is accordingly dismissed. The rule nisi is discharged. Interim order, if any, is vacated. There will be no order as to costs.