

(1966) 08 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Original Order No. 32 of 1965

State of West Bengal

APPELLANT

Vs

Indian Steel and Wire Products Ltd. and Another

RESPONDENT

Date of Decision : 17-08-1966

Acts Referred:

Constitution of India, 1950 — Article 226, 286
Sales of Goods Act, 1930 — Section 4

Citation : (1967) 19 STC 319

Hon'ble Judges : Masud, J;G.K. Mitter, J

Bench : Division Bench

Advocate : S.D. Banerjee, -General, N.C. Chakrabortti, Government Pleader and S.K. Basu, for the Appellant; S.R. Banerjee and S.N. Mookherjee, for the Respondent

Judgement

G.K. Mitter, J.—This is an appeal from an order under Article 226 of the Constitution making absolute a rule issued at the instance of the first respondent for a writ in the nature of certiorari quashing a notice u/s 11(2) of the Bengal Finance (Sales Tax) Act, 1941, and all proceedings thereunder together with a writ in the nature of mandamus directing the State of West Bengal and its Commercial Tax Officer, Esplanade Charge, not to give effect to the said notice.

2. The petition to this Court which was affirmed on 5th September, 1955, was amended twice, first by an order dated 29th May, 1957, and again by another order dated 11th January, 1962. In the petition as originally presented the material averments were as follows:-

(1) The petitioner carried on business in the production and distribution of iron rods, galvanised iron wires etc. Its workshop and factory were situated at Indranagar, District Singhbhum in Bihar. The management and control of its business including sales of the articles were done at its office situated in Bihar.

(2) The petitioner had a registered office at No. 7, Wellesley Place, Calcutta, and

this was merely a statutory office.

(3) The production and sale of the articles manufactured by the petitioner were controlled by the Iron and Steel (Control of Production and Distribution) Order, 1941, promulgated under Rule 81(2) of the Defence of India Rules.

(4) Notifications under the said Order were from time to time issued by the Iron and Steel Controller declaring the conditions under and prices at which the articles produced by the petitioner were to be sold to its customers.

(5) In proceedings started under the Bengal Finance (Sales Tax) Act, 1941, against the petitioner, an order dated 23rd September, 1946, was passed by the Assistant Commissioner of Commercial Taxes, Calcutta, holding that the petitioner was not a dealer within the meaning of Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941.

(6) In spite of the above the Assistant Commissioner of Commercial Taxes issued a notice dated 9th August, 1955, to the effect that he was satisfied on information received that the petitioner had been liable to pay tax under the Bengal Finance (Sales Tax) Act, 1941, in respect of the period commencing on 1st February, 1951, and ending with 31st March, 1951, but had failed to get itself registered u/s 7 of the Act. The notice called upon the petitioner to produce at the appointed place on 1st September, 1955, accounts and documents specified in the notice for the purpose of assessment and to show cause why, in addition to the amount of tax to be assessed for the period 1st February, 1951 to 31st March, 1951, and all subsequent periods, a penalty not exceeding one and a half times the amount assessed should not be imposed on the petitioner under Sub-sections (1) and (2) of Section 11 of the Bengal Finance (Sales Tax) Act. The documents and accounts required to be produced were rather comprehensive in nature including cash book, bank pass book, general ledger, personal ledger, journal, bill register, counterfoils or copies of bills and cash memos etc.

(7) The petitioner appeared before the Commercial Tax Officer on 1st September, 1955, and contended, inter alia, that it was not a dealer within the meaning of the Bengal Act as it sold the goods at Indranagar at the site of the workshop, that in any event the sales being inter-State sales were exempt from taxation under Article 286(1) of the Constitution and that the definitions of "dealer" [section 2(c)] and "sale" [section 2(g)] in the said Act were ultra vires Article 286 of the Constitution.

(8) The petitioner's representation that the proceeding should be dropped was not acceded to and the Tax Officer threatened to proceed with the assessment.

(9) There being no adequate or complete remedy in law the petitioner was compelled to come to this Court on several grounds including :-

(a) that iron and steel had been exempted from taxation by the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act;

(b) that the sales being inter-State were exempt from taxation; and

(c) the petitioner was not a dealer within the meaning of the Act. A rule was issued by this Court on the basis of this petition on 6th September, 1955. There were only two annexures to the petition, the first being the order of the Assistant Commissioner of Commercial Taxes dated 23rd September, 1946, and the second a notice u/s 11 of the Act dated 9th August, 1955.

3. The Commercial Tax Officer affirmed an affidavit-in-opposition on 20th December, 1955. The facts alleged and the contentions raised in this affidavit were as follows :-

(a) The petitioner had its registered office at No. 7, Wellesley Place, Calcutta, and controlled and managed its business from the said office. The petitioner was a dealer within the meaning of the Act as amended in 1950.

(b) On receipt of certain communication from the Central Section of the Directorate of Commercial Taxes it appeared that the petitioner had for some years past been selling goods of considerable value for which it was liable to pay sales tax. Thereupon the notice was issued u/s 14(1) of the Act for production of the books of account of the petitioner to verify the sales. The petitioner produced certain registers of sale from which it appeared that it had been selling goods extensively in the State of West Bengal.

(c) On 5th August, 1955, the authorised representative of the petitioner one L. Mukherjee, submitted a statement of sales made in West Bengal for the period 6th November, 1950 to 31st March, 1951, and for the period 1st April, 1951 to 31st March, 1952. In consideration of all the facts the notice dated 9th August, 1955, was issued.

(d) On 1st September, 1955, the petitioner appeared before the Commercial Tax Officer through an Advocate and two assistants. They produced books from which it appeared that huge sales had been effected by the petitioner in the State of West Bengal. On the said date the Advocate appearing on behalf of the petitioner submitted certain statement of account of sales effected in the State of West Bengal headed "sales to West Bengal during the years 1954 and 1955". On the Commercial Tax Officer's pointing out that there was an admission of sales in West Bengal the Advocate for the petitioner altered the heading to read "despatch to West Bengal from Tatanagar workshop during the years 1954 and 1955". The said alteration was an afterthought and was incorrect as from the statements filed it appeared that the petitioner had effected sales in West Bengal to the extent of Rs. 36,255,691-10-0 during the period 6th November, 1950 to 31st March, 1955. On 1st September, 1955, the petitioner filed an application before the Commercial Tax Officer that if after consideration of the facts stated the petitioner was held to be a dealer three months' time should be granted to the petitioner to enable it to make a claim for deductions.

4. On 16th January, 1956, one Ajaib Singh, a Director of the petitioner affirmed

an affidavit-in-reply. In paragraph 5 thereof it was stated that goods were despatched to West Bengal after sale in Bihar.

5. By the first amendment of the petition paragraphs 10 to 18 shown in red were introduced in the petition and additions were also made to the grounds urged in paragraph 12 of the original petition which was renumbered as paragraph 21. In paragraph 17, it was stated that the notice dated 9th August, 1955, was contrary to Article 286 of the Constitution and as such was null and void.

6. By the amendment of 1962 paragraphs 19 and 20 shown in blue were introduced in the petition with further additions to the grounds in the original paragraph 12 renumbered as paragraph 21.

7. On 24th April, 1964, a supplementary affidavit-in-opposition was affirmed by one Himanshu Kumar Bhadra who also was at that date working as the Commercial Tax Officer, Esplanade Charge. In paragraph 2 of the said affidavit the deponent attempted to describe the successive stages of operations carried on by the dealers manufacturing iron and steel products in effecting sales of such products under the Iron and Steel (Control of Production and Distribution) Order, 1941. These were as follows:-

(i) All intending purchasers were required to submit applications to the Iron and Steel Controller for placing on their behalf and at their risk, their orders on a registered producer for materials as per specifications in the applications subject to the provision of the price schedule etc., and the terms and conditions of sale of the registered producers on whom the order was placed.

(ii) The Iron and Steel Controller, after scrutiny of the production programme and capacity of the registered producers, in his turn forwarded the indent of the purchaser to the dealer (registered producer) for supply of such materials allotted to the purchaser.

(iii) On receipt of indent from the Iron and Steel Controller the registered producer accepted the purchaser's order as per indent subject to the acceptance of the terms of business of the registered producer by the purchaser. The terms of business of the registered producers contained amongst others, clauses governing mode of payment, mode of despatch, payment of sales tax etc. A specimen form of such terms of business of the Indian Iron and Steel Co. Ltd., one of the registered producers, formed annexure "A" to the affidavit. After confirmation of the acceptance of the terms and conditions of the producer by the purchaser, the producer concerned issued works order in respect of the indent which also contained clauses amongst others that all orders booked were subject to the terms of the business and general understanding in force at the time of booking the order and despatch of goods by the producer. A copy of such works order was also forwarded to the Iron and Steel Controller for his information.

(iv) Thereafter as and when manufactured goods were despatched, despatch

advices were issued by the producer to the purchaser.

(v) Generally railway receipts, invoices, bills and other documents were sent through the bankers or sub-office of the producer. One set of correspondence relating to the petitioner's transaction with Messrs Martin Burn Ltd. for supply of materials available in the records of the deponent was annexed to the affidavit.

8. The first annexure to the affidavit is described as acceptance of order and terms of business of the purchaser. The date is not given but it must be sometime after 1950 as the form shows. This document seems to be common to the Tata Iron & Steel Co. Ltd. and Indian Iron & Steel Co. Ltd., two of the well-known producers of iron and steel products. The indenter desired that an order should be placed with either of the two producers as may be selected for supply of materials as per specification mentioned. The indent was subject to the terms and conditions printed on the reverse of the form and the indenter agreed to accept deliveries from either or both of the producers, and requested that works orders should be sent in confirmation.

9. The terms of business contain detailed conditions. A few of them are noted below :-

2. The works order issued by the company shall be the basis of the contract between the company and the customer.

3. All materials are sold subject to the company's list of tolerances.

4. All prices are subject to change without notice.

5. All prices are exclusive of all sales taxes or other taxes or duties, local or provincial.

6. Where goods are sold F.O.R. Tatanagar or SCOB siding or Burnpur or F.O.R. destination all responsibility of the company shall cease after the goods are delivered in wagons and any damage or loss during transit shall be borne by the buyer.

7. Prices F.O.R. Tatanagar or SCOB siding or Burnpur or F.O.R. destination are in all cases for full wagon loads.

8. The company cannot agree on any account to despatch materials except in full wagon loads unless specified in the party's indent and confirmed by the company in the works order.

9. The company will be at liberty to despatch goods 15 days before or after the time of delivery shown in the works order and the customer may cancel the order on which the company may fail to despatch from its works within the aforesaid time-limits; but whatever the delay in delivery may be the customer must accept the goods unless his written instructions countermanding the order are received by the company at least two days before the loading of the goods in the wagons.

10. Claims for shortages should be made against the railway and the company will not be responsible for such claims in any way.

11. The date of delivery as stated in all orders or contracts shall not be the essence of the contract but shall be approximate only, provided nevertheless that where a customer has entered into or proposes to enter into a contract with a third party for the performance of which the materials to be supplied by the company are essential, and if such contract with the third party provides for the payment of a penalty or damages in the event of failure to deliver or for late delivery by the customer then and in such case and subject always to Clause 20 (the force majeure clause) and subject as herein undermentioned the company will indemnify the customer in the manner and to the extent hereinafter mentioned.

13. Offers by letter or otherwise from ready stock with the company are subject to acceptance by wire within 24 hours of receipt of such letter unless otherwise arranged and materials will be retained to meet such an order for not more than five full days. If despatching instructions are not received within that time the material will be sold to other parties against the customer.

16. The prices charged to the customers shall be the prices ruling on the date of the despatch of the goods and not those ruling on the date of booking of the order.

20. The company shall not be liable for non-performance of any contract either wholly or in part nor for any delay in performance resulting from or due to any cause beyond the company's control including fires, strikes etc...or requirements of Governments, force majeure or any other circumstances beyond the control of the company. Should the company so determine it shall be entitled at any time on notice to the customer to cancel any contract the performance of which is likely to be delayed by any of the causes aforesaid and in such case the customers shall have no claim upon the company of any kind.

24. Any dispute arising out of any contract to which the company's term of business and general understanding relate shall be referred to the arbitration of the Tribunal of Arbitration of the Indian Chamber of Commerce, Calcutta.

10. The second document annexed to the affidavit is a form of acceptance of order of Messrs Martin Burn Ltd. The important clauses herein are as follows :-

Clause 2 .-We generally demand from our customers 25 per cent, of the full value of the materials on order in advance. The documents in such cases are sent in our name through our bankers who collect the balance amount at the time of handing over documents. Kindly confirm that you agree to our terms of payment.

Clause 3 .-Price applicable to despatches will be the Government statutory prices ruling at the time of despatch as laid down by the Iron and Steel Controller irrespective of the rates shown in the works order.

Clause 5 .-Your indent will be booked on the clear understanding that sales tax that may be levied by the Central Government or any State Government will be borne by you.

Clause 8 .-All quotations, tenders, offers, and acceptance by the company must be deemed to include and subject to the company's terms of business, general understanding and general stipulations in force at the time of conclusion of the contract.

11. The next document is a letter addressed by Messrs Martin Burn Ltd. to the Iron and Steel Controller dated 25th July, 1949, requesting the addressee to place an order on registered producers for materials as per specification given. The writer confirmed that the indent was placed subject to the provisions of the Steel Price Schedule of the registered producers on whom the order was placed and that delivery or part delivery from any such registered producers would be accepted by the writer. The document further shows that the indent was forwarded to Indian Steel and Wire Products Ltd. (the petitioner). Evidently this is a printed form containing terms of business which was shown to us at the hearing. They are more or less the same as the one of the Tata Iron & Steel Co. Ltd. and the Indian Iron. Steel Co. Ltd. referred to above.

12. A works order No. 60 dated 16th February, 1950, of the petitioner is also annexed to the affidavit. It was addressed to Martin Burn Ltd. The price shown therein is Rs. 620 F.O.R. party's siding plus Bihar sales tax.

13. The petitioner had a further affidavit in reply affirmed by one Hrishikesh Dutta on 30th April, 1964. The affidavit does not purport to deal with the facts brought out in the affidavit-in-opposition of Bhadra. In paragraph 4 of the affidavit the deponent referred to another application made by the petitioner to this Court in respect of the accounting periods between 1951 and 9th August, 1955, before another Bench of this Court because of the change of address of the petitioner from No. 7, Wellesley Place to an address in Beliaghata Road in the eastern part of the City of Calcutta. The rule issued in this case was Civil Rule No. 256(W) of 1962 on 19th April, 1962, and upon hearing, the same was made absolute by a judgment passed on 28th August, 1963, whereby it was held that the petitioner's transactions did not amount to sales in accordance with the law and as such were not amenable to assessment to sales tax.

14. The deponent stated further in paragraph 7 of the affidavit "That the mutual status or rights or obligations subsisting between or in a purchaser and a seller in respect of a purchase or a sale of goods, as the legal concepts enshrined in the law of sale of goods in India are not available to the parties or persons nominated or chosen by the Controller, the price for disposal of the products fixed by the Controller, the time, method, the destination of deliveries indicated by the Controller, in view of the over-all control exercised by the Controller in respect of even the acquisition of the raw materials for production or fabrication work, pursuant to the powers conferred on it by the said order." It was stated

further as was contended before us during the hearing of the appeal, that "in order that there might materialise a sale of goods in law, there must be two essential ingredients, namely, an agreement of sale of goods and the eventual sale itself of the agreed goods." It was argued that the operation of the said order deprived the petitioner of the capacity or competence to negotiate and conclude any agreements of sales as required by the law of sale of goods and as such the production and delivery of the products by the petitioner did not amount to sales in accordance with the law of sale of goods and that being so, those transactions were beyond the legislative competence of the respondent No. 2 to legislate for and/or de hors the competence of the executive authorities commissioned to execute the Bengal Finance (Sales Tax) Act of 1941,

15. No documents were annexed to this affidavit to show the course of dealings adopted by the petitioner or enjoined upon the petitioner by the Iron and Steel Controller for the manufacture or distribution of its products. No attempt was made to show what classes of goods the petitioner had from time to time been required by the Controller to produce or the orders of the Controller directing the terms on which the said goods were allotted to or despatched to persons desirous of acquiring them. No reference was made to the terms of business of the petitioner in respect of any such distribution or despatch. Far from disclosing any document which would help the Court in coming to a conclusion as to the nature of the transaction entered into by the petitioner a complaint was made that Bhadra had, by his affidavit-in opposition violated Section 25 of the Act in utilising and divulging specimen forms of terms of business of the Iron and Steel Co. Ltd. It was stated that the two companies mentioned in Bhadra's affidavit were not parties to this application and the entire material records from which Bhadra derived his information had not been disclosed.

16. A further complaint was made to the effect that annexure "A" to the affidavit of Himanshu Kumar Bhadra referred to a bunch of papers and documents exchanged by and between the petitioner and Martin Burn Ltd. in the year 1950 which was not the relevant period for the purpose of appeal and as such should not be taken into consideration. It was said further that on 9th August, 1955, the petitioner had no occasion at all to produce and/or file the papers covering the production and/or distribution of the goods produced by the petitioner-company and delivered to Martin Burn Ltd. It was also averred that as these papers were not supported by the affidavit of anybody from Martin Burn Ltd. no heed should be paid to them. Lastly it was said that "even assuming that such correspondence were in fact exchanged by and between the parties concerned, those related to the entire process of production and distribution of the products of the registered producers, subsequent to the selection of the nominee or authorised person or party concerned by the Controller, and further to the service by the Controller of the order or communication to that effect, embracing even the quantity and category of the product to be manufactured by the petitioner, on the petitioner. As such all those transactions did not acquire the legal sanctity and validity of a free and voluntary agreement required by the law of sale of

goods between a free, voluntary and willing seller and a free, voluntary and willing purchaser, competent to higggle and haggle between them about the quantity and category of the goods, about the price of the goods, about the terms of delivery of the goods; and as such, even taking those papers at their best, those did not evidence the conclusion and performance of an agreement of sale in law or any sale of the goods.

17. The learned trial Judge came to the conclusion that "the expression "sale of goods" in Entry 48, List II, Schedule VII, of the Government of India Act, 1935, was a nomen juris, its essential ingredients being an agreement to sell goods for a price and property passing therein pursuant to that agreement. Entry 48 introduced a new topic of legislation with respect to which there was no legislative practice. Under the Government of India Act, 1935, Provincial Legislatures were competent to enact laws in respect of the matters enumerated in Lists II and III and though the entries therein are to be construed liberally and in their widest amplitude the law must, nevertheless, be one with respect to those matters and Provincial Legislatures could not in the purported exercise of their power tax transactions which were not sales by merely enacting that they shall be sales. A contract of sale postulates the exercise of volition on the part of the contracting parties. A transaction by which title to goods passes by compulsion was not a sale of goods as contemplated by the Sale of Goods Act, 1930. Where the elements of sale required under the Sale of Goods Act, 1930, wanted, it was immaterial whether the word "sale" was used or the word "seller" or "buyer" was used. One must look at the substance of the transaction.

18. Applying the above tests the learned Judge came to the conclusion that as the petitioner was under the control of the Steel Controller both in the manufacture and disposal of its manufactured goods and had to sell to consumers as ordered at prices which were compulsorily fixed it had no independent volition. As such the transactions were not sales so as to attract taxability under the Bengal Finance (Sales Tax) Act, 1941.

19. Fortunately for us, the law on the subject has engaged the attention of the Supreme Court in several cases and in order to find out whether a transaction is a sale within the meaning of the Bengal Finance (Sales Tax) Act, we must guide ourselves by the Supreme Court judgments.

20. The preamble to the Bengal Act 6 of 1941 shows that its object was to impose a general tax on the sale of goods in Bengal. The definition of "goods" is given in Section 2(d) and "sale" according to Section 2(g) "means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge." Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, read "tax on the sale of goods and on advertisements". Entry 54 in List II of the Seventh Schedule to the Constitution before amendment in 1956 read "tax on the sale or purchase of goods other than newspapers". The Supreme Court had to consider

the validity of the Bombay Sales Tax Act (24 of 1952) and the rules framed thereunder in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . The judgment in this case was delivered on the same day as another judgment on the validity of the Madras General Sales Tax Act (9 of 1939) in *Poppatlal Shah Vs. The State of Madras*, .

21. A very elaborate judgment was given by the Supreme Court in the *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , where the Madras Act again came up for consideration. As the sales tax laws of the different Provinces later converted into States are practically on the same lines the observations of the Supreme Court apply with equal force to all such State laws. The true meaning of the word "sale" as used in Entry 48 and Entry 54 was examined at length in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, . There it was observed after considering the earlier cases of the Supreme Court "that the expression "sale of goods" in Entry 48 cannot be construed in its popular sense and that it must be interpreted in its legal sense." Tracing from the Roman Law of *emptio venditio* the Court considered "the common law of England relating to sales which had developed very much on the lines of the Roman Law in insisting on an agreement between parties and price as essential elements of a contract of sale of goods" and referring to the codification of the law in England by the Sale of Goods Act, 1893, and the Indian Sale of Goods Act, 1930, it was said,

According to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course pre-supposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale.

22. After considering the legislative practice in interpreting words in the Constitution it was said that

the true legislative intent is that the expression "sale of goods" in Entry 48 should bear the precise and definite meaning it has in law, and that that meaning should not be left to fluctuate with the definition of "sale" in laws relating to sale of goods which might be in force for the time being.

23. According to the Supreme Court "the ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they

should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes.

24. In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , the question was whether sales tax was payable on the materials used for constructing a structure on the basis of a building contract. The Court held that "in such an agreement there was neither a contract to sell the materials used in the construction, nor was there any transfer of property in movables and it was impossible to maintain that there was implicit in a building contract a sale of materials as understood in law." In short the judgment of the Supreme Court was to the effect that the expression "sale of goods" in any Act providing for the imposition of taxes thereon must be construed in the sense which it has in the Sale of Goods Act.

25. In *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, , the facts were as follows : The appellants owned a factory manufacturing sugar in the State of Bihar. During the assessment period 1st April, 1947 to 31st March, 1948, the appellants who were registered as dealers under the Bihar Sales Tax Act despatched sugar valued at approximately Rs. 7,00,000 to the authorised agents of the State of Madras in compliance with the directions issued by the Controller exercising powers under the Sugar and Sugar Products Control Order, 1946. The Sales Tax Authorities of Bihar were of the opinion that tax was payable in respect of such despatches but the Board of Revenue set aside the order. Under the provisions of Section 25(3) of the Bihar Sales Tax Act. the question as to "whether in the facts and circumstances of the case, the disposal of sugar to the Province of Madras is liable to be taxed" was referred to the High Court of Patna by the Board of Revenue. The High Court held against the assesseees. This was however upset in appeal to the Supreme Court by a majority judgment. It was held by the learned Judges composing the majority that

The transactions of despatches of sugar by the assesseees pursuant to the directions of the Controller were not the result of any contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar

to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirements to the Province. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the State to purchase goods; he acted in exercise of his statutory authority. There was manifestly no offer to purchase, sugar by the Province, and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left with no volition; he could not decline to carry out the order; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate, and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government.

26. Further according to the Supreme Court

Mere compliance with the despatch instructions issued by the Controller, which in law the assessee could not decline to carry out, did not amount to acceptance of an offer. A contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessee... There was on the part of the Province of Madras no signification to the assessee of their willingness to do or to abstain from doing anything, with a view to obtaining the assent of the assessee to such act or abstinence, and the Controller did not invite any signification of the assent of the assessee to the intimation received by them. He did not negotiate a sale of sugar ; he in exercise of his statutory authority ordered the assessee to supply sugar to the Government of Madras. We are unable to hold that from the intimation of the order of the Controller, and compliance therewith by the assessee any sale of goods resulted in favour of the State of Madras.

27. Mr. Justice Hidayatullah took a different view but in this Court we are bound by the majority view and we are to guide ourselves by the opinion of the majority Judges of the Supreme Court and the principles laid down in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, to see whether the transactions entered into by the petitioners were sales within the meaning of Entry 48 of List II of the Seventh Schedule to the Government of India Act, 1935, or Entry 54 of List II in the Seventh Schedule to the Constitution of India.

28. Unfortunately for us the petitioner did not come out with the facts in its petition but raised only some vague contentions including that the sales, if any, were inter-State sales. Not a scrap of paper was produced before the Court to show how the transactions on which tax was sought to be levied had anything to do with inter-State sales. Merely because the Iron and Steel Controller has large powers of controlling or regulating the procedure to be adopted where one party requires iron and steel goods and another party has to supply them it cannot be said that there is such an absence of volition on the part of the parties that the transaction cannot be called a sale of goods within the meaning of the Sale of Goods Act, 1930. In these days volition in the matter of entering into contracts is

cut down to a great extent by legislation of different kinds. Take for instance the case of a person wishing to enter into a tenancy agreement with the owner of a house. Both the owner and the prospective tenant are bound by the relevant provisions of the Rent Control Acts in force in the States. Incidents of tenancy as laid down in the Transfer of Property Act are modified by the laws of every State. A landlord is not free to charge whatever rent he wishes to: he cannot get rid of the tenant merely by issuing a notice to quit. A tenant is not free to sub-let the property to others. Nevertheless however when an agreement is entered into between the owner and the tenant it cannot be said that the relationship between them is not one of landlord and tenant though they are not free to exercise their volition in all respects. Take again the case of an industrial employer and his employees. Before the introduction of Acts like the Industrial Disputes Act an employer was subject to the contract with the employee free to terminate the contract of employment whenever he pleased. He was also free to impose such terms and conditions of service as he thought fit. These rights have been cut down to a considerable extent by various legislations in this respect. Can it be said that because of such legislations and the curtailment of the rights of the employer the relationship is not that of an employer and employee ?

29. Let us consider the case where a State passes a legislation that certain goods cannot be sold at prices beyond the maximum fixed without any other restriction as to the class or classes of persons who can sell them or persons who can buy them. Merely because the seller is not free to charge whatever price he chooses can it be said that transactions entered into by him are not those of sale ? Proceeding a step further let us consider the case where the State does not allow any and everybody to manufacture goods of certain classes and does not permit any and everybody to acquire goods of such specified classes except under permits issued by the State. In such cases considerable restraint is imposed on every person concerned both as regards the acquisition of such goods and the disposal thereof as also the consideration for acquisition or disposal. Even with these limitations the State may allow a citizen to acquire the goods from any supplier of its choice and the purchaser and the seller may be at liberty to offer to purchase and to accept the bargain and enter into binding transactions of sale and purchase.

30. I see no reason to hold why such agreements cannot ripen into sales within the meaning of the Sale of Goods Act. In the present set up of society the State may consider it beneficial in the interest of all that everybody should not be allowed to manufacture iron and steel and everybody should not be allowed to acquire such goods but that the needs of persons wishing to acquire them have to be considered in view of the supplies available from the producers, and to ensure equitable distribution clothes its officer called the Controller with wide powers to enforce and direct that intending purchasers shall not be free to acquire their goods from whatever sources they choose and the producers will not be at liberty to supply the goods to whomsoever they select. With such an object the Controller may direct all intending purchasers to place indents on him

for their needs and after considering the supplies available from different sources direct that the purchasers should place their indents on particular supplier for the quantity required. Such transactions would, nevertheless, contain the essential prerequisites of sales namely, agreements to enter into sales followed by the transfer of property as a result of the payment of prices which again are controlled. Everybody knows that iron and steel goods are in short, supply and allowing any and everybody to manufacture such goods without restrictions and without testing their capability to produce such goods would result in chaos. Similarly if everybody was allowed to acquire iron and steel goods and stock them even if he did not want the goods for his own consumption, the result would be that the persons in genuine need of such products would not get them when they wanted and would not be able to acquire them at reasonable prices.

31. In our view, the Iron and Steel Control Order and the documents disclosed in this case leave us in no doubt that, subject to certain limitations imposed, the petitioner was at liberty to enter into transactions of sale. The facts in this case are not similar to those in New India Sugar Company's case¹. Rule 81(2) of the Defence of India (1) New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, .

32. Rules was promulgated u/s 2 of the Defence of India Act, 1939. By this rule the Central Government or the Provincial Government, as the case may be, was empowered by notification in the Official Gazette to make such rules as appeared to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Amongst other things it could regulate or prohibit the production, storage, movement, transport, distribution, disposal, acquisition, use or consumption of articles or things of any description whatsoever and in particular prohibit, or withhold from sale either generally or to specified persons or classes of persons or in specified circumstances. The rule also provided for controlling the prices or rates at which articles or things of any description whatsoever might be sold and for relaxing any maximum or minimum limits otherwise imposed on such prices and rates.

33. The Iron and Steel (Control of Production and Distribution) Order, 1941, was aimed at regulating the production and supply of iron and steel goods. Under Clause 4 "no person shall acquire or agree to acquire any iron or steel from a producer or a stockholder except under the authority of and in accordance with the conditions contained or incorporated in a general or special written order of the controller." Under Clause 5 "no producer or stockholder shall dispose of or agree to dispose of or export or agree to export from any place to which this Order extends, any iron or steel except in accordance with the conditions contained or incorporated in a special or general written order of the Controller." Under Clause 10B the Controller might by a written order require any person holding stock of iron and steel, acquired by him otherwise than in accordance

with the provisions of Clause 4, to sell the whole or any part of the stock to such person or class of persons and on such terms and conditions as may be specified in the Order. Under Clause 11A, "the Controller may where he is satisfied that such action is necessary in order to co-ordinate the production of iron or steel with the demands for iron or steel which have arisen or are likely to arise under authorisations to acquire duly issued under the Order.. (c) require, with effect from such date as the Controller may specify, any producer to manufacture iron or steel of such categories as he is capable of manufacturing, in accordance either with programmes of production approved under Sub-clause (b) of this clause or with special instructions issued by the Controller." Under Clause 11A "the Controller may direct any person holding stocks of iron and steel to maintain a list of the godowns and stockyards with the boundaries thereof where iron or steel belonging to him is stocked and to exhibit such list on his business premises. The Controller may by notification in the Official Gazette direct that every producer, stockholder or other person holding stocks of iron and steel when selling any iron or steel shall, give to the purchaser a memorandum containing the particulars specified in such notification. Further, no producer, stockholder, or other person holding stocks of iron and steel shall, without sufficient cause, refuse to sell any iron or steel which he was authorised to sell under this Order." Under Clause 11B the Controller was authorised to fix the maximum prices at which any iron or steel may be sold either by a producer or by a stockholder or other class of persons. Such price or prices may differ for iron and steel obtainable from different sources and may include allowances for contribution to and payment from any equalisation fund established by the Controller for equalising freight, the concession rates payable to each producer or class of producers under agreements entered into by the Controller with the producers from time to time and any other disadvantages. Under Sub-clause (3) of Clause 11B "No producer or stockholder or other person shall sell or offer to sell, and no person shall acquire any iron or steel at a price exceeding the maximum prices fixed under Sub-clause (1) or (2).

34. u/s 2(c) of the Bengal Finance (Sales Tax) Act, 1941, "dealer" means any person who carries on the business of selling goods in West Bengal and includes the Government. u/s 2(d) "goods" means all kinds of movable property other than actionable claims, stocks, shares, or securities and includes all materials, articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property.

35. The first respondent has not brought any facts to the notice of the court to show that the successive stages of operation carried on by the dealers manufacturing iron and steel products are not as described in the affidavit of Himangshu Kumar Bhadra affirmed on 24th April, 1964. According to this affidavit as already noted any person intending to purchase iron and steel goods has to submit an application to the Iron and Steel Controller for placing on his behalf and at his risk an order on registered producers for materials as per specification in the application. The Iron and Steel Controller then takes upon

himself to find a registered producer who is in a position to supply materials required by the intending purchaser. The intending purchaser is then required to accept the terms of business of the registered producer. This indicates the manner in which the transaction is completed. The process may be likened to a purchaser approaching a broker who knows all about the trade and persons who stock the goods required by the purchaser and puts him in touch with the seller. The Controller in this case supplants the broker with powers no broker has. He is in a position to dictate from where the purchaser has to acquire his goods and who is the person who must supply the same ; he further has the power to fix the maximum prices. But subject to these restrictions the parties are given the liberty of entering into a bargain of purchase and sale introducing thereunder such terms of business as will not override the conditions laid down by the Controller. The works order issued by the producer forms the basis of the contract between the producer and the purchaser. The prices have to be subject to the maximum limit imposed but within that limit the producer can charge such prices as he likes. According to the terms of business in the contract of M/s. Martin Burn Ltd. and Indian Steel and Wire Products Ltd., the goods were sold F.O.R. Tatanagar or SCOB siding. The producer has the liberty of despatching goods within a certain period of time and the customer has the right to cancel if the time-limits are not observed. If the customer enters into a contract with a third party to perform any engagement entered into by him he can give notice thereof to the producer and on the latter's failure to deliver he can claim compensation from the producer. The producer can cancel the contract in certain circumstances and postpone the time of delivery if he is unable to complete the same by reason of fire, strikes etc. Any dispute arising out of the contract is subject to the arbitration of the Indian Chamber of Commerce as in many other commercial contracts. The intending purchaser has to pay 25 per cent. of the full value of the materials at the time when the order is placed and the documents of title to the goods are sent in the name of the producer through its bankers.

36. All the above show that subject to certain limitations the requirements of Section 4 of the Indian Sale of Goods Act are complied with. There is an agreement for sale between the parties although the parties are not free to agree just as they please. This is followed by actual transfer of title to the goods and payment of the price agreed upon. There is nothing to show that the purchaser cannot reject the goods if they are not such as were contracted for. He can claim compensation for losses suffered in respect of his engagement with third parties if he makes the same known to the producer at the time of entering into the contract. The limitation as to the price or as to the quantity which a purchaser can acquire from a producer or even the want of choice as to the person from whom a purchaser is allowed to acquire the goods does not in my opinion take away from the essential requisites of an agreement for sale followed by transfer of property in pursuance thereof on payment of the price.

37. The petitioner, the first respondent before us who is in business in a large way, could easily have produced documents to show that the statements in the

affidavit-in-opposition of Himangshu Kumar Bhadra were not correct and that the course of operations detailed was not accurate. In my view there is a world of difference between the facts of this case and the facts in the New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, . In The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., there was no agreement for sale of the movables. In New India Sugar Company's case [1963] 14 S.T.C. 316 Mad, the manufacturers were required to send the goods to Madras and had to accept whatever compensation, whether called price or not, which was fixed by the Controller. In the case before us the facts show that at first an offer has to be made by the person wishing to acquire iron and steel goods. The offer is scrutinised by the Controller and after his approval it is placed before a producer. The producer is to accept the offer subject to his own terms and conditions of the business. He then issues a works order. After the goods are manufactured they are put on rail or on other transport and payment thereof is obtained according to the conditions laid down by him. Thus the essential requirements of Section 4 of the Indian Sale of Goods Act have to be complied with.

38. I am not at all impressed by the argument put forward u/s 25 of the Bengal Finance (Sales Tax) Act, 1941. Sub-section (1) of the section provides that

all particulars contained in any statement made, return furnished or accounts or documents produced in accordance with this Act, or in any record of evidence given in the course of any proceedings under this Act other than proceedings before a Criminal Court shall, save as provided in Sub-section (3), be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall, save as aforesaid, be entitled to require any servant of the Government to produce before it any such statement, return, account, document or record or any part thereof, or to give evidence before it in respect thereof.

39. In this case the Court did not require anybody to produce any document. The State of West Bengal and the Commercial Tax Officer who are parties to the proceedings were certainly at liberty to produce before the Court any document in their possession to show how the Iron and Steel Control Order was being given effect to. In my opinion it was the duty of the first respondent to produce before the Court such documents as were in its possession which would throw light on the question as to how the provisions of the Indian Iron and Steel Control Order were carried out or complied with. I cannot help observing that these documents were deliberately suppressed from the Court and the affidavits used, instead of helping the Court to ascertain the truth of the facts, were merely affirmed to put before the Court the view of the petitioner on the question of law involved.

40. In my opinion, the learned trial Judge fell into an error in deciding the case in the way he did and the appeal must be allowed and the rule be discharged. With regard to the question of costs I see no reason why the first respondent who has not helped the Court at all in ascertaining the facts should not be made to bear the costs throughout. The order for costs made by the learned Judge is therefore set aside and the first respondent is directed to pay the costs of the appellant

both of the trial court and of the hearing before us. Certified for two counsel.

Masud, J.

41. I agree.