
(1970) 09 CAL CK 0016
In the Calcutta High Court
Case No : Sales Tax Ref. No. 393 of 1965

Khas Dharmaband Colliery Co. Pvt. Ltd.	APPELLANT
Vs	
Board of Revenue, West Bengal	RESPONDENT

Date of Decision : 15-09-1970

Acts Referred:

Bengal Finance (Sales Tax) Rules, 1941 — Rule 27A
West Bengal Finance (Sales Tax) Act, 1941 — Section 2, 20(1), 20(3), 21(3), 22

Citation : (1972) 1 ILR (Cal) 467

Hon'ble Judges : P.B. Mukharji, C.J.; T.K. Basu, J

Bench : Division Bench

Advocate : S.R. Banerjee, S.N. Mitra and S.K. Banerjee, for the Appellant; B. Das, General, S.C. Bose and B.P. Banerjee, for the Respondent

Judgement

P.B. Mukharji, C.J.—This is a Reference u/s 21(3) of the West Bengal Finance (Sales Tax) Act, 1941. The question raised for an answer is as follows: "

Whether the Board of Revenue was in error of law in construing the agreement dated the 7th April, 1948, between the Petitioner and the Bengal Coal Co. Ltd., and in its conclusion that the said agreement invested the Petitioner with the status and/or incidence of "Dealer" under the relevant law?

2. The question arises on the following facts. The Khas Dharmaband Colliery Co. Pvt. Ltd. is a dealer registered under the Bengal finance (Sales Tax) Act, 1941. The assessment relates to the annual period ended on March 31, 1955. The Commercial Tax Officer assessed the dealer in respect of the above-mentioned period and in doing so added Rs. 3,00,933-10-0 to the dealer's gross turnover and charged the same to tax by his order dated November 15, 1957. The dealer then went in appeal before the Assistant Commissioner of Commercial Taxes who rejected the appeal of the Petitioner and Upheld the assessment order of the Commercial Tax Officer. Thereafter the dealer filed a Revision petition before the Commissioner of Commercial Taxes. That petition was heard by the Additional Commissioner of Commercial Taxes and rejected by his order dated November

18, 1959. Not content with this the dealer then filed a Revision petition before the Board of Revenue, West Bengal, which also rejected the Revision petition of the dealer and upheld the order of the Additional Commissioner of Commercial Taxes. Attempt to make the Board refer to this Court certain questions of law having failed, the dealer came up to this Court and got an order for reference on the question set out above.

3. The whole case of the dealer can be set out at this stage to appreciate the contention raised in this Reference. The contentions and the relevant facts are set out in the dealers application for Revision u/s 20(3) of the Bengal Finance (Sales Tax) Act, 1941, and appear at pp. 19 and 20 of the printed paper-book. These facts and contentions on behalf of the dealer are as follows:

4. The dealers contend that they acted only as middlemen. The commodity is coal which is controlled by the Colliery Control Order, 1945. The production, distribution and even the method of distribution fall within the ambit of the Colliery Control Order. It is contended that the property in the coke or coal can be transferred only by the producer, namely, the Colliery, to the persons who are given permits by the Coal Controller. The wagons for movement of coal or coke from the Railway heads to the permit-holders are, it is said, also controlled by the said Controller. The substance of this contention is that the Colliery owners deal with the permit-holders through the instrumentality of middlemen like the dealer in the present case. In support of that contention attention is drawn to the Colliery Control Order which expressly recognised the existence of middlemen. It is contended also that the Colliery owners received from the Coal Controller sanction in favour of the consumers and indented the Railways for wagons and booked the sanctioned quantity of coal under the respective permits in the name of the permit-holders who were the purchasers of the said goods in the State of West Bengal. For the dealer it is also said that the Railway receipts issued on despatches in every case were for Colliery and they showed the Colliery as the consignor and the permit-holder as the consignee and that they were taken by the Colliery and sent to the consignee direct.

5. All these contentions are put so high for the dealer by Mr. Banerjee appearing for the dealer that it is difficult thereafter to see why, when everything was being done in the manner contended for by the dealer, the dealer should at all get a commission for practically doing no work in this scheme of things. If the consignment is direct from the Colliery owner as consignor to the permit-holder as consignee and if the Coal Controller is directing the recruitment of wagons and the despatches, then it becomes difficult to understand what other work remained for dealers as middlemen to perform and to charge a commission for. Perhaps, Mr. Banerjee realised this difficulty. He, therefore-, contends that under the Colliery Control Order the dealers are entitled to receive brokerage from the Colliery owners as prescribed in that order for "rendering their services". We are quoting from the dealer's own Revision petition that expression. But, what are the services in that scheme of things contended for by the dealer and as

mentioned above ? The dealer's contention quoting its language from the Revision petition is.

the Petitioners merely acted as middlemen and had never any property or lien or control over the consignment of goods.

The basic fallacy of Mr. Banerjee's argument on middlemen's role lies in this outstanding fact.

6. On the basis of those arguments Mr. Banerjee for the dealers contends that these transactions do not "attract West Bengal sales tax and the levy of sales tax, therefore, was illegal in this case. It is also contended that these transactions are neither "sales" nor "turnover" of the dealer on which the tax could be imposed. Lastly, it is contended that the Petitioner is not a dealer at all because its only business consisted in acting as middlemen or brokers in respect of the coal or coke under the Colliery Control Order.

7. That in brief is the whole cause of the dealer in the present Reference.

8. Mr. Banerjee's sheet anchor is the authority of *The State of Bombay Vs. Ratilal Vadilal and Bros.*, That was a case under the Bombay Sales Tax Act and was also a case under the Colliery Control Order. There the Respondents were commission agents and coal was supplied to the parties through the Respondents. There also the consignment was in the name of the permit holder, but the bill was sent by the Colliery to the Respondents who in their turn made out a bill in which they charged, in addition to the amount of the bill of the Colliery, a sum representing their commission. The liability to pay the Colliery in that case rested upon the Respondents. In those circumstances, it was held by the Supreme Court that the Respondents were not dealers because they were not carrying on the business of selling coal and their business was merely that of agents, arranging sale to a disclosed purchaser though guaranteeing payment to the Colliery on behalf of their principal. The Supreme Court in delivering its judgment in that case made the following observations:

The scheme of the Control Order shows that no sale of coal could take place except to a person holding a certificate. A sale otherwise was in contravention of the Control Order. The certificate which has been produced in the case though made out in the name of the Respondents shows that the consumer is the consignee. It is thus plain that there was no sale by the colliery to the Respondents but directly to Karsandas, though through the agency of the Respondents. The Respondents also, when they made out the bill to Karsandas, mentioned that he was the consignee, and that they were only charging their "middleman's" commission. In these circumstances it is difficult to hold that the colliery sold coal to the Respondents, and that they, in turn, sold it to Karsandas. There were no two sales involved; there was only one sale, and that was by the colliery to the consumer. The Respondents never became owners by purchase from the colliery because the colliery would not have sold coal to them, nor could they have bought it unless they had obtained a certificate. The position of the

Respondents was merely that of agents, arranging the sale to a disclosed purchaser, though guaranteeing payment to the colliery on behalf, of their principal.--Pages 24-5.

9. The outstanding difference between that case and the present case is that the instant Reference before us relates only to the question of the construction of the agreement dated April 7, 1948, between the dealer here and the Bengal Coal Co. Ltd. There was no such letter for construction before the Supreme Court in *State/ of Bombay v. Ratilal Vadilal (Supra)*. The language of the letter in the instant reference before us is significant in many ways and we shall presently discuss it at the appropriate stage.

10. The second point of difference is that this whole contention of the dealer on this Reference comes only as a side-wind and as an afterthought in these proceedings. This case was never made at the initial stages and certainly not before the Commercial Tax Officer. In fact, we shall presently show that the case made before the Commercial Tax Officer was in direct contradiction to the case now represented by the contentions put forward before us. Here, in the acts and circumstances of this case, the outstanding points are as follows:

11. The dealer in its return before the Commercial Tax Officer itself admits that it is a registered dealer with a registration certificate. It has never mentioned in the return that apart from its capacity as registered dealer it was acting as middleman in any of these transactions submitted in the return. A glance at the return shows that it disclosed the post-turnover at Rs. 61,68,231-6-0 as admitted by the dealer. What was found understated was a sum of Rs. 3,00,933-10-0 which was, therefore, added by the Commercial Tax Officer. Secondly, even exemption was claimed in that return and exemption was allowed not only u/s 5(2)(a)(i) or (ii) but also u/s 5(2)(a)(v) of the Sales Tax Act. A glance at those provisions of the Sales Tax Act would at once show that u/s 5(2)(a)(i) of the Sales Tax Act the taxable turnover means the sale of goods declared tax-free u/s 6 and u/s 5(2)(a)(ii) the taxable turnover is sales to a registered dealer

of goods of the class or classes specified in the certificate of registration of such dealer, as being intended for re-sale by him in West Bengal or for use by him directly in the manufacture in West Bengal etc.

Under Section 5(2)(a)(v) of the Bengal Sales Tax Act the turnover is on the sales of goods which are shown to have taken place in West Bengal or to have taken place in the course of inter-State trade or commerce.

12. The significant point about this return is that not a word was said that this turnover was not liable to tax because these transactions represented the earnings of a middleman who was not liable to sales tax. Indeed, the return proves that the dealer did not take into account the figure of Rs. 3,00,933-10 covering for Bihar Colliery sales to West Bengal because the dealer claimed that these were Bihar sales despatched to their customers in West Bengal direct in

the course of inter-State sales. It is not said or urged as a fact by the dealer at that stage that this was not a turnover at all or that this transaction did not attract the sales tax on the ground because it represented the work of the dealer working as a middleman. The only ground or the only fact then represented was that this figure of Rs. 3,00,933-10 was excluded because they were inter-State sales and they were Bihar sales despatched to their customers in West Bengal direct in the course of such inter-State sales. This basic fact, therefore, was neither urged nor proved before the Commercial Tax Officer. Not a word was said before the Assistant Commissioner of Commercial Taxes either when there was an appeal to him u/s 20(1) of the Bengal Finance (Sales Tax) Act, 1941. In the application for Revision u/s 20(3) of the Bengal Finance (Sales Tax) Act, 1941, and specially in ground No. 1, the dealer did not mention this fact or this ground repeated the previous contention before the Commercial Tax Officer by saying:

The said transactions worth Rs. 3,00,933-10 are really sales in Bihar by the Petitioner in the course of inter-State trade, and the Commercial Tax Officer had no authority and jurisdiction to add the same to West Bengal turnover. (See p. 12 of the printed paper-book.)

Now, that action is significant. Here, the language shows that this was an admission by the dealer that the dealer made the sale in Bihar. The exemption claimed by the dealer was only on the ground that it was an inter-State sale and not on any other ground that it represented the transaction of a middleman not liable to sales tax at all. These facts are plainly contradictory to the case now put forward by the dealer.

13. It was only before the Additional Commissioner, Commercial Taxes, that we get a hint of this particular contention where the Additional Commissioner of Commercial Taxes in his order of November 18, 1959, observed:

Before me, the Petitioner took a new stand as well and urged that the company acted only as a middleman in the deals between the Colliery and the consumer against a commission as provided under the Colliery Control Order and, as such, had no liability for payment of tax.

14. The unsatisfactory way and character in which this particular question of fact appears to be introduced by the dealer at the latest stage is also noticed by the following observations of the Additional Commissioner of Commercial Taxes:

It was urged that the sanction from the Coal Controller was received by the Colliery and was in favour of the consumers who were the permit holders. (This should not be a matter of mere urging but should be a question of fact properly proved and evidenced with necessary documents, but that is not done here.) I was also told that in the case under dispute the Railways were the purchasers and in the Railway receipts issued the Collieries were shown as consignors and the permit-holders as consignees. I was shown the copies of the bills to indicate that the Petitioner billed the Railways for the value of the goods at controlled prices and I was told that the Colliery billed the Petitioner at such value less the

commission.

15. It will be seen again that all this was being put forward by the dealer by telling the Additional Commissioner of Commercial Taxes" (except copies of the bills which were supposed to have been shown to him).

16. The Additional Commissioner of Commercial Taxes on that unsatisfactory nature of fact and evidence had no other option but to follow two courses. He first gave his interpretation of the transaction under reference. Secondly, he gave his interpretation of the letter of April 7, 1948, which is directly concerned in the question that we have to answer. On the first point about the interpretation of the transaction under the Colliery Control Order, the Additional Commissioner records after noticing the existence of middlemen in coal trade in West Bengal as a common custom with the coal trade:

Under such circumstances, I feel he should be held to have sold the goods and as such he is a dealer for the purposes of the Sales Tax Act of West Bengal and should necessarily be liable for payment of taxes on such sales. It is true that the coal trade is partially guided by the provisions of the Colliery Control Order which provide for middlemen in the trade. But not only I do not find anything in the Colliery Control Order which positively prohibits a sale by a middleman but also even assuming that in terms of the Colliery Control Order, a middleman is not to be treated as a seller, still I do not see any reason why he should not be held as a dealer for the purposes of the Bengal Finance (Sales Tax) Act, 1941, if he satisfied the conditions laid down in the same..... In my opinion, in the circumstances noted above, the Petitioner satisfied the conditions laid down in the State Act and is a dealer for the purposes of such 1 transactions which were nothing but the Petitioners sales.

17. In taking that view, the Additional Commissioner of Commercial Taxes can be supported by the recent decision of the Supreme Court in the State of Rajasthan and Another Vs. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur, , where the Supreme Court made the following observations:

The price chargeable was fixed under the Colliery Control Order. The effect of the Control Order was only to superimpose upon the agreement between the parties the rates fixed under the Order. But on that account it cannot be said that the relation between 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.

18. Again, in that very case the Supreme Court observed as follows (Supra (228):

There was in the present case 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 Rajasthan Sales Tax Act.

19. Necessarily and naturally the learned Advocate-General, who appeared for the Revenue in this case, strongly relied on these observations. Mr. Banerjee for the dealer made the comment that although this was a decision on the Colliery Control Order and the Sales Tax Act, the Supreme Court in Karam Chand Thapar's case (Supra) did not notice the first Colliery Control Order case decided in The State of Bombay Vs. Ratilal Vadilal and Bros., . Mr. Banerjee's further comment was that this first case of the State of Bombay v. Ratilal Vadilal on the Colliery Control Order was also not considered by the Supreme Court in its earlier The State of Rajasthan and Another Vs. Karamchand Thappar and Bros., , even though the Bombay High Court judgment expressed the view that the State of Bombay v. Ratilal Vadilal (Supra) was very much on the point and from which the Supreme Court was hearing that appeal. But these comments, in our view, do not advance matters so far as the dealer in the present case is concerned and we do not propose to pursue them.

20. Mr. Banerjee for the dealer has also shown us other decisions on other Control Orders on the ground that most of the Control Orders followed the same principle of control, controlling the parties, production, despatch according to the conditions laid down in such orders. It will not be necessary, having regard to the views that we are taking, to discuss these other cases and other Control Orders. We shall, however, refer to one decision on which reliance was placed by Mr. Banerjee. That was the case of New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, , a decision of the Supreme Court. There it was held by majority judgment that the despatches of sugar by the Assessee pursuant to the directions of the Sugar Controller under the Sugar Control Order were not the result of any contract of sale and, therefore, there was no sale and the Assessee was not liable to pay sales tax on the amount received from them from the State of Madras for sugar supply. The reason for Mr. Banerjee's drawing our attention to the New India Sugar Mill's case (Supra) was that he was trying to say that the Supreme Court was holding a sale under the Sugar Control Order to be not a sale and yet in other Supreme Court cases, as in The State of Rajasthan and Another Vs. Karamchand Thappar and Bros., ; a sale under the Colliery Control Order was a sale and he also made reference to the Indian Steel and Wire Products Ltd. Vs. State of Madras, another decision of the Supreme Court, where it was held that the transactions were sales attracting liability to sales Tax. Finally, Mr. Banerjee relied on the The State of Bombay Vs. United Coal Co., , a decision of the Bombay High Court saying that in the facts and circumstances of that case under the Colliery Control Order, the Respondents were del credere agents for the consignors and, therefore, the transactions were not transactions of sale within the meaning of Bombay Sales Tax Act. There again it would be unnecessary to discuss these authorities first, because the Bombay and the Bengal Acts might have their differences and, in fact, in some instances they have and secondly, because here the two notable facts in the present Reference before us are that the Khas Dharmaband Colliery Co. Pvt. Ltd. is a registered dealer and it actually used registered declaration forms for the purpose of

claiming and obtaining exemption.

21. The learned Advocate-General for the Revenue has emphasized certain outstanding facts and features in this case. His first emphasis naturally is on the letter dated, April 7, 1948. We propose now to take up this letter written by the Bengal Coal Co. Ltd. to the dealer Khas Dharmaband Colliery Co. Pvt. Ltd. The significant words used in this letter are to be found in the context, it begins by describing it as

contract for the sale of the output of coal of Murulidih Colliery of Bengal Coal Co. Ltd. It uses such expression as "we will sell to you", "the output will be made over to you loaded into wagons at colliery siding screened into such sizes as you may direct", "for the material delivered as above we shall charge you the Government controlled selling prices".

On these words the learned Advocate-General contends that this is a contract of sale outright and it is not a contract of agency or of a middleman earning his agency or commission. The language according to the learned Advocate-General is clear.

22. His second submission is that this contract contained in that letter on which question is asked does not speak about the Colliery Control Order of Khas Dharmaband Colliery Co. Pvt. Ltd. acting as a middleman under the Colliery Control Order. A perusal of this letter shows that no mention is made of the Colliery Control Order. If it is the dealer's contention now that he is acting as a middleman under the Colliery Control Order then obviously the whole of this contract is illegal and void and is against that order and we cannot assume that parties specially the responsible parties like Bengal Coal Co. Ltd. and Khas Dharmaband Colliery Co. Pvt. Ltd. who are experienced traders and dealers in coal in the coal trade to be doing something flying in the face of the Colliery Control Order. The necessary inference is that this action mentioned in his letter was not hit by the Colliery Control Order OR else we have to come to the conclusion that these two responsible companies are entering into an illegal contract which throw them open to penalty which might result in imprisonment. We cannot assume such a conclusion. This consideration is a persuasive factor in coming to the conclusion that this letter represents an independent out and out buying and selling contract and not a contract of agency or for earning commission.

23. Mr. Banerjee for the dealer tried to get out of this consequence by suggesting two arguments. One argument was that there is a reference in that letter to the "Government controlled selling prices", but the point is not merely control of prices by the Government. The control under the Colliery Control Order is far more extensive and goes very much beyond prices. We do not propose to set up the diverse clauses of the Colliery Control Order, but a mere glance would show that the Colliery Control Order controls who is to sell and who is to purchase and who is to be allotted and what should be the quantity and provides for special

authorities and, licences, as for instance Clause 12(e):

Clause 12(e). 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 authorities and in accordance with the conditions contained in a general or special authorities of the Central Government.

24. Mr. Banerjee, however, was more enthusiastic about another expression used in that letter as helping the contention of the dealer and that is this sentence:

On the prices so defined we shall allow you a selling commission of 6 as per ton of coal or coke.

On the strength of the expression "selling commission", Mr. Banerjee argues, that here is an indication that the dealer was acting only as commission agent earning commission because no outright buyer, as indicated in the other portion of the letter, would however get a commission of this nature. In this connection he relied on the Privy Council decision in *Livingstone v. Ross* (1901) A.C. 327 (334) Sir Ford North made the following observations:

One other "clause remains for consideration--one of the utmost importance. It supplies the keynote to the whole. It is the provision for %\\ per cent commission being payable to Livingstone on the purchase-money after the completion of the sale--a phrase already made the subject of comment. This provision as to commission is in their Lordships' opinion absolutely inconsistent with Livingstone's contention. It shows that he was an agent for sale to be paid for commission and not a purchaser. These observations were made in spite of the fact that there already before the Privy Council the words used were "sell and sell to you" as will be seen in the report (p. 332).

25. Again, Mr. Banerjee says that the rate of selling commission in that letter is 6 as per ton of coal or coke. He says that it has a mysterious reference and correspondence with the permissible commission of 37 nP. per ton mentioned in Clause 6(1) of the Colliery Control Order.

26. Certainly Mr. Banerjee for the dealer is entitled to make this comment on the basis of the authority of the Privy Council decision in *Livingstone v. Ross* (Supra) where, in spite of the words used like "sale" or "sale to you", the use of the word "commission" was held to be decisive in holding the contract to be one of agency and not of sale. But, there are many distinguishing features between that case before the Privy Council and the present Reference before us. The words used in the Privy Council case were not selling commission but as will be seen from the report (p. 331) were "two and a half per cent commission payable to you on the said sum after completing sale". Therefore, that implied that that was a commission payable "when the agent completed the sale. Agency would seem to be implied in such a situation. Secondly, the glaring- and outstanding fact in the Privy Council case (Supra (331-32) was that this agent is a person without the

means to pay the purchase price as will be seen from the observations of Sir Ford North where the following statement of fact appears:

Livingstone, who was admittedly a person of no means, that Livingstone was merely employed by him as his agent to find a person or persons of means willing to buy agent property from Ross on the terms contained in the letter of August 23.

The Supreme Court decision in *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, was also referred in that connection where on the construction of the particular document the Supreme Court observed:

On the face of it therefore the contract is clearly not one of agency "for sale but it reads as an agreement of sale. If the Defendants were intended to be constituted as the agents for sale the terms of the contract would have been entirely different. Another important feature in this case is that there is a definite price fixed in the contract for the Plaintiff's goods.

Both these features are present in the present Reference before us and for that purpose that part of the observation and conclusion in the Supreme Court decision is against Mr. Banerjee's contention. But, he relies on the subsequent observations of the Privy Council (*Supra* (184)):

It was contended for the Plaintiff that according to the contracts the prices fixed are ci.f. less 2Jr % and discount of %\\ % was the commission for the Defendants as agents. There is no use of the word "commission" in the contracts and we see no reason to hold that 2jr % should be taken as commission and not as a margin.of profit. The important point is that if the contract was one of agency there was no need to mention the price at all as between the Plaintiff and the Defendants. It may be that in most cases the prices which the Defendants obtained from the London purchasers were the same as the prices stipulated in the contracts with the Plaintiff but the fact remains that they obtained t\\ % discount in the sale price, that is to say, they purchased the goods from the Plaintiff 2| % less and sold them to their London purchasers at the full price, so that 2 % was their margin of profits.

27. These observations only show that each contract must be construed on its own merits, context and language. It must be recorded here that the learned Advocate-General appearing for the Revenue explained the words "selling commission" in the letter of April 7, 1948, by saying that this was not a selling commission to an agent but was a commission to the purchaser for lifting the stock quickly and not delaying it, by reason of the fact of another portion of the contract which is in the following terms.

This agreement will continue up to 31st December, 1948, in the first instance and thereafter would be subject to two months" notice on either side at any time, payment for the gross value will be made within 15 days of the calendar month for the despatches made during the month ended and we shall pay you or pass

you a credit note for the commission.

On these clauses contained in the letter of April 7, 1948, the learned Advocate-General said that this provision for giving a selling commission was only an incentive to the buyer to lift the goods quickly and within a short time in a contract which was terminable with two months' notice and on which the payment and the credit note for the commission depended on a short period of 15 days.

28. In addition, the learned Advocate-General also has relied on the fact that the dealer having claimed exemption from the sales tax on these transactions must be deemed to have admitted liability for the sales tax or else no question of exemption under the Sales Tax Act could arise. To that Mr. Banerjee for the dealer argued that there could be no estoppel against law and even if he had by mistake taken such a course that should not be held against him. His argument would have acquired at least some force if he could bring himself within the doctrine of estoppel of law, but this is not a doctrine of estoppel of law. It is a question of a particular fact. That fact is that the dealer himself is a registered dealer who had applied and used registered declaration forms and who has never pleaded non-liability on the basis of that fact at any of the primary stages or even subsequent stages, until very late his complete non-liability, for the sales tax with regard to these transactions. The next submission of the learned Advocate-General was to emphasize again that the Assessee in this case obtained the sales tax declaration forms, which are form No. XXIV, from its customers which could only be obtained in law if the Assessee's transactions with its customers were sales. This appears to us as an unanswerable argument both on law and, in fact, in the present Reference. It is needless to say that the use of sales tax declaration forms or possession thereof, unless they are obtained from persons to whom sales are made, are illegal under the Bengal Finance (Sales Tax) Act u/s 5(2)(a)(ii) proviso read with Section 22(i)(cc) and Rule 27A of the Bengal Finance (Sales Tax) Rules. Lastly, he emphasized that even in its own bills to the customers the Assessee has not proved that he had mentioned that Bengal Coal Co. Ltd. sold directly to its customers. Absence of proof on that fact would lead to the irresistible conclusion that the transactions between the Assessee and its customers were sales.

29. To meet this argument about forms Mr. Banerjee for the dealer made a submission that forms are not decisive and for that purpose relied on the decision in Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, where it was pointed out that the form in which the invoice was made was- not determinative of the contract between the company and the customers. But that case does not help Mr. Banerjee for the simple reason that there the question was whether the Railway freight was at all liable to pay sales tax which was included in the invoice. As it was held that Railway freight was not liable to pay sales tax, it was pointed out that the invoice or its form in that context would not be decisive. But, here the use of sales tax declaration form stands entirely on

a different footing and does not involve or raise that kind of a question.

30. It now remains to notice another argument made by Mr. Banerjee for the dealer based on the definition of a "dealer" u/s 2(c) of the Bengal Sales Tax Act and its expl. No. 2 dealing with an "agent". Having regard to the interpretation we have already given, this question is no longer of primary importance, because on such an interpretation we have come to the conclusion that the Assessee is not an agent. Anyhow, we shall briefly refer to and notice this argument made by Mr. Banerjee.

31. Section 2(c) of the Bengal Finance Sales Tax Act defines a dealer to mean any person who carries on the business of selling goods in West Bengal and includes the Government.

On that basis Mr. Banerjee argued first that the Assessee was not carrying on the business of selling goods but was only acting as an agent. We have already come to the conclusion that the Assessee in the facts and circumstances of this case was selling goods and not acting as an agent.

32. The next submission of Mr. Banerjee was based on expl. 2 which reads as follows:

A factor, a broker, a commission agent, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling goods and who has, in the customary course of business authority to sell goods belonging to the principals as a dealer.

33. This explanation far from helping Mr. Banerjee appears to us to go against him. It shows in the first place that a dealer can be a broker or a commission agent or a del credere agent. No doubt, that would be so when he

carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals.

We have found as a fact in this case, and so has the Board of Revenue, that he carries on the business of selling goods and in fact; on the interpretation of the letter of April 7, 1948, the Assessee is a buyer of the goods from the Bengal Coal Co. Ltd.

34. Mr. Banerjee has also drawn our attention to the definition of "sale price" and "sale" under "Section 2(h)(i) and Section 2(g) of the Bengal Finance Sales Tax Act, 1941. But, that was again for the purpose of emphasizing the word "sale".

35. Having regard to our finding and interpretation, we do not consider that these sections defining "dealer", "turnover", "sale" or "sale price" help the Assessee's contention in any manner.

36. As a matter of last resort, Mr. Banerjee for the Assessee relied on a recent decision of the Supreme Court in Chitter Mal Narain Das v. Commissioner of

Sales Tax (1970) 2 S.C.W.R. 306. Now, that case was under the U.P. Sales Tax Act. It reiterated the previous view of the Supreme Court that the expression Sale of Goods Act in the Constitution must be understood in the same sense in which it is used in the Sale of Goods Act, 1930, and therefore the U.P. Legislature can legislate for levy of sales tax on a transaction which amounted to a sale within the meaning of Sale of Goods Act, 1930, and not on any other transaction which was deemed by fiction to be a sale. It was on that foundation that the Supreme Court came to the conclusion that the Wheat Procurement (Levy) Order upon the licensed dealer imposed a liability to deliver half the quantity of wheat on hand and he had also to supply to the State Government 50 % of the quantity of wheat procured or purchased by him every day beginning from the date of commencement of the order and in default of which he was to be penalised. In that context the Supreme Court held that it was not possible to hold that there was any contract between the Assessee and the State pursuant to Which the goods were sold within the meaning of U.P. Sales Tax Act and, therefore, were not taxable. In explaining the decision of the Supreme Court in the previous case of Indian Steel & Wire Products Ltd. (supra) already discussed by us, the Supreme Court in Chitter Mai Narain Das's case (1970) 2 S.C.W.R. 306 said that it

does not justify the view that even if the liberty of contract in relation to the fundamentals of transactions is completely excluded, a transaction for supply of goods pursuant to directions issued under a Control Order may be regarded as a sale.

That ratio is, therefore, based on "fundamentals of transactions". We have stated what the "fundamentals" are in this case and which leave us with no doubt that the present transaction in the instant Reference is a sale and liable to tax.

37. For the reasons stated above and the authorities discussed, we hold and we are of the opinion that the Board of Revenue was not in error of law in construing the agreement of "April 7, 1948, between the Assessee and the Bengal Coal Co. Ltd. In other words, we hold that the agreement dated April 7, 1948, represented a transaction by which the Bengal Coal Co. Ltd. sold the coal to the Assessee and, as such, the turnover was taxable under the Bengal Finance (Sales Tax) Act. We further hold and are of opinion that this agreement dated April 7, 1948, invested the Assessee with the status and/or incidence of a dealer under the Bengal Finance Sales Tax Act and the Board of Revenue was correct in so holding. We answer the question accordingly and. the answer is in favour of the Revenue.

38. No order as to costs.

T.K. Basu J.

I agree.