

(1956) 07 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 128 of 1954

Ramesh Chandra Dey

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 16-07-1956

Acts Referred:

Constitution of India, 1950 — Article 19, 226, 286

Citation : AIR 1956 Guw 177 : (1957) 8 STC 384

Hon'ble Judges : Sarjoo Prosad, C.J.; Ram Labhaya, J

Bench : Division Bench

Advocate : S.K. Ghose, P. Chaudhuri and G.K. Talukdar, for the Appellant; S.M. Lahiri, Advocate-General and R.K. Goswami, Government Advocate (Jr.), for the Respondent

Final Decision : Allowed

Judgement

Sarjoo Prosad, C.J.—The petitioner is a wholesale dealer in tea, having his principal place of business at Silchar in the district of Cachar. He has been carrying on business since 1949, and got his name registered as a dealer on 14th January, 1950, as required by the Assam Sales Tax Act (hereinafter called the Act). In pursuit of his trade, the petitioner makes purchases of tea for resale both within and outside the State. The procedure normally adopted by the petitioner in making sales of tea outside the State is that the tea meant for resale is booked in the name of the petitioner, of which he is both the consignor and the consignee ; when the tea arrives in Calcutta, the sample of tea is examined by the prospective purchaser, and if he approves, the bill of lading or the consignment note is endorsed in his favour on receipt of the price, and the purchaser then obtains delivery of the tea consigned. The prospective purchasers are registered dealers within their circles.

2. As the law stood earlier, the petitioner was liable to pay sales tax only in the case of sales to non-registered dealers within the State; but Section 15 (1) (b) of the Act was amended by Amending Act IV of 1951. As a result of the

amendment, the relevant portion of the section reads as follows:-

The net turnover shall be determined by deducting from a dealer's gross turnover during any given period-

(1) his turnover during that period on

* * * *

(b) sale to a registered dealer of-(1) goods specified in the purchasing dealer's certificate of registration as being intended by him for (a) resale in the State.

3. The underlined words "in the State" were introduced in the Act in consequence of the said amendment. This was followed by a notification No. FMT 14/50/42, dated 22nd August, 1951, which also introduced corresponding changes in the rules inserting rules 79 and 80. Rule 80, inter alia, requires the dealer to submit a declaration in the following form :-

I/We...hereby declare that I/We have purchased the goods hereinmentioned for the purposes for use in the manufacture of goods for sale in the State or for use in the execution of a contract in the State or for resale in the State, and further declare that these goods have been specified in my/our certificate of registration bearing No. ...in the District of....

4. Though the said rules were notified in August, 1951, it is alleged that they were not strictly enforced and the petitioner continued to make purchases for resale without the required declaration. It appears, however, that for some time past the Sales Tax Department has been insisting on the said declaration, which the petitioner has been compelled to give. The petitioner states that, in the absence of the declaration, he is prevented from carrying on his transactions as he normally used to do, and has to pay sales tax on any purchases made without the registration certificate. The net result of the aforesaid amendment of Section 15 of the Act and the insertion of rule 80, according to the petitioner, therefore, is that he has to pay taxes for purchase of tea intended for resale outside the State, but, for resale within the State of Assam to registered dealers, no such tax is levied, or can be levied under the law, from the petitioner. This purchase of tea intended for resale outside the State, the petitioner pleads, is in the course of inter-State trade and he submits that the imposition of any tax on sale or purchase in the course of inter-State trade or commerce is against the provision of Article 286(2) of the Constitution, and it also unreasonably interferes with the fundamental right of the petitioner to pursue his lawful trade, business or avocation. As such, the above changes in the law are challenged by the petitioner as ultra vires and unenforceable. On the above grounds, the petitioner has applied for a writ of mandamus directing the respondents or their agents to forbear from giving effect to the amended provision of Section 15 of the Act, or the new rule 80 framed thereunder, and from taking any further steps in pursuance of the said offending provisions.

5. The points, therefore, which arise for consideration are whether the said

amendment of Section 15 of the Act and the declaration required by rule 80 of the rules offends against the provisions of Article 286(2) of the Constitution and puts an unreasonable restraint on the fundamental right of the petitioner to pursue his lawful trade or avocation, as guaranteed by Article 19(1)(g) of the Constitution.

6. To understand the nature of the petitioner's contentions, it is necessary to refer to a few relevant provisions of the Assam Sales Tax Act. The liability to pay sales tax under the Act arises u/s 3 thereof. Divested of details, which are irrelevant at present, the section requires that a dealer would be liable to pay tax under the Act on all sales effected, after the relevant date mentioned in the section, where his gross turnover during the year preceding exceeds the sum of Rs. 12,000, the taxable quantum. The gross turnover is determined, according to Section 14 of the Act, by taking the aggregate of the sale prices of goods sold during that period. u/s 5 of the Act, the tax is to be charged at specified rates on the total net turnover of a dealer. This "net turnover" of the dealer, as defined in Section 2 (7) of the Act, means the turnover referred to in Section 15 of the Act, which Section I shall presently discuss. Section 9 of the Act lays down that no dealer shall, while being liable to pay tax under the provisions of this Act, carry on business as a dealer unless he has been registered and possesses a certificate of registration. The dealer is, therefore, required to apply for registration to the Commissioner of Taxes in the prescribed manner and obtain such a certificate, and if the Commissioner finds the application in order and is so satisfied after such enquiry as may be deemed necessary, he shall register the applicant. Section 11 of the Act enables the dealer, whose total gross turnover during a year amounts to or exceeds the taxable quantum, to apply for registration in the manner mentioned in Section 9 and in case of his failure to do so, there is also provision in the Act for compulsory registration. The certificate of registration is to be in accordance with the specified form as mentioned in Section 12 of the Act containing certain particulars and specifying the class or classes of goods in which, at the time of the grant of the certificate, the dealer carries on business. The list of such registered dealers is duly published in the official Gazette.

7. These provisions, therefore, show that registration of a dealer is very necessary, because otherwise, as stated above, no dealer, while being liable to pay tax under the Act, is authorised to carry on business as a dealer unless he is so registered and possesses a certificate of registration. Another advantage of this registration is that he is entitled to certain exemptions in calculating his net taxable turnover, as required by Section 15. Section 15 shows, inter alia, that the net turnover is to be determined by deducting from a dealer's gross turnover during any given period, his turnover during that period on sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended by him for resale. I need not refer to some of the other exemption clauses in Section 15 as they are not relevant to the present discussion. Let us now analyse the implications of this provision. It means that where a dealer sells a commodity to another registered dealer, the commodity

being specified for sale in the dealer's certificate of registration, the dealer who sells gets an exemption, in respect of such sale, in calculating his net turnover. It is to be remembered that u/s 17 of the Act the tax is assessed on the net turnover. The dealer who sells, therefore, cannot, in his turn, charge any sales tax from the purchasing dealer in respect of such sales. The position would be otherwise, however, where the vendor himself is compelled under the law to pay sales tax, in which event, he will a fortiori levy such tax on the purchaser and realise the same from him. Thus, under the law as it stood prior to the amendment, the dealer who sells and the dealer who purchases, both enjoyed exemption from sales tax provided they were both registered dealers and the commodity sold was a commodity specified for sale in their certificate of registration. It follows, therefore, that whether the purchasing dealer bought the commodity for resale within the State or outside or in the course of inter-State trade or commerce, it made no difference to his non-liability to pay sales tax so long as the above conditions were fulfilled. The paramount question is-whether the new law has made any difference. As a result of the amendment, it obviously has. Now the dealers have lost the exemption unless the purchasing dealer expressly buys the commodity for resale in the State. This is what the amendment in terms provides, and rule 80 further provides that, in order to be entitled to the exemption, the dealer or some one authorised on his behalf, has to make a declaration or give an undertaking to that effect. If the dealer is not so prepared to give an undertaking or make a declaration as required by the said rule, the dealer who sells will realise the tax from the purchasing dealer for the simple reason that under the present law, the former dealer himself will not get any exemption from tax or refuse to sell. In other words, it comes to this that if the purchasing dealer buys the commodity for resale in the State, he is exempt from taxation; if he buys the commodity for resale outside the State or in the course of inter-State trade or commerce, he has to pay the tax by virtue of the change in the law. The undertaking which he has to give under the rule, for purposes of exemption u/s 15 (1)(b) of the Act, restricts his trade activities to resell within the State only, and prevents him from making purchases for reselling outside the State or in the course of inter-State trade or commerce. If he transgresses the declaration or the undertaking given, he runs the risk of prosecution under Sections 38 and 39 of the Act. The petitioner submits that such a prosecution is, in fact, in contemplation, against him. Thus it appears to me clear that the amendment complained of is in violation of Article 286(2) of the Constitution, as, in substance, it authorises the imposition of tax on the sale and purchase of goods which may take place in the course of inter-State trade or commerce.

8. Rule 80 of the rules makes the position even worse, as it compels the dealer to purchase for resale only within the State or pay the sales tax because if he purchase for any other purpose or in the course of any other transaction, he loses the benefit of the exemption u/s 15 (1) (b); and if he acts in violation of the undertaking given, it may even lead to criminal prosecution. On account of

this distinction in the law, the dealer who purchases tea for sale in the course of inter-State trade or commerce is placed in a position of obvious disadvantage, as compared to other traders of the same class who are not burdened with any such tax or imposition. It is apparently this inequity or anomaly which the Constitution-makers were anxious to avoid in enacting Article 286(2) of the Constitution, and the petitioner, therefore, rightly points out that there is no such provision in the sales tax law of any other State in India, except in the Orissa Sales Tax Act. It seems to me, therefore, that these illegal coercive provisions of the law cannot be utilised against the petitioner and to his detriment.

9. The learned Advocate-General contends that the petitioner in the present case is not entitled to any relief. He submits that the petitioner has not established that the transactions carried on by him are in the course of inter-State trade or commerce. He points out that the purchases made by him should be so integrated as to be the immediate cause of the inter-State sale. In other words, the transactions should be so intimately connected with each other in time and sequence that one should occasion the other and the inter-State sale or purchase must go hand in hand, as it were, being integral parts of the same transaction. He illustrates the legal position with reference to three decisions of the Supreme Court. The first is the decision in *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366 . Patanjali Sastri, C.J., there laid down that a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of 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 resultant export form part of a single transaction. His Lordship provided the test that sales and purchases which themselves occasion the export or import of the goods fall within the exemption. The majority decision in *State of Travancore-State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, emphasised the same view based upon the phrase "integrated activities". It was observed:-

A sale in the course of export out of the country should similarly be understood in the context of Clause (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. The time factor alone is not determinative. The previous decision proceeded on this view and emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export. It is, however, contended that on this principle of connected or integrated activities a purchase for the purpose of export must be regarded as covered by the exemption under Clause (1)(b). We are unable to agree.

10. S.R. Das, J., (as he then was), in his dissentient judgment was inclined to take a broader view of the expression "in the course of". His Lordship observed thus :-

In my judgment the purchase made by the exporter to implement his agreement for sale with the foreign buyer is to be regarded as having taken place "in the course of export. I take this view, not because I read the words "in the course of as synonymous with the words "for the purpose of", but because I regard the purchase by the exporter as an activity so closely integrated with the act of export as to constitute a part of the export process itself and, therefore, as having taken place "in the course of" the export.

11. His Lordship also quoted with approval the dictum of Dixon, J., in *Clements and Marshall Pty. Ltd. v. Field Peas Marketing Board* (1947) 76 C.L.R. 40, which I may as well reproduce :-

We should consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade, which, apart from the theoretical legal possibilities, must commercially involve transfer from one State to another.

12. And finally he summed up his conclusions in these memorable words:-

The reasonings adopted by the learned Judges in the above cases apply with full force not only to Clause (2) but also to Clause (1)(b) of Article 286, and we should construe the words "in the course of in the same way as it has been done in the case of *Queen v. Wilkinson* (1952) 85 C.L.R. 467. So construed, the purchases made by the exporter even without any previous order for export form "an essential and integral, even if initial, step" in the exportation of the goods. They form an "integral part of a continuous flow" which is commercially involved in the export process. No "legal nexus" between these purchases and the actual physical export is required to secure immunity from State taxation. In my judgment the last purchases by the exporters-whether in fulfilment of foreign orders already secured or in anticipation of future orders-must, in a commercial sense, be "in the course of the export. The only way to give business efficacy to Article 286(1)(b) is to construe it in this commercial sense. Tax such purchases and you tax the export itself and by that process eventually cripple our export trade and bring about an adverse trade balance against us in the long run. It must always be borne in mind that with our exports we pay for our imports.

13. But for the majority decision, which unquestionably binds me, I confess I felt more attracted by the line of reasoning which appealed to S.R. Das, J. It appears, however, that in *State of Madras Vs. Gurviah Naidu and Co. Ltd. and Others*, in which the judgment was delivered by the learned Chief Justice himself, his Lordship was content to adopt the majority view in the earlier case, and the broad test therein laid down that even if purchases were made for the purpose of export, if those purchases did not themselves occasion the export, the purchases would not fall within the exemption of Article 286(1)(b) of the Constitution.

14. The decisions discussed above seem to support the contention of the learned Advocate-General. But I do not feel called upon in the present case to decide positively whether the transactions carried on by the petitioner come within the

purview of the expression "in the course of inter-State trade or commerce". We have no adequate materials to pronounce finally on the point. It is sufficient to notice, and it is not disputed either, that the petitioner is a wholesale dealer in tea and that he largely sells his tea outside the State. We know for a certainty that he has been compelled, by virtue of rule 80 of the Rules, to give a declaration that he has to purchase the tea for resale in the State. If we hold that the amendment to Section 15 of the Act and rule 80 of the Rules are both illegal, as I think we must, I see no reason why the petitioner should not be given relief by issue of an appropriate writ against the said coercive provisions being utilised to his prejudice by the taxing authorities.

15. There are various instances where Courts have not only interfered but considered it their duty to interfere in such cases. In *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, it was held that any action under an illegal provision was without the authority of law and "that being so, a threat by the State by using the coercive machinery of the impugned Act to realize it from the appellant, is a sufficient infringement of his fundamental right under Article 19(1)(g) and it was clearly entitled to relief under Article 226 of the Constitution." Similar was the case in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, In that case, there was no assessment order, and all that had happened was that the taxing officer had issued notice on the petitioner to get himself registered. *S.R. Das, C.J.*, held as follows :-

It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. This Court has said in the last mentioned case that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do. Another plea advanced by the respondent State is that the appellant company is not entitled to take proceedings praying for the issue of prerogative writs under Article 226 as it has adequate alternative remedy under the impugned Act by way of appeal or revision. The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself ultra vires and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is ultra vires the powers of the Legislature which enacted it and as such void and prays for appropriate relief under Article 226.

16. It is then argued that Section 15 of the Act should be read with Section 3, which defines the liability to tax. Section 3, of course, makes specific savings in respect of sales outside the State of Assam and sales in the course of inter-State trade or commerce. It is suggested that if the two sections are read together, then there would appear to be no blemish in Section 15. The argument, in my opinion, overlooks the basic distinction between the exemption on sales taking place outside the State or in the course of inter-State trade and commerce,

provided for in Section 3, and the permissible deductions contemplated by Section 15 of the Act to a registered dealer in determining his taxable turnover. Here the complaint is that the petitioner, by virtue of the impugned provisions, has to pay tax on purchases made within the State, though he is a registered dealer, simply because he makes the purchases for resale outside the State or in the course of inter-State trade or commerce. He is made to pay because the dealer who sells to him is now himself deprived of the exemption from tax on such sales and the consequence is that, in substance, the purchasing dealer suffers on account of the changes in the law. Therefore, the application of Section 3 of the Act does not improve the situation.

17. Lastly, the learned Advocate-General submits that in case the amendment is declared illegal, the State would suffer great loss of revenue. He urges that the main sources of revenue available to the State are those of oil, tea and jute. Sale of these commodities outside the State is not taxable, nor is it taxable if the sales take place in the course of inter-State trade. These commodities are mostly purchased by registered dealers for sale, in either case, outside the State. The dealer who sells is protected because he sells to another registered dealer while the purchasing dealer escapes liability because his sales take place outside the State. The State was thus deprived of substantial revenue both ways and, therefore, hit upon this device of depriving the dealer, who sells in the State, of the exemption from tax unless he sold to a registered dealer for resale within the State. If now these provisions are held illegal, it would seriously affect the economy of the State and the sources of revenue on which it mainly depends. We quite appreciate the argument of the learned Advocate-General, but what cannot be done directly under the law cannot be indirectly permissible. The remedy, in my opinion, lies in Article 286 itself, and in such cases, the President or the Parliament may, by law, provide for relief against hardship. I feel tempted to quote in this context the very appropriate remarks of S.R. Das, J., in *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*,

An argument is advanced suggesting that if all sales or purchases that take place in the course of inter-State trade and commerce are put beyond the taxing power of the States then that fact will very seriously and prejudicially affect the economy of the States and may prevent them from discharging the responsibilities, which all welfare States are expected to do. Apart from the benefit that a free flow of trade is likely to bring to the public generally the apprehended danger appears to me to be more assumed than real. The proviso to Clause (2) empowers the President to direct the continuation, up to the 31st March, 1951, of the sales tax which was being levied before the commencement of the Constitution and in fact the President, on the same day as the Constitution came into force, actually made an order in exercise of this power as hereinbefore stated. There was, therefore, no immediate danger to State revenue and the status quo was maintained. Further, Clause (2) itself empowers Parliament to lift the ban imposed by it, should Parliament, in the interest of State economy, think

fit to do so. The Constitution has thus itself provided ample safeguards and this Court need not assume unto itself the functions of Parliament and indirectly under the guise of interpretation seek to secure the safety of State finance which Parliament itself has adequate direct power to do.

18. For the reasons stated above, the application should be allowed and the Rule made absolute. A writ should accordingly issue declaring that the amendments to Section 15 (1) (b) of the Act made by Section 4 of Amending Act IV of 1951, and rule 80 of the Rules, are illegal and ultra vires, and directing that no action to enforce these illegal provisions can be taken by the taxing authorities against the petitioner. We do not propose to make any order for costs.

Ram Labhaya, J.

19. This is a petition under Article 226 of the Constitution of India. The petitioner is a registered dealer under the Assam Sales Tax Act, 1947 (hereinafter called the Act). He was registered as a dealer in 1950- He has been carrying on business in tea. The certificate granted to the petitioner on 14th January, 1950, contained the following recitals :-

The business (of the petitioner) is wholly wholesale distribution.... The sales of the following goods to this dealer (the petitioner) and for the purpose mentioned hereunder will be free of tax.

20. In August, 1951, the certificate was amended so as to include other articles like tea chests, etc. with which we are not concerned. The petitioner was purchasing tea for resale. But for some time no tax was being charged in view of his certificate which permitted him to purchase free of tax.

21. Section 15 of the Act in its original form laid down that the net turnover shall be determined by deducting from a dealer's gross turnover during any given period-

(1) his turnover during that period on-

(a) the sale of goods exempted u/s 6 and Section 7 ;

(b) sale to a registered dealer of (1) goods specified in the purchasing dealer's certificate of registration as being intended by him for (a) re-sale.

22. The recitals in the certificate were in conformity with this provision. There was no conflict. Under Clause (1) (b) of the section the dealer selling tea to the petitioner, which was intended for resale, was not liable to any tax. The turnover from tea sold was deductible from the gross turnover.

23. In 1951 Section 15 was amended. The relevant portion of Section 15 reads as follows :-

15 (1) (b). Sale to a registered dealer of-

(1) goods specified in the purchasing dealer's certificate of registration as being

intended by him for (a) resale in the State.

24. The words "in the State" have been added.

25. The effect of the provision is that the registered dealer from whom the petitioner makes his purchases can sell to him tea free of tax for resale in the State. If he purchases for resale outside the State, his seller would be liable to pay tax u/s 15 (1) (b) as it now stands. The result would be that the seller would charge him tax on tea for resale outside the State. Stated shortly the effect of the amendment is that the petitioner as a dealer now has to pay tax on his purchases of tea for resale outside the State, though he enjoyed the exemption before the amendment. u/s 15 the tax is payable by the seller ; the dealer from whom the petitioner purchases is liable to pay tax u/s 15 (1) (b) as he would not be permitted to deduct from his gross turnover the sale price of tea sold to the petitioner if it was not intended for resale in the State. As he has to pay tax he would naturally add it to his sale price and collect it from his purchaser in which position the present petitioner is.

26. By notification No. FMT. 14/50/32 dated 22nd August, 1951, two new rules were inserted. Rule 80 which is relevant for our purposes is reproduced here:-

80. (1) A dealer who wishes to deduct from his gross turnover the amount of sales on the ground that he is entitled to make such deductions under Clause (b) of Sub-section (1) of Section 15 shall, on demand, produce in respect of such sales the copy of the relevant cash memo or bill according as the sale is a cash sale or a sale on credit, and a true declaration in writing by the purchasing dealer or by such responsible person duly authorised by the purchasing dealer in this behalf that the goods in question are specified in the certificate of registration of such dealer.

(2) For purposes of this rule, the declaration shall be in the following form:-

I/We...hereby declare that I/We have purchased the goods hereinmentioned for the purposes for use in the manufacture of goods for sale in the State, or for use in the execution of a contract in the State or for resale in the State, and further declare that these goods have been specified in my/our certificate of registration bearing No. ...in the District of....

27. This rule evidently has been added to give effect to the amendment made in Section 15(1) (b). It requires that a dealer who wishes to deduct from his gross turnover the amount of sales on the ground that he is entitled to make such deduction under Clause (b) of Sub-section (1) of Section 15 shall produce on demand in respect of sales certain documents specified in the rule and a true declaration in writing by the purchasing dealer or someone on his behalf that goods in question are specified in the certificate of registration of such dealer. So far the rule causes no difficulty to the petitioner. Clause (2) of the rule provides the form which the declaration should take and here the purchaser has to declare that the goods purchased are for use in the manufacture of goods or for sale in

the State or for use in the execution of a contract in the State or for resale in the State and further declare that these goods have been specified in the certificate of registration.

28. It is obvious that a dealer who wants to deduct the amount of sales to a registered dealer u/s 15 (1) (b) has to produce a declaration from the purchaser that the goods are for resale in the State, or they are such that they fall under other clauses of the declaration. The result is that to a dealer selling tea, the petitioner who is doing wholesale business in tea and is purchasing it in the State for resale must give a declaration that he is purchasing for resale in the State. Otherwise his seller will have to pay tax and the turnover from the sale would not be deductible u/s 15 (1) (b). Rule 80 thus provides the procedure by which Section 15(1) (b) as amended is enforced and given effect to.

29. The grievance of the petitioner as stated in para 9 is that he has not been able to make any purchases for resale of tea outside the State free of tax on the basis of his registration certificate for some time. There is no absolute prohibition against his purchases. The amended provision merely creates liability to tax on the turnover of tea when sold by a dealer in the State for resale outside the State. It is urged that the petitioner has to pay tax on tea for resale outside the State, while on tea which he purchases for resale in the State no tax is payable. The validity of the impugned provision of the Act and rule 80 is challenged on the double ground that they contravene the provisions contained in Article 286(2) of the Constitution of India and also involves an infringement of petitioner's fundamental right of free trade. The petitioner has disclosed the procedure that he adopts for sales outside the State in para 11 of his petition. His case is that tea meant for resale outside the State is booked in his own name. He himself receives it at Calcutta for sales there and sells to purchasers who after inspection approve the sample.

30. An affidavit in opposition has been put in by Mr. R.Z. Ahmed, Assistant Commissioner of Taxes. He has affirmed that the petitioner could purchase goods specifically mentioned in the certificate of registration and not other goods nor for purposes not specified. He also stated that the petitioner being bound to act according to the provisions of the Act and Rules and having failed to do so has become liable to prosecution under Sections 38 (9) and 39 of the Assam Sales Tax Act, 1947, for evading taxes and giving false declarations. It is further urged that the amendment to Section 15 (1) (b) and the insertion of rule 80 do not infringe the petitioner's rights or the provisions contained in the Constitution as they do not provide for levy of taxes on sales made outside the State. They merely "provide for levy of taxes on the previous sale, that is, at the point of purchase by the petitioner and not at the point of sale by him. Section 15 (1) (b) of the Assam Sales Tax Act and rule 80 of the Rules cannot therefore be ultra vires the Constitution.

31. The procedure which the petitioner alleged he was adopting for sales outside the State has not been disputed.

32. The first contention raised by Mr. Ghose is that the petitioner's transactions of purchase are in the course of inter-State trade. As a result of the amendment of Section 15 (1) (b) and the insertion of rule 80 of the Rules, tax is being levied on inter-State transactions. But the provisions are ultra vires as they offend against the provisions of the Constitution contained in Article 286(2). He urges that except in so far as Parliament may by law provide otherwise, no State can impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce. He points out that it is immaterial if the sale or purchase in the course of inter-State trade is accompanied by delivery in the taxing State. In support of his contention he relies on the decision in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, In this case the earlier decision of the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, was held not well-founded on principle or authority. The majority view in this case was that Article 286(2) puts an absolute restriction on the taxing power of the States where transactions of sale or purchase take place in the course of inter-State trade or commerce unless and until the ban is lifted by Parliament, and until such ban is lifted no delivering State within the meaning of the Explanation to Article 286(1) and much less the other States are in a position to impose a tax on transactions of sale or purchase covered by the Explanation.

33. Mr. Lahiri has no quarrel with this proposition. It is now settled law. He has therefore not relied on the Explanation to Article 286(1) when supporting the validity of the impugned provisions of the sales tax law. His contention is that when the petitioner purchases tea in the State of Assam and transports it to the neighbouring Province and sells it there himself, he is purchasing for resale in the Calcutta market. His transactions of purchase in Assam on his own showing are not inter-State transactions. The tax therefore that he may have to pay at the time of purchasing tea for resale at Calcutta does not represent an imposition of tax on a transaction in the course of inter-State trade. The first question in the case therefore is whether the petitioner's transactions of purchase for resale outside the State can be regarded as transactions in the course of inter-State trade. The learned counsel for the parties have both tried to derive support for their respective views from the two decisions of the Supreme Court in *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366 and *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, Both these decisions deal with the significance and import of the words used in Clause (b) of Article 286(1). This clause forbids the States from imposing a tax on the sale or purchase of goods where sales or purchases take place either outside the State or in the course of the import of the goods into or export of the goods out of the territory of India. The learned Judges had to ascertain the true significance of the words "in the course of...export of the goods out of the territory of India." In the earlier case in *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366, the conclusion reached was stated as follows :-

Whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India, come within the exemption under Article 286(1)(b). Export sales of commodities to foreign buyers on c.i.f. or f.o.b. terms, therefore, fall within the scope of exemption under Article 286(1)(b). A sale by export 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 resultant export form parts of a single transaction. Of these 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. Even where the property in the goods passes to the foreign buyers and the sales are thus completed within the State before the goods commence their journey, 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).

34. The proposition was summarised in para 14 of the judgment in the following terms:-

We accordingly hold that whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of these appeals.

35. In *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, the majority of the learned Judges followed the view expressed in *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366. They laid down the following propositions :-

(1) Sales by export and purchases by import fall within the exemption under Article 286(1)(b).

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State-power of taxation extends to such transactions.

36. Das, J. (as he then was) dissented from the majority view. In his view,-

a sale or purchase "in the course" of import or export within the meaning of Article 286(1)(b) includes (1) a sale or purchase which itself occasions the import or export, (ii) a sale or purchase which takes place while the goods are on the high seas on their import or export journey, and (iii) the last purchase by the exporter with a view to export and the first sale by the importer to a dealer after

the arrival of the imported goods.

37. Mr. Ghose has relied on the third proposition laid down by the learned Judge. He has urged that purchase by an exporter with a view to export would be in the course of export of the goods out of the territory of India for purposes of Article 286(1)(b). He argues that the words in Clause (2) are "in the course of inter-State trade or commerce". Considering that the words "in the course of" occur in both the provisions he argues that purchase of goods with a view to sale outside the State would fall within the ambit of Clause (2). The purchase would be in the course of inter-State trade. This view no doubt receives support from the judgment of Das, J. This however is the minority view. We are bound by the judgment of the Court. The majority view laid down three propositions. The second proposition laid down in the judgment of the Court was that "purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption". If therefore the relevant words in Clause (2) are interpreted on grounds of analogy, according to the majority decision, the purchases by a dealer with a view to selling outside the State would not be covered by Clause (2) on which Mr. Ghose has relied. Since both the learned counsel relied on these decisions and cited no others, in which the meaning or the import of the words "in the course of inter-State trade or commerce" in Clause (2) came into question, the contention of Mr. Ghose cannot prevail. They do not lend any support to it.

38. Their Lordships of the Supreme Court followed the two decisions referred to above. *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366 and *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, in *State of Madras Vs. Gurviah Naidu and Co. Ltd. and Others*, In this case the assessee had secured orders for the supply of skins to London buyers and after securing the orders they went about purchasing the requisite kind and quantity of skins to implement such orders. The purchases were found to be for purposes of export but as such purchases did not themselves occasion the export, they were held not to fall within the exemption of Article 286(1)(b) of the Constitution. The purchases in the State by the exporter for the purposes of export were found liable to be included in the turnover and assessed to sales tax under the Madras General Sales Tax Act. The judgment was delivered by Das, Acting C.J., (as he then was). He followed the majority view expressed in *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, In this case it was found as a fact that the assessees were purchasing for purposes of export. They had secured orders already. The assessees in this case were in a better position than the petitioner before us. The petitioner when purchasing had no such orders from purchasers in Bengal. He was purchasing and taking tea on his own responsibility for sale at Calcutta. His transactions of purchase could not be regarded as in the course of inter-State trade if the purchases of the skins in the Supreme Court case referred to above could not be regarded as in the course of the export of goods out of the territory of India.

39. The petitioner has described in para 11 of his petition the procedure he follows in his business. He admittedly purchases tea in the State intending to resell it in the neighbouring State of Bengal. The tea meant for resale is then booked in his own name. He is both the consignor and the consignee and after its arrival in Calcutta if the sample is approved by a prospective purchaser the bill of lading or the consignment note is endorsed in his favour, who then makes the payment and takes delivery of the tea consigned. On the petitioner's own showing the two transactions, viz., of purchase in the State of Assam and sale in the State of Bengal, are independent of each other. The purchase in this State though with the intention of taking the goods out of the State is complete in itself. The tea at that stage is not sold to anyone in the other State. The petitioner continues to remain the owner of the goods till after their arrival in Calcutta. Even there the sale is made when some prospective buyer is willing to purchase it after seeing the sample. The two transactions have absolutely no connection. It cannot be said that when the petitioner purchases, the purchase is in the course of an inter-State transaction. The mere fact that the petitioner purchases tea for resale in Calcutta does not bring him within the exemption in the view that their Lordships of the Supreme Court have taken of the meaning of the expression "in the course of". The emphasis of the view was that a sale in the course of export out of the country should be understood as meaning a sale taking place not only during the activities directed to the end of export of the goods out of the country but also as part of or connected with such activities. It is the second part of the requirement that is lacking in this case. The purchase transactions of the petitioner cannot be regarded as part of or connected with such activities. There is no connection between the two. The contention that the impugned provisions authorising as they do, by necessary implication, the imposition of tax on purchases of tea by the petitioner for resale at Calcutta are hit by Article 286(2) is not sound and must be repelled.

40. The other ground on which Mr. Ghose has challenged the validity of the impugned legislation is that the levy in question involves an infringement of his fundamental right under Article 19(1)(g) "to practise any profession, or to carry on any occupation, trade or business." The petitioner is a registered dealer. He can purchase as well as sell. He may sell inside the State or outside the State. No restriction is placed on his right to purchase or sell wherever he pleases and if the law by which a tax is levied is valid and not in excess of the authority vesting in the State or against any provision contained in the Constitution, the imposition or levy cannot be regarded as unconstitutional merely because it imposes a burden on the trade or business of the petitioner. Taxation per se is not hit by the provisions contained in Part 13 of the Constitution of India. Mr. Ghose has not contended that the taxation in this case involves any infringement of any provision in Part 13 of the Constitution. He has argued that it involves infringement of the petitioner's fundamental right under Article 19(1)(g). But it is not correct to say that the fundamental right of the petitioner guaranteed to him under Article 19(1)(g) is wholly free from the taxing power of the State. It

was not Mr. Ghose's case that the taxation in this case created restrictions on trade which were unreasonable. As held in *Anantha-krishnan v. The State of Madras* AIR 1952 Mad. 395, there is nothing in the Constitution to exempt fundamental right under Article 19(1)(g) wholly from the taxing power of the State. The imposition is not being challenged as an unreasonable restriction ; nor is there any reason for holding that the measure of taxation makes the restriction unreasonable. In the circumstances this contention also cannot prevail.

41. The petitioner has not been taxed on sales made in Calcutta or outside the State of Assam. These sales are not taxable both under the Constitution and the Assam Sales Tax Act. His grievance as stated above is that it is not possible for him to purchase tea, even from the producers without paying tax though he can purchase tea without payment of tax for sales within the State. He has now to give a declaration to his seller if he wants to avoid payment of sales tax. If he does not give the declaration the seller would charge him tax which he is liable to pay u/s 15 (1) (b) of the Assam Sales Tax Act. If he pays the tax he is placed in a disadvantageous position qua the producer who exports the bulk of his tea to Calcutta and sells there. But the petitioner cannot claim any right, much less fundamental, to be placed on a level with his own producer or manufacturer. Even if he does not pay sales tax, the producer or the manufacturer would be in a somewhat advantageous position in the Calcutta market. The petitioner being an intermediary may have to pay tax, if a tax can be validly imposed. As observed by Bhagwati, J., in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*,

When the transaction is one on which a tax on sale or purchase can be levied, it does not necessarily mean that only a sales tax can be levied and not a purchase tax. The inside dealer may therefore be taxed on his purchases or if he sells in retail to actual consumers in the State he may be taxed on the sales.

42. There is no prohibition against purchases of the petitioner being taxed if the case does fall under Article 286(1) or Article 286(2) and indirect taxation of purchases for sale in Calcutta is not hit by that Article.

43. Section 15 (1) (b) as amended, however, does not allow a registered dealer to deduct the turnover of the sales from his gross out-turn which in amount to sales in the course of inter-State trade or sales in the course of export of goods out of the territory of India. In both these cases the goods would not be purchased for sale in the State. The turnover therefore would not be deductible from the gross turnover. The result would be that the registered dealer who sells in the course of inter-State trade or in the course of export trade, would pay tax on these transactions and would naturally realise it from his purchasers.

44. Mr. Lahiri has argued that Section 15, even in its amended form, has to be read subject to the provisions contained in Section 3 which is the only charging section in the Act and that section specifically provides that transactions in the course of inter-State trade and commerce and similarly in the course of export

trade shall not be liable to tax. He relies on the provisions contained in Sub-section (2) of Section 3 which provides as follows :-

Nothing in Sub-section (1) shall, except in cases covered by the first proviso to Sub-section (12) of Section 2 of this Act be deemed to render any dealer liable to tax on the sale of goods where such sale takes place-

(i) outside the State of Assam ;

(ii) in the course of the import of the goods into, or export of the goods out of, the territory of India ; or

(iii) in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

45. Assuming for the moment that the Sub-section provides an exemption from tax for all dealers so far as sales in the course of inter-State trade or commerce are concerned, it appears that it is no more than a pious declaration. Effect has not been given to it in the text of the Act. Section 14 defines gross out-turn. It provides that the gross out-turn of the dealer during any given period shall be determined by taking the aggregate of the sale price of goods sold during the period. The sales would include sales in the course of inter-State trade and also in the course of export trade in addition to sales made to persons for resale outside the State of Assam. Clause (2) of this section mentions other heads under which turnover is to be included in the gross turnover.

46. The language of this section leaves no room for doubt that turnover from sales in the course of inter-State trade also is meant to be included in gross turnover. Effect to the general exemption allowed in Section 3 (2) is not given here. This interpretation of Section 14 is supported by the provisions contained in Section 15 which exempts turnover from sales of a specified kind which may be deducted from the gross turnover when ascertaining the net turnover on which a dealer is assessed to tax. Section 15 provides the mode for determining the net turnover. The provision is as follows :

The net turnover shall be determined by deducting from a dealer's gross turnover during any given period-

(1) his turnover during that period on--

(a) the sale of goods exempted u/s 6 and Section 7 ;

(b) Sale to a registered dealer of--

(i) goods specified in the purchasing dealer's certificate of registration as being intended by him for--

(a) resale in the State,

(b) use in the manufacture or production of any goods, the sale of which is taxable under this Act, or

(c) use in the execution of any contract.

(ii) containers and other materials for the packing of such goods; and

(c) such other sales as may be prescribed.

47. Whilst the turnover from sale of goods exempted u/s 6 and Section 7 is deductible from the gross turnover u/s 15, no provision is made for deduction of turnover from sales in the course of inter-State or export trade. The omission to exempt the turnover not covered by the provisions of the charging section introduces a conflict between Sections 3 and 15. The taxing authorities would not permit deduction of any item of turnover u/s 15 which is not covered by it, particularly in view of the fact that deductions of the turnover from the sale of goods falling under Sections 6 and 7 have been specifically provided for. Apart from the turnover exempted under Sections 6 and 7, turnover from goods specified in the purchasing dealer's certificate is deductible only if the purchase is for resale in the State. The exemption is strictly limited and turnover from sales in the course of inter-State or export trade cannot be brought within its scope. Clause (c) of Section 15 also could not be utilised for the purpose. It refers to other sales as may be prescribed. This clause reserves power in the State for adding to the exemptions. Turnover from certain sales may be made deductible u/s 52 (2) (a), which authorises the framing of rules on all matters expressly required or allowed by the Act to be prescribed. This clause has no reference to the provision of Clause (2) of Section 3. The combined effect of Sections 14 and 15 is that turnover from sales in the course of inter-State or export trade is not deductible when the net turnover is determined u/s 15. When determining the net turnover such turnover as is not liable to tax ought to be excluded. The purpose of determining the net turnover is to find out the amount on which sales tax is leviable. But taxing authorities have not been given any authority to allow deduction of turnover from sales in the course of inter-State or export trade. If Section 14 or Section 15 had been made subject to the provisions contained in Section 3, the difficulty could have been avoided. This has not been done.

48. The result is that the assessee cannot in practice claim deduction from turnover for sale of goods in the course of inter-State or export trade. The assessing authorities in not allowing such deductions would not be acting contrary to law. The exemption in Section 3 therefore merely states an abstract principle which is embodied in the Constitution. In determining the taxable turnover effect is not given to the principle stated so clearly. The constitutional validity of Section 15 thus remains open to objection.

49. So far I assumed that the provisions in Section 3 (2) on which the learned Advocate-General has relied cover dealers of both the categories dealt with in the section. This assumption was for purposes of examining the contention of the learned Advocate. The assumption is not justified by the language of Sub-section (2) of Section 3. As would appear from the terms of the sub-section, it qualifies a

dealer's liability to tax under Sub-section (1) only. Its requirement is that nothing in Sub-section (1) shall, except in cases covered by the proviso to subSection (12) of Section 2, be deemed to render any dealer liable to tax where the sale takes place outside the State of Assam, in the course of import of goods into or the export of goods out of the territory of India or in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide. The exemption is limited thus in its scope to cases of liability falling under Sub-section (i) of Section 3. That provision makes dealers falling in a certain category liable to tax. It does not cover all dealers who may become liable under the Act. Section 3 (3) deals with another class of dealers. They are persons who become liable to tax after the commencement of the Act. This sub-section is not qualified in the same way or to the same extent as Sub-section (1) is. Dealers under this sub-section may be taxed on sales in the course of inter-State trade. The petitioner became liable to registration sometime after the enforcement of the Act. He was registered in 1950. His case would fall under Clause 3 (3). The situation is that while dealers under Clause (1) of Section 3 were meant to be exempted so far as their turnover from the sale of goods in the course of inter-State trade or commerce was concerned, such exemption is not provided for dealers covered by Clause 3 (3).

50. Even if therefore the interpretation placed on Section 3 by the learned Advocate-General be taken as correct, the turnover from the sale of goods in the course of inter-State trade or commerce and also the turnover from transactions in the course of import or export trade would not have the benefit of exemption in the case of dealers who incur liability to taxation u/s 3 (3). In such cases the provisions in Section 15 would clearly conflict with the requirements of Article 286(2) and so would rule 80 which requires a declaration in terms of Section 15 (1) (b). For, if a dealer has become liable u/s 3 (3) the taxing authorities will have no authority to allow any deduction of turnover from sales though made in the course of export or inter-State trade. The turnover from these also will form part of net turnover u/s 15. He would therefore charge tax from his purchasers.

51. The contention that the amended provision of Section 13 (1) (b) when read with Section 3 (3) would require levy of tax over transaction even in the course of export or inter-State trade thus seems to be irresistible. But the petitioner's transactions of purchase for resale in Calcutta not being transactions in the course of inter-State trade, no right of his is infringed nor has any provision of the Constitution been violated by indirect taxation of his purchases. I have dealt with this aspect of the matter above. The State of Assam is perfectly within its rights to tax sales made to registered dealers in Assam when they are purchasing for resale outside the State. That right is undoubted. But the provisions contained in Section 15 (1) (b) and rule 80 do expose themselves to the charge of constitutional invalidity levelled against them. They founder on the rock of constitutionality. The decision on the question has become necessary to dispose of the petition, even though no right of the petitioner has been infringed by reason of the indirect taxation of his purchases for resale at Calcutta as these

transactions cannot be regarded as sales in the course of inter-State trade. In view of the conclusion reached I agree that the petition may be allowed.