

(1991) 03 KAR CK 0065

In the Karnataka High Court

Case No : Writ Petitions No"s. 4743 and 4744 of 1988

Kerala Small Industries Development Corporation Ltd.

APPELLANT

Vs

Commercial Tax Officer, Second Circle, Mangalore

RESPONDENT

Date of Decision : 26-03-1991

Acts Referred:

Central Sales Tax Act, 1956 — Section 3 (a)
Constitution of India, 1950 — Article 32

Citation : (1991) 83 STC 356

Hon'ble Judges : S.R. Rajasekhara Murthy, J

Bench : Single Bench

Advocate : K.R. Prasad, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Judgement

S.R. Rajasekhara Murthy, J.—The petitioner is an undertaking of the Kerala State Government and a company registered under the Companies Act, 1956 (the Act). The petitioner entered into agreements with the suppliers of cement from Taiwan and South Korea for the importation of cement. A shipment of cement which was due to be berthed in Cochin had to be diverted to the Mangalore port on account of congestion in Cochin port and adequate berthing place was not available there.

2. The cement meant for the petitioner was unloaded in Mangalore port on account of supervening circumstances and the exigencies mentioned above. The said cement imported was meant for sale by the petitioner-company in kerala. Even before the consignment left Taiwan and South Korea, the buyers in kerala had placed orders with the petitioner for supply of cement and had made payments in advance also. After the cement was unloaded in Mangalore port, a part of the consignment was transported in trucks to Kerala and a part of the consignment was sent to the depots of the petitioner situated at various places in Kerala and part of the consignment was dispatched direct to its customers in Kerala. Such dispatches made to the customers directly from the Mangalore port to various places in Kerala where the customers were evidenced by dispatch

orders. A few samples of the orders placed by the customers in Kerala are produced along with the writ petitions.

3. The petitioner has an office in Mangalore and is a registered dealer under the Karnataka Sales Tax Act, 1957 (the Act), but has not registered under the Central Sales Tax Act, 1956, in Mangalore.

4. The petitioner had filed returns before the respondent for the years ending March 31, 1983 and March 31, 1984. A notice was issued to the petitioner on December 29, 1987, calling upon the petitioner to file returns under the Central Sales Tax Act. In continuation of the said notice, two proposition notices, as per annexure F and G, were issued by the respondent on February 17, 1988, proposing to conclude the assessments under the Central Sales Tax Act for the years ending March 31, 1983 and March 31, 1984. In these show cause notices it was proposed to conclude the assessments against the petitioner under the Central Sales Tax Act in respect of the inter-State sales of cement effected by the petitioner out of the consignment cleared from the vessel - "Katan-Keerthi" on several dates during the two accounting years. These proposition notices are challenged by the petitioner in these writ petitions.

5. The case of the department is that the petitioner effected sales of cement from Mangalore to its customers in Kerala pursuant to the orders placed by its customers in Kerala. These sales constituted inter-State sales, according to the department, and the movement of cement from Mangalore to various places in Kerala State was pursuant to contract entered into by the petitioner with its customers in order to fulfil the prior orders. It was, therefore, proposed to subject the said inter-State sales to tax under the Central Sales Tax Act. The reason set out in the show cause notices is reproduced below :

"You have effected import of cement from foreign countries and obtained delivery thereof at Mangalore port. It is seen from the despatch sheets maintained by you that you have entered into contract with various consumers and dealers of Kerala State for supply of cement. To comply with these orders you have effected import of cement from foreign countries and taken delivery of the same at Mangalore port. Thereafter, to comply with your orders, you have effected transportation of cement from Mangalore port to various consumers as well as dealers. Such transaction constitutes inter-State sale of cement u/s 3(a) of the Central Sales Tax Act, 1956, inasmuch as the movement of goods from Mangalore to Kerala State is directly as a consequence of and to comply with your prior orders. This view is supported by the Supreme Court decision in the case of English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others,

6. The case of the petitioner is that the cement imported by it from Taiwan and Korea was offloaded in Mangalore port due to supervening circumstances explained in the writ petition. According to the terms of the contract with the carriers, it was intended to be offloaded only at Cochin and the cement was

meant for supplies to be made to its customers, who were within the State of Kerala. Since the ship was diverted to Mangalore port, the petitioners had necessarily to transport the cement imported from Mangalore to Kerala and the ship had to call at Mangalore port only by accident and not under a contract. Out of the cement so unloaded at Mangalore port, a part of it was sent to its depots and godowns in various places in Kerala and part of it was sent directly to the customers in Kerala who had placed orders for supply. It was, therefore, contended that the despatches of cement in lorries made by the petitioner to its customers in Kerala from Mangalore did not constitute inter-State sale and, therefore, does not attract Central Sales Tax Act. The two proposition notices are, therefore, challenged on various grounds raised in the writ petitions.

7. Elaborating the contentions on behalf of the petitioner, it was argued by Sri. K. R. Prasad :

(i) that the movement of goods commenced in Korea and Taiwan as soon as the cement was loaded in the ship and the Mangalore port was the only a port of transit or an intermediate port in the transit of goods from foreign countries, to Kerala;

(ii) that the movement of goods from Mangalore to Kerala was not caused by any sale or purchase in order to attract the provisions of section 3(a) of the Central sales Tax Act;

(iii) that the transportation of offloaded cement from Mangalore port to Kerala was not on account of any sale or purchase, or to fulfil any contract of sale entered into in Karnataka;

(iv) that such supply of cement from Mangalore to Kerala and consequent movement from one State to another was not in contemplation between the parties; and

(v) the integrated movement from Taiwan/Korea to Kerala cannot be segregated and Central sales tax cannot be levied in Karnataka, since the movement did not commence from Mangalore.

8. The petitioner also filed objections before the respondent to the show cause notices, as per annexure "J". Since the respondent was not inclined to agree with the case of the petitioner, the writ petitions were filed challenging the proposition notices questioning the jurisdiction of the respondent to subject the entire consignment of cement unloaded in Mangalore to Central Sales Tax Act.

9. It was alternatively contended by Sri. K. R. Prasad, the learned counsel for the petitioner, that the respondent was not justified in adopting the value of the entire cement dispatched from Mangalore to various places in Kerala, which included the dispatches made to its godowns and despatches made directly to its customers, under the heading "inter-State sales of cement" for the two years in question.

10. In support of the propositions advanced by the learned counsel for the petitioner the ratio laid down by the Supreme Court in the earliest of the decisions in *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, was relied upon. The test laid down by the Supreme Court as explained in the said decision at page 679 was relied upon. The said passage is reproduced below :

"The question then arises, when does a sale occasion the movement of goods sold ? It seems clear to us that a sale can occasion the movement of the goods sold only when the terms of the sale provide that the goods would be moved; in other words, a sale occasions a movement of goods when the contract of sale so provides."

11. In *The State of Bihar and Another Vs. Tata Engineering and Locomotive Co. Ltd.*, it was held, on facts, that the transaction between the assessee in that case and the buyer resulted in an inter-State sale and the sales to dealers outside the State of Bihar was evidenced by agreements entered into between the parties, and on facts, it was found that it was the intention of both the buyer and the seller that the trucks manufactured by the Tata Engineering and Locomotive Co. Ltd., should be delivered at places outside the State of Bihar. Such supply was made in accordance with the terms of the contract between the parties. The Supreme Court applied the principles enunciated in the three decisions rendered earlier in (page 149) : *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, ; *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, and *Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of Commercial Taxes and Another*, , and reiterated the same thus :

"The decided cases establish that sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances :

- (1) When goods which are in export or import stream are sold;
- (2) When the contracts of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place; and
- (3) Where as a necessary incidence of the contract of sale goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place."

12. It is unnecessary to refer in detail to all the three decisions, referred to above, except to the observations made by the Supreme Court in *Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of Commercial Taxes and Another*,

"Even the Assistant Commissioner found that on some occasion vehicle had been

moved from a stock-yard in one State to a stock-yard in another State. It is not possible to comprehend how in the above situation it could be held that the movement of the vehicles from the works to the stock-yards was occasioned by any covenant or incident of the contract of sale. As regards the so-called firm orders it has already been pointed out that none have been shown to have existed in respect of the relevant periods of assessment. Even on the assumption that any such orders has been received by the appellant they could not be regarded as anything but mere offers in view of the specific terms in exhibit I (the dealership agreement) according to which it was open to the appellant to supply or not to supply the dealer with any vehicle in response to such order. What was, therefore relevant was the acceptance of firm orders occasioning the movement of vehicles out of the State of Bihar."

13. The two decisions of the Madras High Court in :

(i) Deputy Commissioner (Commercial Taxes) Vs. The Pudukkottai Textiles Limited, Mad, and (ii) Sri Ganapathy Mills Co. Ltd. v. State of Tamil Nadu [1977] 40 STC 397 Mad, were relied upon by the learned counsel. The observations made by the Madras High Court in the said decisions, were strongly relied upon by the learned counsel for the petitioner. In the said decisions, it was observed, inter alia, that it is immaterial wherefrom the seller procures the goods even from a place outside the State and it was held that in the absence of any contract between the parties to supply the goods from outside the State, the transactions were not inter-State in character.

14. So far as the jurisdiction of the Commercial Tax Officer, Mangalore, the respondent, to issue the proposition notice is concerned, in the present cases, it was urged that it was not established, on facts, by the respondent, that his action to levy Central sales tax on the petitioner, was justified.

15. On the question of jurisdiction, the ratio of the Supreme Court in Commissioner of Sales Tax v. Suresh Chand Jain [1988] 70 STC 45 SC, was relied upon by the learned counsel. The Supreme Court laid down, dismissing the petition of the Commissioner, that a condition precedent for imposing sales tax under the Central Sales Tax Act, 1956, was not satisfied in that case, and that the onus lies on the Revenue to disprove the contention of the dealer that a sale is a local sale and to show that it is an inter-State sale.

16. On behalf of the Revenue it was argued by Sri Dattu, the learned Government Advocate, that from the facts set out and the material found in the show cause notices, the action of the respondent to levy Central sales tax on the petitioner was perfectly justified. It was contended by Sri Dattu that there was sufficient material, on record and the information collected from these materials by the department justified the levy of Central sales tax, on the petitioner. It was submitted, in all fairness, by the learned Government Advocate that only the dispatches made directly to the customers from Mangalore to the customers in Kerala, would be the subject-matter of assessment under the Central Sales Tax

Act, and not the despatches made to the petitioner's godowns at various places in Kerala. The writ petitions were also opposed by the learned Government Advocate on the ground that it should be left to the assessing authority under the Act, to record a finding after considering the various materials on record and also to examine whether the transactions in question, attracted levy of Central sales tax. In support of this contention the learned Government Advocate relied on the decision of the Supreme Court in : Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others,

17. Strong reliance was placed by Sri Dattu on the decision of the Supreme Court in Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others, Reliance was also placed by the learned Government Advocate on the observations of the Supreme Court in English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others, and Oil India Ltd. Vs. The Superintendent of Taxes and Others,

18. Adverting to the last of the cases first Oil India Ltd. Vs. The Superintendent of Taxes and Others, the following observations made by Sri K. K. Mathew, J., at page 449, was strongly relied upon by the learned Government Advocate :

"No matter in which State the property in the goods passes, a sale which occasions "movement of goods from one State to another is sale in the course of inter-State trade". The inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."

19. The decision of the Supreme Court in South India Viscose Ltd. Vs. State of Tamil Nadu, was also cited by Sri Dattu, for the following proposition :

"If there is a conceivable link between a contract of sale and the movement of goods from one State to another in order to discharge the obligation under the contract of sale, the interposition of an agent of the seller who may temporarily intercept the movement ought not to alter the inter-State character of sale."

20. The learned Government Advocate also distinguished each one of the decisions relied upon by Sri K. R. Prasad, the learned counsel for the petitioner, and submitted that there was enough material and evidence on record to justify the proposed levy.

21. Let me now advert to the decision of the Supreme Court in Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others, since in my opinion, the Revenue must succeed or fail on the applicability of the tests laid down by the Supreme Court. Sri Pathak, J. (as he then was), to the facts of the

present case.

22. The assessee in that case had challenged, by way of a writ petition under article 32 of the Constitution, the assessment order made for the year 1979-80 and proposed action to reopen the assessment for the years 1977-78 and 1978-79. The facts arising in that case are summarised in para 7 of the judgment. The branch offices of the petitioner-company situated outside the State of Andhra Pradesh had procured orders for the supply of goods with definite specifications from the customers outside the State. On such orders, the head office at Hyderabad manufactured and supplied the goods in accordance with the specifications and despatched the goods from Hyderabad to the branch offices and the branch offices despatched the goods, in turn, to its customers outside the State. On these facts, it was found that all activities, including the booking orders, sales, despatching, billing and receiving of the sale price were all carried on by the branch offices. On these admitted facts it was held by the Supreme Court that the Commercial Tax Officer was justified in his finding that the transactions were inter-State sales. It was observed, on the basis of the facts found by the Commercial Tax Officer, that the movement of goods from Hyderabad to stations outside the State was an incident of the contract incorporated in the orders placed by the customers with the branch offices and, therefore, the transactions attracted levy of Central sales tax.

23. In this context it also becomes necessary to advert to the tests laid down by the Supreme Court for the said conclusion. Explaining the guide-lines the Supreme court in paragraph 8 of its judgment sets out the facts and the ratio. I, therefore, reproduce the entire paragraph, which reads thus :

"8. The petitioners challenge the finding of the Commercial Tax Officer that the transactions in question constitute inter-State sales. The petitioners contend that when the registered office of the company at Hyderabad despatched the manufactured goods to its branch office it was merely a transfer of stock from the registered office to the branch office, and thereafter the movement of the goods started from the branch office to the buyer. It is urged that the registered office and the branch office were separately registered as dealers under the sales tax law and transactions effected by the branch office could not be identified with transactions effected by the registered office. The movement of the goods from Hyderabad to the branch office, it is said, was only for the purpose of enabling the sale by the branch office and was not in the course of fulfilment of the contract of sale. We are unable to agree. Even if, as in the present case, the buyer places an order with the branch office and the branch office communicates the terms and specifications of the orders to the registered office and the branch office itself is concerned with the sales, despatching, billing and receiving of the sale price, the conclusion must be that the order placed by the buyer is an order placed with the company, and for the purpose of fulfilling that the order the manufactured goods commence their journey from the registered office within the State of Andhra Pradesh to the branch office outside the State for delivery of

the goods to the buyer. We must not forget that both the registered office and the branch office are offices of the same company, and what in effect does take place is that the company from its registered office in Hyderabad takes the goods to its branch office outside the State and arranges to deliver them to the buyer. The registered office and the branch office do not possess separate juridical personalities. The question really is whether the movement of the goods from the registered office at Hyderabad is occasioned by the order placed by the buyer or is an incident of the contract. If it is so, as it appears no doubt to us, its movement from the very beginning from Hyderabad all the way until delivery is received by the buyer is an inter-State movement. In *English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others*, this Court held that when the movement of the goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale, and it does not matter which is the State in which property in the goods passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. It was also pointed out that the branches had no independent and separate entity, that they were merely different agencies, and even where a branch office sold the goods to the buyer it was a sale between the company and the buyer. It is true that in that case the goods, on manufacture at the Madras branch factory, were directly despatched to the Bombay buyer at his risk and all prices were shown f.o.r. Madras, and the goods were delivered to the Bombay buyer at Bhandup through clearing agents. In the instant case, the goods were despatched by the branch office situated outside the State of Andhra Pradesh to the buyer and not by the registered office at Hyderabad. In our opinion, that makes no difference at all. The manufacture of the goods at the Hyderabad factory and their movement thereafter from Hyderabad to the branch office outside the State was an incident of the contract entered into with the buyer, for it was intended that the same goods should be delivered by the branch office to the buyer. There was no break in the movement of the goods. The branch office merely acted as a conduit through which the goods passed on their way to the buyer. It would have been a different matter if the particular goods had been despatched by the registered office at Hyderabad to the branch office outside the State for sale in the open market and without reference to any order placed by the buyer. In such a case if the goods are purchased from the branch office, it is not a sale under which the goods commenced their movement from Hyderabad. It is a sale where the goods moved merely from the branch office to the buyer. The movement of the goods from registered office at Hyderabad to the branch office outside the State cannot be regarded as an incident of the sale made to the buyer."

24. The Supreme Court also referred to its earlier three decisions in :

(a) *Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others*, and the two decisions for covering the opposite situations in :

(b) *Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of*

Commercial Taxes and Another,

(c) State of Bihar v. Tata Engineering and locomotive Co. Ltd. [1971] 27 STC 127.

25. It is the settled law as to when a sale becomes an inter-State sale as enunciated by the Supreme Court in a series of decisions right from the first Tata case in the year 1960 Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others, and reiterated in the second and third Tata cases reported in Tata Engineering and Locomotive Co. Ltd. Vs. The Assistant Commissioner of Commercial Taxes and Another, and reiterated in the subsequent decisions, viz.,

(i) English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others,

(ii) Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others, and

(iii) Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others, .

26. To sum up the ratio of the various decisions mentioned above, the position of law or the ratio that emerges from the interpretation placed by the Supreme Court in those decisions is this :

(i) that an inter-State sale takes place when there is movement of goods from one State to another;

(ii) that such inter-State movement must be the result of a covenant, express or implied in the contract of sale or as an incident of the contract;

(iii) that such a covenant need not be specified in the contract itself and it would be enough if the movement was in pursuance of and incidental to the contract of sale;

(iv) that there should be a conceivable link between a contract of sale and the movement of goods from one State to another.

27. It must (be held ?) on a careful examination of the terms of the contract and the distinguishing facts of each case, that for attracting section 3(a) of the Central Sales Tax Act, the movement of goods should be pursuant to a covenant in the contract of sale or as an incident of the contract. Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others, does not assist the department both on facts as well as on law.

28. In the present case, the State has failed to make out a prima facie case of an inter-State sale and that the movement of goods from Mangalore to Kerala was as a result of sale which took place in Mangalore. The situs of sale becomes very important since the movement must be occasioned by the sale. If sale has taken place in Kerala, according to the petitioners and that there was no such covenant, or agreement between the parties that the supply of cement must be made from Mangalore office of the petitioner-corporation, it cannot result in an

inter-State sale by the mere transport of cement from Mangalore to the customers in Kerala. The circumstances under which the transport of cement took place must be accepted as the correct position and no case is made out to disbelieve the petitioner's reason given for the movement of goods from Mangalore to Kerala.

29. In my opinion, this is an eminently fit case to interfere at the stage of proposition notices, since the ingredients to apply section 3(a) of the Central Sales Tax Act, are totally absent in this case and the petitioner should not be exposed to the proceedings of assessment resulting in demands and driving the assessee to challenge the same in appeals provided under the Act.

30. It must be noticed in this context that the learned Government Advocate was not able to produce the invoices referred to in the statement of objections in support of his contention that the sale took place in Mangalore and the movement of goods from mangalore to Kerala was pursuant to the said sale.

31. For the reasons stated above, these writ petitions are allowed and the proposition notices dated February 17, 1988 (annexures "F" and "G"), are quashed.

32. Writ petitions allowed.