
(1974) 08 CAL CK 0035
In the Calcutta High Court

Messrs. Jhagu Shaw Dukh Raj Shaw

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 26-08-1974

Acts Referred:

Central Sales Tax Act, 1956 — Section 3
Constitution of India, 1950 — Article 286(1)(b)

Citation : (1974) 08 CAL CK 0035

Hon'ble Judges : Salil Kumar Datta, J; Bankim Chandra Ray, J

Bench : Division Bench

Advocate : Basudeb Banerjee, Tapan Kumar Banerjee and D.W. Trivedi, for the Appellant; Ganendra Narayan Roy and Pradipta Roy, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is by the petitioner against the judgment and order passed by D. Basu, J. dated March 7, 1963 in Civil Rule No. 4413 of 1959, whereby the Rule was discharged.

2. Petitioner claimed to be an exporter to scrap iron carrying on business under the name and style of Messrs. Jhagru Shaw Dukhraj Shaw, Howrah. He entered into a contract for export of a scrap iron to Genoa and Iron and Metal Traders Ltd. Bombay (hereinafter to as the Bombay Company) acted as Commission agent. The petitioner obtained transferable export licence and dispatched 900 tons and 300 tons of scrap iron in two consignments to Genoa and Messrs. Richard Nathan Corporation of New York (hereinafter referred to as the Corporation), was the purchaser and its steamer agent was M/s. Mahboob Kasim & Co. Ltd. the petitioner loaded the goods at its costs to the ship of the said shippers at Calcutta and bill of lading was issued in the name of the Corporation. The petitioner sent the invoice etc. and received payment for the same. Though the provisions of Bengal Finance (Sales Tax) Act, 1941 were not attracted, the Commercial Tax Officer, Howrah, assessed sales tax on the said transactions by his order dated September 27, 1956. The Officer overlooked that u/s 5(2) (a) (v)

of the Act the sales which have not taken place in West Bengal or sales in course of the export of goods out of the territory of India are exempted and the same was to be deducted from the taxable turnover. The petitioner claimed exemption under this head for a sum of about Rupees 2.24 lakhs on account of transactions referred to above. On appeal, the Assistant Commissioner on April 30, 1957 affirmed the order. The Additional Commissioner also affirmed the order in revision on August 20, 1957. The petitioner thereafter moved the Board of Revenue and the same order was affirmed on April 13, 1959 by the Additional Member of the Board. The petitioner made an application before the Board for making a reference u/s 21 of the Act to this Court which was, however, rejected as being barred by limitation. In the meantime a certificate for a total demand of Rs.11,031/- was issued on October 30, 1959 by the Certificate Officer, Howrah in respect of the said transactions. The petitioner thereupon moved this Court in Constitutional Writ Jurisdiction in or about December 22, 1959 praying for a Writ in the nature of Mandamus directing a reference to this Court u/s 21 and also for a Writ in the nature of Certiorari quashing all the orders mentioned above, on this application the concerned Rule was issued. The Rule was opposed by the respondent No.5, the Commercial Tax Officer, Howrah, by filing an affidavit-in-opposition affirmed on April 4, 1960 and it was stated therein that there were two perfected sales. One sale took place at Calcutta and there was a resale whereupon the commodity was sent outside India. The first sale was between the petitioner as seller and the Bombay Company who was the actual buyer and not the commission agent as alleged. This company subsequently sold the exported goods outside India on the export licence of the petitioner. The petitioner loaded the goods in the ship under the instruction from the Bombay Company and not of the foreign buyer in whose names the bills of lading were made also under instructions of the Bombay Company. The payments were also received by the petitioner from the Bombay Company. Accordingly, the provisions of the said Act was directly attracted and the exemption claimed was not admissible.

3. In the affidavit-in-reply the petitioner, while reiterating the allegations made in the petition, stated that the Bombay Company worked as commission agent of the foreign buyers and the terms were either cash or by letters of credit at the opinion of the buyers against shipping documents. The sale became complete only after the goods were loaded in the ship for dispatch outside India. Before such delivery the goods remained in the possession of the petitioner as owner and not as custodian.

4. At the hearing of the Rule before D. Basu, J., it was found that the petitioner failed to establish that the Corporation was the purchaser of the goods from the petitioner or that the Bombay Company was the agent of the Corporation. In all these transactions, the Court held that the mere fact that the goods were exported under petitioner's export licence did not establish that the transactions were direct sale by him to foreign buyers and the Bombay Company was a mere negotiator. All correspondence would show that Bombay Company itself was the purchaser as was asserted by it and was to pay the price under arrangement

against shipping documents. This Company never mentioned that they were acting as agent. Further instructions were by the Bombay Company to load the goods in the ship chartered by the Corporation and make out the bills of lading in its name and to forward the Mates receipt to the Bombay Company for payment. This demolishes the petitioner's case that the Bombay Company was the agent of the Corporation.

5. It was held that u/s 5(2)(a)(v) dispatch outside West Bengal must be by the dealer as a part of the transaction. This was not the case here as instead of taking delivery of the goods the Bombay Company asked the petitioner to dispatch the goods to its nominee under a separate contract of sale. The dispatch was made by the petitioner not on its own behalf but for the Company, and accordingly the sale was not entitled to any exemption.

6. As to exemption under Article 286(1)(b) the sale was held not in course of export of goods outside India. The Bombay Company merely took advantage of the export licence of the petitioner but for sale to be in course of export it must be established that there was a privity of contract between the foreign firm and the dealer. Mere description of the price as FOB did not indicate that the property in goods could not pass to the Company prior to shipment outside the customs frontier. Letters indicated that the Bombay Company had already purchased the goods which were to be dispatched under the petitioner's export licence and thus the property had already passed before they were dispatched from Calcutta. Only payment of price was deferred, to be made against Mate certificate. Accordingly, it was held that the petitioner's case of exemption under Article 286(1) (b) could not be accepted. This appeal is by the petitioner against this decision.

7. Mr. Basudeb Banerjee, learned Advocate appearing for the petitioner, contended with great force that the impugned sale was in course of export and was entitled to exemption. He has referred to various decisions in support, which we shall consider presently. His contention is that the Bombay Company was merely a commission agent of an undisclosed principal and as such the petitioner's transactions were really with the foreign buyer through the Bombay Company. The sale as such involved export before it could be completed and such export was an integral part of the transactions. He has referred to the decision in (1) *State of Travancore-Cochin v. Bombay Company Ltd.*, AIR 1952 SC 356 : 3 STC 434. In that case it was held as follows:

A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction. Of those two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming, without deciding that the property in the goods in

the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Article 286(1)(b). That clause indeed, assumes that the sale had taken place within the limit of the State and exempts it if it took place in the course of the export of the goods concerned.

8. Reliance was also placed on the decision in (2) *B.K. Wadeyar Vs. Daulatram Rameshwarlal*, . It was held,

The law is now well settled that if the property in the goods passes to the buyer after they have for the purpose of export to a foreign country crossed the customs frontier the sale has taken place "in course of the export" out of the territory of India.

The Court further observed:

The normal rule in FOB contracts is that the property is intended to pass and does pass on the shipment of the goods.

Strongly relying on these decisions, it has been contended that the contract there was a FOB contract and the petitioner loaded the goods to the ship at its own cost for export to a foreign country. Accordingly, it should be held that the sales had taken place "in course of export" and as such exempted.

9. Our attention has been drawn to the decision in (3) *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, . It will be proper to quote the relevant extract in full as follows:

A sale in the course of export predicates a connection between the sale and the export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties or from mutual understanding or agreement between them or even from the nature of the transaction which links the sale to export. A transaction of sale which is preliminary to export of the commodity sold may be regarded as one in the course of export, unless the sale occasions export.

And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India. There are a variety of transactions in which the sale of a commodity is followed by

export thereof. At one end are transactions in which there is a sale of goods in India and the purchaser immediate or remote exports the goods out of India for foreign consumption. For instance, the foreign purchaser either by himself or through his agent purchases goods within the territory of India and exports the goods and even if the seller has the knowledge that the goods are intended by the purchaser to be exported, such a transaction is not in the course of export for the seller does not export the goods, and it is not his concern as to how the purchaser deals with the goods. Such a transaction without more cannot be regarded as one in the course of export because etymologically "in the course of export" contemplates an integral relation or bond between the sale and the export. At the other end is a transaction under a contract of sale with a foreign buyer under which the goods may under the contract be delivered by the seller to a common carrier for transporting them to the purchaser. Such a sale would indisputably be one for export, whether the contract and delivery to the common carrier are effected directly or through agents. But in between lie a variety of transactions in which the question whether the sale is one for export or is one in the course of export, i.e., it is a transaction which has occasioned and export, may have to be determined on a correct appraisal of all the facts. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But that is not to say that the distinction between transactions which may be called sales for export and sales in the course of export is not real. In general where the sale is effected by the seller, and he is not connected with the export which actually takes place it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature at the transaction, the sale is in the course of export.

10. The ratio of the decisions is that if the sale and export are integral parts of the same transaction so that sale and export cannot be disintegrated except at the cost of the contract for sale, it can be said that sale in such circumstances takes place in course of export. The contract in the case we are concerned with is with the Bombay Company which as we have seen no where discloses that it was acting as commission agent of a foreign buyer. On the contrary, the Bombay Company by its letters of 2nd and 4th August, 1952 asserted more than once that it was the Bombay Company which was the purchaser. By its letter of 4th August, 1952 it requested the petitioner to ship the goods under the contract to the chartered vessel of the Corporation. It was further stated that there should be no delay in loading in the ship as otherwise the Bombay Company would suffer demurrage. The Bombay Company if the sale was in course of export, could not ask that the bills of lading were to be made in the name of the Corporation as consigner and the same was to be directly collected by the shipper by the Corporation's agent and the petitioner was not to have any control or custody over the same. Even in the declaration given by the Corporation on July 12, 1954 there is no indication that he was the purchaser of

the goods from the petitioner. All these indicate that the petitioner's sale to the Bombay Company had nothing to do with the export of goods and the real purchaser was the Bombay Company at whose request the goods were loaded to the shippers at Calcutta by way of delivery of goods. Ordinary rule of the FOB contract had accordingly no application as the title of the goods under agreement had already passed before the Bombay Company and in the correspondence the Bombay Company referred the goods as its own. Payment of price on a subsequent date did not alter the position as even by definition of sale means any transfer of property in goods for cash or deferred payment. Further, export licence did not indicate that the petitioner was the exporter of the goods and the petitioner himself admitted in the petition that the export licence was transferable.

11. For all these reasons, we are of opinion that the goods are not exempted under Article 286(1)(b), the sale not being in the course of export.

12. Section 5(2)(a)(v) also exempts sale of goods shown to the satisfaction of the Commissioner not to have taken place in West Bengal or to have taken place in course of inter-State trade or commerce within the meaning of section 3 of the Central Sales Tax Act, 1956. A discussion of the nature of the transactions would clearly show that the goods on sale were delivered at Calcutta when at the request of the Bombay Company they were loaded in the ship at Calcutta. This would clearly indicate that the sale took place at Calcutta where delivery of the goods were given at the request of the purchaser, the Bombay Company. Accordingly, there is no substance in the contention of the appellant that the petitioner was entitled to exemption in any event on the ground that the sale took place outside West Bengal.

13. For all these reasons, as all contentions of the appellant fail, this appeal is dismissed. There will be no order as to costs. All interim orders are vacated.

Ray, J.

14. I agree.