

(1966) 07 KL CK 0031
In the High Court Of Kerala
Case No : O.P. No. 2100 of 1965

Nechupadam Construction Engineering Contractors	APPELLANT
Vs	
The Executive Engineer and Another	RESPONDENT

Date of Decision : 14-07-1966

Acts Referred:

Central Sales Tax Act, 1956 — Section 5

Citation : (1967) 20 STC 82

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : K. Velayudhan Nair and M.C. Sen, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioner are a firm. They had undertaken a contract work with Government for forming embankment for the dam from L. S. O. to 2000 in the Pothundi Project. Their case is : Government, the second respondent, had undertaken to supply petrol and high speed diesel oil at Re. 0.71 per litre for petrol and Re. 0.63 per litre for diesel oil; the value of the petrol and diesel oil was agreed to be deducted from out of the part-bills paid by the first respondent; along with the amount so deducted as value of the diesel oil and petrol, the first respondent deducted various amounts -totalling Rs. 19,502.53 as sales tax on the diesel oil and petrol purchased by the petitioner ; the petrol and diesel oil are liable to tax only at the point of first sale in the State. The contention of the petitioner is that they are not the first purchasers in the State of the petrol and diesel oil, and that the recovery of sales tax from them was illegal. The petitioner made a demand to refund the sales tax illegally levied, by their letter dated 7th March, 1965. The first respondent gave a reply to the petitioner refusing to refund the sales tax realised from the petitioner. Exhibit P-I is the copy of the reply. The prayer in the petition is for quashing exhibit P-.1 and for issuance of a writ of mandamus directing the respondents to refund the tax collected from the

petitioner. On behalf of the first respondent, a counter-affidavit has been filed and in the counter-affidavit it is stated in para 7 :

For supplying petrol and diesel oil to contractors in the Pothundi Irrigation Project and for other purposes the Government purchased petrol and diesel oil from the Burma Oil Company at Pollachi who delivered the same in the pump installed in the workshop compound at Pothundi from where the department regularly supplied petrol and diesel oil to the contractors including the petitioner realising the price thereof from them. The purchase by the State was an inter-State one taxable under the Central Sales Tax Act and not an intra-State one. In doing so the Government was carrying on an adventure or concern in the nature of trade or commerce and as such the Government is a dealer as denned in Section 2(viii) of the Kerala General Sales Tax Act, 1963. The sale of petrol and diesel oil to the petitioner was the first sale in the State by the Government and as such the sales are liable to be taxed u/s 5 of the Kerala General Sales Tax Act, 1963, and the petitioner is liable to pay the sales tax as per clause 12 of the special conditions of the agreement entered into by him and it was in pursuance of that condition and the request of the petitioner that the sales tax was deducted from the part-bills.

2. Mr. Velayudhan Nair for the petitioner did not contend that his clients were not liable to pay sales tax if they were the first purchasers of the petrol and diesel oil in the State. His contention was that it was in pursuance of the contract between Government and the petitioner that Government purchased petrol and diesel oil from Pollachi and transported them to Pothundi and therefore the sales to the petitioner were inter-State sales not liable to tax under the State law. He submitted that in order that the sales of petrol and diesel to his clients may be taxed, the State must have jurisdiction to tax the same under the State law and as the sales in question were inter-State sales, his clients were not liable. It was argued that the contract of Government with the petitioner involved the movement of petrol and diesel oil from Pollachi to Pothundi and therefore the sales were inter-State sales. Whether the sales were inter-State sales would depend upon the answer to the question whether the contract of Government with the petitioner involved the movement of goods from one State to another or whether the movement of goods from one State to another was a necessary incident of the contract. Mr. Velayudhan Nair argued that the contract between Government and the petitioner necessitated the purchase of petrol and diesel oil from Pollachi by Government and the transportation of the same to Pothundi and therefore the sales were inter-State sales not liable to be taxed. In support of his contention he relied upon the decision in *Khosla & Co. (P.) Ltd. v. Deputy Commissioner of Commercial Taxes* [1966] 17 S.T.C. 473 and also upon *The Cement Marketing Co. of India (P.) Ltd. v. The State of Mysore* [1963] 14 S.T.C. 175. In *The Cement Marketing Co. of India (P.) Ltd. v. The State of Mysore* [1963] 14 S.T.C. 175 the Supreme Court had to consider this question. The first appellant before the Supreme Court was the sales manager of the second appellant there, who was manufacturing cement and was having factories in

different parts of India outside the State of Mysore. The first appellant with its head office in Bombay and a branch office in Bangalore was a registered dealer under the Mysore Sales Tax Act, 1948. Persons desirous of buying cement had to get an authorisation in a standard form which authorised the first appellant to sell and supply cement in quantities and from the factory mentioned therein. The buyer then placed an order with the first appellant who accepted the order and instructed its Bombay office to despatch the cement in accordance with the instructions of the buyer and the authorisation. A copy of the letter of instruction was sent to the factory from where the goods were to be despatched and the particulars of the authorisation were mentioned therein. Thereafter the first appellant sent an advice to the buyer enclosing therewith the railway receipt for the goods and the particulars of the authorisation. Both the contract of sale and the advice stated that the goods were being despatched at the buyer's risk from the time delivery was made from the factory to the carriers and the railway receipt was obtained for the goods. In respect of the period of assessment from 6th September, 1955 to 31st March, 1956, both the Sales Tax Authorities and the High Court held that as the actual delivery of the goods to the buyers was made within the State of Mysore the sales were intra-State sales and liable to be taxed under the Mysore Sales Tax Act, 1948. It was held by the Supreme Court that the sales were inter-State sales and exempt from sales tax because under the contract of sale there was transport of goods from outside the State of Mysore into the State of Mysore and the transactions themselves involved movement of goods across the border. The Supreme Court accepted the test propounded in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, where it was held that a sale can be said to take place in inter-State trade only if two conditions are satisfied ; the conditions are : (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale.

3. Section 3 of the Central Sales Tax Act says : "3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.-A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-

(a) occasions the movement of goods from one State to another ;

or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.-Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of Clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2.-Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the

goods pass through the territory of any other State.

4. In this case there was no contract between Government and the petitioner for sale of petrol or diesel oil. Clause 5 of the agreement would show that the petitioner had an option to purchase petrol and diesel oil from Government. There was no obligation on the part of the petitioner to purchase petrol or diesel oil from Government. The provision in clause 5 of the special conditions of agreement is as follows :

If the contractor requires petrol or high speed diesel oil the same can be supplied from the pump installed in the departmental workshop compound and the cost of the same will be recovered in cash at the following rates: Petrol at Re. 0.71/litre, diesel oil at Re. 0.63/litre.

It cannot be said that the so-called contract involved the movement of goods from Pollachi to Pothundi. Nor can it be said that the movements of goods were the necessary result of the contract. The fact that Government purchased petrol and diesel oil from Pollachi and transported the same to Pothundi in the Kerala State with the idea of supplying the petrol and diesel oil to persons like the petitioner would not make the movement of goods across the border, a movement under the so-called contract with the petitioner. Government could as well have supplied the petitioner with petrol and diesel oil by purchasing them in the local market. There was no necessary connection between the movement of goods across the border and the so-called contract between the petitioner and Government. This is a simple case where Government in order to supply petrol and diesel oil purchased them in inter-State transactions and supplied them to the petitioner and other contractors. The Government entered into a contract of sale with the Pollachi dealer and under that contract the movement of goods took place and therefore the sales to Government were really inter-State sales and the sales to the petitioner being first sales in the State, were liable to be taxed.

5. Mr. Velayudhan Nair submitted that the Government were not a "dealer" as they were not carrying on the business of buying or selling petrol and diesel oil and therefore they were not entitled to collect sales tax from the petitioner. The word "dealer" is denned in Section 2(viii) of the Kerala General Sales Tax Act, 1963, and the material portion of it reads as follows:-

2. Definitions.-In this Act, unless the context otherwise requires,-

(viii) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes-

(a) the Central Government, a State Government, local authority, company, a Hindu undivided family, a Marumakkathayam tarwad, a family governed by the Kerala Nambudiri Act, 1958, an Aliyasanthana family, a firm, a society, a club or an association which carries on such business.

"Business" as defined in Section 2(vi) is as follows :-?

2. Definitions.-In this Act, unless the context otherwise requires,-

(vi) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, with or without profit motive in such trade, commerce, manufacture, adventure or concern.

6. From these definitions it would be clear that Government can be a dealer if they are engaged in an adventure in the nature of business. The contention of the State as stated in the counter-affidavit is that the Government were engaged in an adventure in the nature of business for the purpose of supplying petrol and diesel oil to persons like the petitioner and therefore they are a "dealer" within the definition of that word u/s 2(viii). I think that Government were a "dealer" and the sales by Government to the petitioner were first sales which would attract liability to sales tax. Mr. Velayudhan Nair submitted that the ruling in K. G. Khosla & Co. (P.) Ltd. v. Deputy Commissioner of Commercial Taxes [1966] 17 S.T.C. 473 is decisive of the question in favour of the petitioner. In that case :

The assessee entered into a contract with the Director-General of Supplies and Disposals, New Delhi, for the supply of axle-box bodies. The goods were to be manufactured in Belgium, according to specifications and the D.G.I.S.D., London, or his representative had to inspect the goods at the works of the manufacturers and issue an inspection certificate. Another inspection was provided for at Madras. The assessee was entitled to be paid 90 per cent, after inspection and delivery of the stores to the consignee and the balance of 10 per cent, was payable on final acceptance by the consignee. In the case of deliveries on f.o.r. basis the assessee was entitled to 90 per cent, payment after inspection on proof of despatch and balance of 10 per cent, after receipt of stores by the consignee in good condition. The assessee was entirely responsible for the execution of the contract and for the safe arrival of the goods at the destination. The contract provided that notwithstanding any approval or acceptance given by an Inspector, the consignee was entitled to reject the goods, if it was found that the goods were not in conformity with the terms and conditions of the contract in all respects. The manufacturers consigned the goods to the assessee by ship under bills of lading and the goods were cleared at the Madras Harbour by the assessee's clearing agents and despatched for delivery to the Southern Railway in Madras and Mysore. The question was whether the sales by the assessee to the Government departments were in the course of import and exempt from taxation u/s 5(2) of the Central Sales Tax Act, 1956: Held, (i) that the expression "occasions the movement of goods" occurring in Section 3(a) and Section 5(2) had the same meaning ; (ii) that before a sale could be said to have occasioned the import it was not necessary that the sale should have preceded the import, (iii) that the movement of goods from Belgium into India was incidental to the contract that they would be manufactured in Belgium, inspected there and imported into India for the consignee, and was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There

was no possibility of the goods being diverted by the assessee for any other purposes and, therefore, the sales took place in the course of import of goods within Section 5(2) of the Act, and exempt from taxation. (See head-notes).

The only new point that was decided in that case, if I may say so, is that before a sale could be said to have occasioned the import, it is not necessary that the sale should have taken place anterior to the import and that even if the sale took place and the property in the goods passed during the course of import or even after import, a sale could be a sale in the course of import, provided that the movement of goods was incidental to the contract or was in pursuance of the conditions of the contract. That case can hardly help the petitioner. There was no condition in the alleged contract between Government and the petitioner which occasioned the movement of goods from Pollachi to Pothundi. There is nothing in the contract which prevented Government from diverting the petrol and diesel oil purchased from Pollachi for other purposes. I think the contract between the Government and the petitioner had no immediate causal connection with the movement of the goods across the border.

I dismiss the petition but without any order as to costs.