
(1968) 02 PAT CK 0008
In the Patna High Court
Case No : Tax Case No. 6 of 1966

Shankerjee Raut Gopalji Raut

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 28-02-1968

Acts Referred:

Constitution of India, 1950 — Article 286(1)

Citation : AIR 1968 Patna 329 : (1968) 16 BLJR 747 : (1968) 1 PLJR 241 :
(1968) 22 STC 241

Hon'ble Judges : R.L. Narasimham, C.J;Tarkeshwar Nath, J;N.L. Untwalia, J

Bench : Full Bench

Advocate : Rajeshwari Prasad, Shambhu Sharan and Devendra Prasad Sinha, for the Appellant; Lal Narain Sinha and S. Sarwar Ali, for the Respondent

Judgement

N.L. Untwalia, J.—The Commercial Taxes Tribunal of Bihar has stated a case and referred to the High Court u/s 25(1) of the Bihar Sales Tax Act, 1947 read with Sub-sections (1) and (3) of Section 47 of the Bihar Sales Tax Act, 1959 the following question of law-

Whether on the facts and in the circumstances of the case, the turnover of the applicant on account of sales made to Nepal purchasers be treated as sales in the course of export of goods out of the territory of India and as such exempt from levy of any sales tax.

2. The facts mentioned in the statement of case prepared by the Tribunal are these. The assessee Messrs Shankerjee Raut Gopalji Raut is a dealer which carried on business at Jainagar in the district of Darbhanga in various commodities. The assessee is a registered dealer under the Bihar Sales Tax Act, and bears registration certificate No. 1086. For the period commencing from the 1st of April, 1958 to "31st of March, 1959 it was assessed to sales tax on a gross turnover of Rs. 5,64,631/- and a taxable turnover of Rs. 2,92,319/- by the Assistant Superintendent of Commercial Taxes, Darbhanga, by his order dated the 25th of October, 1959, a copy of which is annexure A appended to the

statement of case. The assessee claimed before the said officer that the sale of goods made to customers in Nepal to the extent of Rs. 1,11,220/- should be exempted from assessment of sales tax on the ground that the sales aforesaid took place in the course of export of the goods out of the territory of India. While rejecting the claim of the assessee, the Assistant Superintendent of Commercial Taxes held that since the delivery of goods was taken from the assessee by the Nepal purchasers at Jainagar in Bihar, transport cost to Nepal had been paid for by the customers, and although the custom receipts were in the name of the assessee, the custom duty was paid by the Nepal purchasers, the sale was completed at Jainagar in the State of Bihar and hence the assessee was not entitled to claim any exemption on account of the sales to Nepal purchasers. The assessee went up in appeal to the Deputy Commissioner of Commercial Taxes, Patna; a copy of his petition of appeal together with the grounds is annexure B. The Deputy Commissioner, by his order dated the 20th of July, 1962, a copy of which is annexure C, allowed the deduction of Rs. 12,076/- from out of the total turnover on account of sales to Nepal Purchasers on the ground that the despatches to this extent to Nepal were made by rail. The claim of exemption from tax on the balance of the amount was disallowed by him also. The assessee then moved the Board of Revenue in revision-a copy of the revision petition is annexure D-against the appellate order of the Deputy Commissioner. The assessee claimed before the Board that the sales to Nepal dealers took place in the course of the export of the goods out of the territory of India within the principle of law engrafted in Section 5(1) of the Central Sales Tax Act, 1956 (Act 74 of 1956) as the sales had occasioned the export of the goods outside the territory of India to Nepal. While making this claim, the assessee through its lawyer gave the following modus operandi of the sales, as appears from the order of the Board of Revenue, a copy of which is annexure E:

The Nepal purchaser comes to Jainagar in Bihar to the petitioner's premises, buys the goods, pays cash and takes delivery. The purchaser, thereafter, carries the goods in his own bullock-cart, crosses the Nepal boundary and pays the customs duty, producing before the customs official the cash memo issued by the petitioner. He then takes customs receipt, in which is noted both the names of the petitioner as well as the buyer. This customs receipt is sent by the buyer to the petitioner.

It was also recorded in the order of the Board that the learned advocate for the assessee frankly conceded that so far as the petitioner was concerned, the sale was finished and completed at its premises in Jainagar and it had no further responsibility in regard to the despatch, conveyance or delivery of the goods in Nepal. With reference to the facts as stated before the Board, it took the view that the sales in question had not occasioned the export of the goods to Nepal, specially when the seller had no obligation under the contract of sale to deliver the goods in Nepal. The sale itself having been completed at Jainagar, the assessee was not entitled to any exemption even in respect of the despatches by rail, which was allowed by the Deputy Commissioner of Commercial Taxes, but

the Board ordered no enhancement on this score.

3. The assessee filed an application before the Board u/s 25(1) of the Bihar Sales Tax Act, 1947 as the proceeding related to its liability under the said Act. The application for reference was transferred to the Tribunal after its constitution u/s 34-A of the Bihar Sales Tax Act, 1959 in view of the proviso to Sub-section (3) of Section 47 of the said Act. The reference accordingly has been made by the Tribunal.

4. When the reference in the first instance came up for hearing and answer of the question of law referred, before my Lord the Chief Justice and B.N. Jha, J., the correctness of a Bench decision of this Court in *Dulichand Hardwari Mull Vs. State of Bihar and Another*, to which I was a party, was challenged in the light of the observations made by their Lordships of the Supreme Court in *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, and other decisions of the Supreme Court. Hence their Lordships, by their order dated 11-12-1967, were pleased to refer this case for hearing by a larger Bench.

5. Article 286(1) of the Constitution provides-

No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Two leading cases interpreting Clause (b) of Article 286(1) decided by the Supreme Court are popularly known as the two cashew-nut cases, the first being *The State of Tran vancore-Cochin v. The Bombay Company Ltd.* AIR 1952 S.C. 366 : 3 STC 434 and the second being *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, . On a careful consideration of the various arguments advanced before the Court ranging between extremely broad and narrow views, the law was succinctly, if I may say so with respect, laid down by Patanjali Sastri, C.J., speaking for the Court, as to what kind of sales would be exempt from imposition of tax within the meaning of Article 286(1)(b). In the first case, the learned Chief Justice has said at pages 438-39 of 3 sales Tax Cases-

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 result 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.

Finally it was said at page 440-

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....

It would be noticed with reference to the facts of this case that the export sale of the respective commodities to foreign buyers was on c.i.f. or F.O.B. terms; that is to say, under the terms of contract of sales, the seller had undertaken to ship the goods to the foreign buyers and shipped them accordingly. In that view of the matter, irrespective of the question as to at what point of time, the property in the goods passed to the foreign buyers and the sales were completed within the meaning of the Sales of Goods Act, the sale and the resultant export were held to form part of a single transaction, the former occasioning the latter. The meaning of the words used by the learned Chief Justice in the first Cashew-nut case were further clarified and explained in the second Cashew-nut case in which Patanjali Sastri, C.J., stated at page 212 of 4 Sales Tax Cases Volume--

What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words "import into" and "export out of" in this context do not mean the article or commodity imported or exported. The reference to "the goods" and to "the territory of India" make it clear that the words "export out of" and "import into" mean the exportation out of the country and importation into the country respectively. The word "Course" etymologically denotes movement from one point to another, and the expression "in the course of" not only implied a period of time during which the movement is in progress but postulates also a connected relation.

...

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.

...

The phrase "integrated activities" was used in the previous decision to denote that "such a sale" (i.e., a sale which occasions the export) "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." It is in that sense that the two activities-the sale and the export-were said to be integrated.

6. The Supreme Court has reiterated the principle of law laid down in the two Cashew-nut cases, namely State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, after further clarifying and explaining as to what was meant by the various expressions used by Patanjali Sastri, C.J., while interpreting Clause (1)(b) of Article 286 of the Constitution. Many other decisions of the Supreme Court given after those two cases were also considered and reviewed. In none there seems to have been any divergence of opinion on the basic principle of law enunciated by the two leading cases. The difference has been only in its application so much so that, as I shall presently show, even in the case of Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, the difference between the majority decision of Gajendragadkar, C.J., Shah and Sikri, JJ., delivered by Shah, J., and the minority one of K.N. Wanchoo, J., as he then was, and N. Rajagopala Ayyangar, J., delivered by the latter, has been only in regard to the application of the law to the facts of the particular case and not in the principle itself.

7. Shah, J. has said, at page 759-

To constitute a sale in the course of export of goods out of the territory of India, common intention of the parties to the transaction to export the goods followed by actual export of the goods to a foreign destination is necessary. But intention to export and actual exportation are not sufficient to constitute a sale in the course of export....

A sale in the course of export predicates a connection between the sale and 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 a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to 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 the 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.

It would thus be seen that what is of importance is not necessarily the fact as to when the property in the goods passes to the purchaser and the sale is complete within the meaning of the Sales of Goods Act nor is the common intention of the parties to the transaction to export the goods followed by the actual export even though it may be in close proximity of time the only determining factor to bring

the cast within the exemption of Article 286(1)(b). What is of importance, however, to make the sale as one in the course of export is that there must be an obligation to export-the obligation may be of the seller or of the buyer-and it 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 linked the sale to export. If a seller merely sells the goods to a foreign buyer who transports them out of the territory of India, the two activities by them selves are not so integrated and associated with one another as to make the sale occasioning the export or one in the course of export. A third connecting link between the two activities must co-exist. And, that link is the obligation either of the seller or of the buyer to export the goods. If the seller is under the obligation and fails to fulfil it, the breach results in making even the fact of exportation absent. After such breach of obligation by the seller, it is manifest, he cannot claim exemption from taxation, if the sale has otherwise taken place. The obligation to export may be thrown on the buyer under the contract of sale itself, either expressly or impliedly, by a mutual understanding or agreement between the parties, and if, the buyer actually exports the goods out of the territory of India as being bound to do so, even then the sale becomes one in the course of export as in view of the said obligation it occasions the export. In absence of such an obligation either on the buyer or on the seller, the sale is not for export and the two activities-one of sale and the other of actual export-remain disintegrated and dissociated. If a buyer commits the breach of such an obligation to export, it may be that in absence of proof of actual exportation, in respect of the sale, though it may be complete within the meaning of the Sales of Goods Act by transfer of title and delivery of the goods to the buyer, exemption from imposition of sales tax is not possible. In that view of the matter, the buyer may be liable to the seller for breach of the obligation to compensate for payment of sales tax or the like. That is not a question for determination before us. What, however, is to be emphasised is that all the three elements, namely (i) common intention of the parties to the transaction to export, (ii) actual exportation and (iii) obligation to export, must exist and be found to bring the case within the exemption of Article 286(1)(b).

8. As said by Shah, J., at page 760 of 15 Sales Tax Cases-

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 of the transaction, the sale is in the course of export.

On the facts of the case before the Supreme Court, the majority view as finally expressed at page 764 was-

There was between the sale and the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The appellants were not concerned with the actual exportation of the goods, and the sales were intended to be complete without the export, and as such it cannot be said that the said sales occasioned export.

Ayyangar, J., also noticed at page 765 that it was common ground that the tea sold under the transactions involved in the appeals before the Supreme Court was actually exported out of the territory of India. But said his Lordship-

Doubtless, this circumstance would not per se render the sales which preceded the export "sales in the course of export".

The argument was that the exports were so directly and immediately linked up with the sale effected by the appellants and so integrated with them that the two formed parts of the same transaction as to render the sales "sales in the course of export." After discussing the facts of the case, his Lordship stated at page 769-

On these facts we are satisfied that it was part of the understanding between the seller and the buyer, inferable from all the circumstances attendant on the transaction, that the buyer was bound to export.

I may state here that in some of the cases which went before the Supreme Court it was found that the seller in pursuance of a contract for sale with a foreign buyer had put the goods on board a ship bound for a foreign destination-Such a sale was, no doubt, an "export sale" which would undoubtedly be within the constitutional protection of Article 286(1)(b). In some of the cases, the sale was effected to a resident purchaser who effected the export by sale of the goods purchased to a foreign buyer. The first sale was constitutionally held to be not a sale in the course of the export. No case whereunder the contract of sale a buyer had bound himself to export the goods cropped up. And, that is the reason that, while discussing the point of obligation to export, largely the connection or the obligation of the seller to export was noticed. But the learned Advocate General conceded, and, in my opinion, rightly, that such an obligation may be even of the buyer and if such a fact exists along with the other two facts of intention to export and actual exportation, the sale would attract the protection of Article 286(1)(b) of the Constitution from imposition of sales tax.

9. In view of the clear enunciation of law by the Supreme Court as discussed above, there was practically no dispute between the learned Counsel for the parties, as there was no scope for it, in that regard. The dispute, however, centred round the application of the law to the particular facts of the case. The learned Advocate General also conceded that no wrong principle of law was laid down by the Bench of this Court which decided the case of Dulichand Hardwari

Mull Vs. State of Bihar and Another, . But he submitted that the law was wrongly applied to the facts of that case, while conceding again at the same time that this Full Bench is not concerned with the examination and pronouncement of its views expressly in regard to the inference of facts which were deduced in that case from the primary findings of fact by the sales tax authorities for application of the principle of law enunciated by the Supreme Court in the first Cashew-nut case AIR 1952 S.C. 366 : 3 STC 434. Mr. Rajeshwari Prasad, learned advocate for the assessee, on the other hand, submitted that" the facts of the instant case are identical to those of Dulichand-Hardwari Mull's and the same inference of fact must necessarily follow in this case also for application of the principle of law enunciated by the Supreme Court in AIR 1952 S.C. 366 : 3 STC 434 as explained in Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, . I shall, therefore, proceed to examine and compare the facts of the two cases.

10. The Superintendent of Sales Tax had recorded the following facts as quoted in the judgment at page 360 (column 1) in the case, of Dulichand Hardwari Mull Vs. State of Bihar and Another, :

- (i) The credit memos were prepared in the name of the Nepal parties.
- (ii) Bhansar receipts stood in the name of the selling party,
- (iii) Bhansar tax paid by the selling dealer did not find entry into its accounts.
- (iv) The goods were sold in Bihar in the instant case, prices were paid either in full or part thereof and title to the goods passed in India to the purchasers.
- (v) The delivery of the goods to the purchasers their representative was finalised in India without any conclusive evidence to establish that the dealer continued to be the owner of the goods up to and beyond the time when the goods entered into the export or until after the goods crossed the customs barrier to make the sale.
- (vi) Books of account of the assessee did not show that the cost of transport or on custom duty was borne by the selling party.
- (vii) The sales were completed in India and transport to Nepal took place under the direction of the purchaser.

11. After quoting in column 1 at page 361 the principle of law enunciated by Patanjali Sastri, C.J., in the first Cashew-nut case AIR 1952 S.C. 366 : 3 STC 434 it was said in column 2-

In our opinion the crucial findings in this case are that the credit memos were prepared in the name of the Nepal parties and the goods were actually exported to Nepal in pursuance of the contract of sale between the parties. (*italicised by me*).

Having said so, the material facts of Dulichand Hardwari Mull Vs. State of Bihar

and Another, were held to be parallel to those of the Supreme Court case in and it was further said that the principle of that decision must govern Dulichand Hardwari Mull Vs. State of Bihar and Another, also.

12. The facts of the instant case as recorded in the order of the Board on the basis of which the statement of the case has been drawn up by the Sales Tax Tribunal are almost similar to those of the case of Dulichand Hardwari Mull Vs. State of Bihar and Another, to the extent they have been discussed by the Bench in its judgment reported in. Whether the sale was on cash basis by issuance of the cash memo or on credit by issuance of credit memo is of no consequence for the determination of the liability. The common facts of the two cases, however, are that the sale within the meaning of the Sales of Goods Act was complete within the territory of India on delivery of goods to the Nepal purchasers, the seller had no concern thereafter in transport of the goods, the goods were actually transported beyond the border by the Nepal purchasers on bullock carts arranged by them, custom duty seems to have been paid in both the cases by the purchasers although the Bhansar receipts were obtained in the name of the seller, and the Bhansar receipts seem to have been sent back by the purchasers to the seller who produced them before the sales tax authorities in proof of the fact of export of the goods outside the territory of India. These facts by themselves neither take the case out of the protection of Article 286(1)(b) nor are they per se sufficient to bring the case within that protection. On these bare facts, the missing link, namely, the obligation to export either under the contract or in pursuance of a mutual understanding or agreement between the parties remains wanting. That missing link, however, was supplied in the case of Dulichand-Hardwari Mull, by stating therein in column 2 at page 361 that-

the goods were actually exported to Nepal in pursuance of the contract of sale between the parties.

It is not clear from the judgment on what basis or primary finding of fact, the said inference was drawn. Be that as it may, on the facts of the instant case, it is not possible to draw that inference.

13. The Assistant Superintendent of Sales Tax disallowed the claim of exemption of the export sale in question on the ground that although custom duty was paid in the name of the selling dealer, he had not carried the goods to Nepal; rather the delivery of the goods had taken place in the territory of India and the transfer of property in the goods had passed in the State. It is manifest that the grounds for disallowance of the claim as recorded by him were not quite correct and sound. Mr. Rajeshwari Prasad submitted that the facts that the Nepal purchaser was not charged sales tax by the Indian dealer, the former paid the custom duty in the name of the selling dealer as the Bhansar receipts showed and that the purchaser sent back those receipts to the seller, clearly go to show that the buyer took the goods outside the territory of India being under an obligation to do so in pursuance of, and in accordance with, the terms of the transaction of sale. Counsel submitted that there must have been a mutual

understanding between the parties which bound the Nepal purchaser to export the goods outside the territory of India otherwise the Indian dealer would not have sold the goods to him free of sales tax. The argument was quite attractive and had great force to induce us to accept it. But the difficulty is that at no point of time such a case was made out by the assessee before any of the authorities. In the ground of appeal which was filed before the Deputy Commissioner, it was stated in ground No. 6 that the custom receipts were sufficient to prove and establish that the goods had been exported to Nepal and once it is proved, the sale should be held to be one in course of export. As I have said above, although the expressions used by Patanjali Sastri, C.J., in the two Cashew-nut cases enunciated the law in the manner as has been explained, if I may say so with respect, by Shah, J., in the case reported in Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, the common people and some lawyers seem to have remained under the impression, although wrongly, that the last sale to a foreign buyer by an Indian dealer with an intention to export and the actual exportation of the goods sold were sufficient to attract the protection of Article 286(1)(b) from imposition of sales tax. Actually it was not so. The fact of obligation to export, in a majority of the cases such obligation may be of the seller -and in some, specially in the case of Nepal purchasers-the obligation may be of the buyer, was necessary to be shown. It may well be that even in the instant case the obligation of the Nepal purchaser to take : the goods outside the territory of India was there as a part of the transaction of sale, but in absence of such a case of fact having been put forward or found at any stage of the proceeding, I had to check myself from drawing this inference of fact from the bare facts as they appear from the records of this case. Those facts by themselves can not. irresistibly lead to the conclusion of the fact of obligation to export on the part of the buyer. They may also be consistent with the mere fact of export of the goods, and all that was done by the buyer : might have been with a view to prove, for the benefit of the seller, the fact of the exportation of the goods. Some assertion or some : more evidence might have been sufficient to find the missing link of obligation to export as between the two established facts of the sale with an intention to export and the actual exportation. But unfortunately that is absent in this case.

The Deputy Commissioner stated in his appellate order that apart from the despatches by rail the assessee did not adduce any evidence in respect of the other sales whether "the sales were completed after the delivery of goods in Nepal". As I understand the use of the word "completed" in his order, it must mean "completed" in the sense of attracting protection of Article 286(1)(b). If there is any obligation cast under the transaction of sale either on the seller or on the buyer to export the goods, the sale would be complete within the meaning of that Article to come under the cover of its protection when the obligation has been fulfilled and the goods have been exported. Yet in the ground of revision before the Board, no such case was made out. In ground No. 5 again it was stated-

For that the learned lower courts should have held that the goods having moved to Nepal in support of which customs receipts have been duly produced, the Bihar Sales Tax was not livable to such transactions as it was the sale to Nepal parties which occasioned the movement of goods to Nepal.

On concession of the learned advocate for the assessee, when the learned Member, Board of Revenue, recorded the facts in his order in revision in the manner, as has been stated above, it is to be noted here that those facts were not challenged by the assessee in his reference application u/s 25(1) of the Bihar Sales Tax Act, 1947 except one that the sales were not on cash payment but actually the sales were on credit for which credit memo's were issued by the assessee. It was not asserted either that even though the seller had no "further responsibility in regard to the despatch or conveyance or delivery of the goods in Nepal," the buyer had such a responsibility or obligation under the transaction of sale either because of any express talk between the parties at the time of the transaction or impliedly by mutual understanding. Such a case was tried to be made out by filing an affidavit in this Court with certain annexures; but the learned Advocate for the petitioner fairly and rightly conceded that he could not, in law, make use of it. I am, therefore, unable to find the missing link of obligation to export in favour of the assessee in this case and to hold that the goods were actually exported to Nepal in pursuance of the contract of sale between the parties, as was the view expressed by the Bench deciding the case of Dulichand Hardwari Mull Vs. State of Bihar and Another, , even though the facts as they appear, in the two cases are almost identical.

14. Great stress was laid by Mr. Rajeshwari Prasad on the fact of not charging of any sales tax from the Nepal purchaser by the Indian dealer, on the basis of which learned Counsel submitted that it could not be so but for the fact, that the purchaser had bound himself to export the goods. This fact must have been present in every case decided by the Supreme Court including the tea export case Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, . Yet on the basis of such a fact, nobody could advance an argument to support the case of an obligation to export.

15. For the reasons given above, I would answer the question of law referred to the High Court against the assessee and hold that on the facts and in the circumstances of the case the turnover in question of the assessee on account of sales made to Nepal purchasers can not be treated as sale in course of export of goods outside the territory of India; hence it is not exempt from sales tax. Since the facts of the case were very much similar to those of the case of Dulichand Hardwari Mull Vs. State of Bihar and Another, on the basis of which the reference was sought and made, I would make no order as to cosit.

R.L. Narasimham, C.J.

16. I agree. As pointed out in Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, , there is

a fine but real distinction between sale for the purpose of export on the one hand and sale in the course of export on the other. In the former, the series of acts relating to the sale of the goods and the acts dealing with the movement of the goods from the State form two distinct transactions; whereas, in the latter, all these acts constitute a series of integrated activities forming a single transaction. As to what are the elements which make a series of acts into a single transaction, no exhaustive test can be laid down, as pointed out by their Lordships in the aforesaid Supreme Court case at page 1756:

No single test can be laid as decisive for determining that question. Each case must depend upon its facts.

The expression one series of acts so connected together as to form the same transaction is a familiar one in criminal procedure, and occurs in Sub-section (i) of Section 235, Criminal Procedure Code, and also in Section 239(a), Criminal Procedure Code. In the State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another, , their Lordships, while construing the said expression, observed as follow:

But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every of these elements should exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a strong circumstance to indicate that those acts form part of the same transaction....The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions.

These observations would afford a useful guide.

17. Mere proximity of time between the acts connected with the sale and the acts connected with the export of goods will not be decisive. Their Lordships of the Supreme Court Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, , however, laid down that those two sets of acts should be "so integrated that the connection between the two can not be voluntarily interrupted without a breach of the contract or the compulsion arising from the nature of the transaction." Where there is an obligation to export, that obligation arising out of (a) statutory provision or (b) contract between the parties or (c) mutual understanding or agreement between them or (d) from the nature of the transaction which links the sale to export, there will be sale in the course of export. If such an obligation could not be inferred, the sale would not be a sale in the course of export even though the export might have immediately followed the transaction of sale.

18. In the present reference, the primary facts connected with the impugned sales were summed up by the assessee's lawyer before the Member, Board of

Revenue, and have been quoted at page 3 of my learned brother's judgment; but, In the statement of the case, the Tribunal has not stated as a further finding of fact that, in its view, on the aforesaid facts, it should be held that, in the transaction of sale, there was an obligation to export. Mr. Lalnarayan Sinha for the Department, therefore, contended that this is a pure finding of fact, and, in the absence of such a finding by the Tribunal (which stated the case for the opinion of this Court), this Court has no jurisdiction to come to an independent finding on the basis of the primary facts admitted by the Counsel for the assessee before the Member, Board of Revenue. Mr. Rajeshwari Prasad for the assessee, however, urged that, if the primary Facts admitted before the Member, Board of Revenue, lead to the irresistible conclusion that there was an obligation to export the goods, this Court has jurisdiction to arrive at such a conclusion because the question referred to this Court is prefaced by the words "whether on the facts and in the circumstances of the case". According to Mr. Prasad, such a conclusion is an inference of law.

19. Assuming without deciding that Mr. Rajeshwari Prasad's contention is correct, the further question for consideration is whether such an irresistible conclusion can be made from the primary facts. The actual terms of the contract of sale between the buyer and the seller are not known. It is true that the terms of the contract of sale may be implied; but, even for that limited purpose, the necessary facts and circumstances are not found on the records, nor were they urged before any of the Sales Tax authorities, as pointed out by my learned brother. Merely because the purchaser came from Nepal to the border town of Jainagar, purchased the goods, immediately transported them in his bullock-cart to Nepal, paid the customs duty and obtained customs receipts (Bhansar receipts) in the names of the buyer and the seller, and then sent the receipts to the seller, it does not necessarily follow that, when he bought the goods from the seller, there was an obligation to export the same. It is true that the special care which he took to note the name of the seller also in the customs receipts and to send those receipts to the seller, coupled with the admitted fact that the seller did not charge sales tax on him, may possibly lead to an inference that there was some sort of understanding or agreement between the seller and the buyer to the effect that the goods would be exported after purchase. But that is only one of the several alternative conclusions that can be drawn on the aforesaid facts. It may be urged with equal force that the aforesaid facts merely show that the sale was for the purpose of export, and that the customs receipts were sent to the seller by the buyer solely with a view to enable the buyer to have the necessary evidence to show that the goods were actually exported. But, as already pointed out, mere export of goods soon after purchase will not suffice to show in all cases that there was an obligation to export. Some further materials have to be produced to justify such an irresistible conclusion, and not only are these totally wanted here but at no stage did the assessee put forward such a contention.

20. So far as the previous Bench decision of this Court, viz., *Dulichand Hardwari Mull Vs. State of Bihar and Another*, is concerned, I agree with my learned

brother that the law has been correctly laid down in that decision on the facts found, namely, that "the goods were actually exported to Nepal in pursuance of the contract of sale between the parties". This Court is not concerned with the further question as to whether such a finding was justified from the primary facts found by the sales tax authority reproduced in paragraph 10 of the judgment of my learned brother. It is sufficient to say that, merely because in the present case the primary facts found are almost identical with the primary facts found in that case (the slight difference, which is not material, has been noticed by my learned brother), one can not jump to the conclusion, in the absence of further materials, that, here also, the sale was in the course of export.

Tarkeshwar Nath, J.

21. I agree.