
(1970) 11 CAL CK 0017
In the Calcutta High Court
Case No : Matter No. 499 of 1967

Swaika Oil Mills

APPELLANT

Vs

Member, Board of Revenue

RESPONDENT

Date of Decision : 25-11-1970

Acts Referred:

Central Sales Tax Act, 1956 — Section 5
Constitution of India, 1950 — Article 286
Customs Act, 1962 — Section 50, 51

Citation : 76 CWN 711 : (1971) 27 STC 218

Hon'ble Judges : Sankar Prasad Mitra, J;K.L. Roy, J

Bench : Division Bench

Advocate : D. Gupta and S. Sen, for the Appellant;P.K. Sen Gupta and B.P. Banerji, for the Respondent

Judgement

This Judgment has been overruled by : Member Board of Revenue, West Bengal Vs. Swaika Oil Mills, AIR 1977 SC 2008 : (1977) 4 SCC 286 : (1977) SCC 577 : (1978) 1 SCR 270 : (1977) 40 STC 367 : (1977) 9 UJ 507

Sankar Prasad Mitra, J.—This is a reference u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941. The applicant is a registered dealer under the Act. The assessment is for the period of four quarters ending on 1st Ashar Sudi 2010. During this period, according to the statement of the case, Messrs Netherland Selling Organisation Ltd. had entered into an agreement with the applicant for purchase of linseed oil on f.o.b. Calcutta terms. The purchasers agreed to insure the goods. The payment was to be made against the first presentation of "clean on board" mate's receipt along with the relevant G.R. 1 forms in triplicate. A copy of the relevant document has been produced before us on behalf of the department and has been kept in the records of this reference by consent of parties. This is a letter addressed by Netherland Selling Organisation Ltd. to the applicant containing the terms and conditions of the agreement which the applicant was invited to accept. From this letter as well as from the statement of the case we find that the linseed oil purchased by Netherland Selling

Organisation Ltd. was to be exported under export licences which the applicant had held. The letter also shows that the goods would bear various "shipment marks" stating, inter alia, different places in Indonesia as their destination. In terms of this agreement, it is stated, the goods were to be put on board the ship arranged by the purchasers. The bills of lading were in the name of the purchasers as shippers of the goods. The sales aforesaid were to the extent of Rs. 16,200.10.

2. Before the Commercial Tax Officer the dealers claimed exemption u/s 5(2)(a) (v) of the Act. According to these provisions a dealer's "taxable turnover" is to be determined after deducting there from his turnover during the relevant period on, inter alia, sales of goods in the course of export of the goods out of the territory of India within the meaning of Section 5 of the Central Sales Tax Act, 1956. In the instant reference, however, we are not concerned with Section 5 of the Central Sales Tax Act but with Article 286(1) of the Constitution. It provides, inter alia, that 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 in the course of export of the goods out of the territory of India. The point for our decision, therefore, in this reference is whether the transaction between the applicant and the Netherland Selling Organisation was in the course of export of the goods in question out of India. The Commercial Tax Officer rejected the applicant's claim. Before the Assistant Commissioner of Commercial Taxes the applicant specifically claimed exemption under the above provisions of the Constitution. But the Assistant Commissioner observed:

...In the present case the seller divested himself of the ownership of the goods by unconditional appropriation of the goods to the purchasers. That the seller had no right, title or interest in the goods is evident from the fact that the insurance policy was taken by the purchasers in their own name. Further, the actual shippers were the purchasers themselves. The seller only in accordance with the directive of the purchasers placed the goods on board the ship. It is, therefore, evident that the sales in question were not the last sales which occasioned the export. Rather, these are the purchases by the exporters for the purpose of export and as such they are not within the exemption of Article 286(1) (b).

3. The applicant had the same fate before the Additional Commissioner of Commercial Taxes and came to the Board of Revenue. The applicant contended before the Board that the actual sale took place on delivery of the goods on board a particular ship beyond the customs barrier, and that, as such the State Government could not levy any tax on it. The Board observed:

The fact that the petitioner held an export licence and that on the strength of it paid customs duty and shipped the goods, does not establish that the sale of the goods took place in the course of export out of the territory of India. The material order issued by the purchaser...is in the file. It will appear therefrom that the purchasers on the 10th September, 1952, confirmed having bought from

the petitioner the goods in question. The price was on f.o.b. Calcutta basis, insurance was to be covered by the purchaser and export was to be made under the export licence of the petitioner. Payment was to be made on presentation of "clean on board" mate's receipt along with the relative G.R. 1 forms in triplicate. It will appear that the bill of lading was made out, not in the name of the petitioner but in the name of the purchaser.... In acceptance of the terms of this letter, the sale was evidently made. The circumstances fit in more with a case of sale before the goods entered the export stream. The sale does not appear to be one which occasioned export; it was a sale for the purpose of export.

4. The Board has referred to this court the following question:

Whether in the facts and circumstances of the case the sale of linseed oil amounting to Rs. 16,200.10 is exempt from sales tax under Article 286(1)(b) of the Constitution ?

5. In construing the expression "in the course of export of the goods out of the territory of India" in Article 286(1) of the Constitution we may, to start with, refer to the amendments to this article that were introduced by the Constitution (Sixth Amendment) Act, 1956, which came into force on the 11th September, 1956. Sub-article (2) of Article 286 was one of the amendments introduced and it said:

Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1).

6. In other words, the principles for determining when goods are sold or purchased in the course of export out of the territory of India were left to Parliament to determine by legislation. Pursuant to these amended provisions, Section 5 of the Central Sales Tax Act, 1956, was amended and as from 1st July, 1957, Sub-section (1) of Section 5 provided as follows :

A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

7. It is to be noticed that the amended Sub-section (1) of Section 5 has two limbs. When a sale or purchase occasions an export it is a sale or purchase in the course of export. This is the first limb. The second limb is, when a sale or purchase is effected by a transfer of documents of title after the goods have crossed the customs frontiers, it would be a sale or purchase in the course of export.

8. In the instant reference counsel for the applicant contends before us that the transaction we are considering is within the scope of the first limb. We are, therefore, invited to express our opinion as to whether the facts in this case fit in with the first limb of Sub-section (1) of Section 5 of the Central Sales Tax Act which lays down one of the principles for construing the provisions of Article

286(1) of the Constitution. Our attention was drawn to two judgments of the Supreme Court and it was stated before us that it was difficult to reconcile the views expressed therein. But both the judgments were on the second limb and we do not propose to enter into the controversy about reconciliation raised at the Bar.

9. Mr. Sen Gupta appearing for the department has argued that a close scrutiny of the terms of the agreement between the parties would reveal that this was not a sale which had occasioned the export. He has said that simply because the seller had been directed to put the goods on board and the price was f.o.b. Calcutta price per imperial gallon, would not make the transaction a sale occasioning the export. He has urged that there is no evidence that there was a foreign buyer or importer in relation to the Indian seller. There is also no evidence, according to him, of any integrated activity between the sale and the export inasmuch as the applicant did not prove that the goods had crossed the customs frontiers of India.

10. Mr. Sen Gupta relied on several decisions in support of his contention aforesaid. In *Sales Tax Officer, Jodhpur and Another Vs. Shiv Ratan G. Mohatta*, , it was held that when an assessee claimed exemption under article 286(1)(b), the burden of proving the facts was on him. This proposition is undisputed. Reliance was placed on the Supreme Court judgments in *B.K. Wadeyar Vs. Daulatram Rameshwarlal*, and *The State of Madras Vs. Davar and Co. etc.*, Both these cases were on the second limb of the amended Sub-section (1) of Section 5 of the Central Sales Tax Act and their Lordships of the Supreme Court were principally concerned with what was meant by crossing the customs frontiers of India. As the applicant in this reference is not relying on the second limb these authorities would not help us to answer the question referred. Mr. Sen Gupta also invited us to consider the cases of *Burmah Shell Oil Storage and Distributing Co. of India, Ltd. and Another Vs. The Commercial Tax Officer and Others*, and *The State of Kerala v. Cochin Coal Company Ltd.* AIR 1961 S.C. 408 In these cases the Supreme Court has explained the concept or meaning of "export", but the propositions laid down would not solve our problem in the instant case as the facts in the cases decided by the Supreme Court were entirely different. In *Burmah Shell's* case, the appellant sold aviation spirit to the aircraft proceeding abroad for consumption by the aircraft concerned. In the case of *The State of Kerala*⁵, the assessee supplied bunker coal to steamers arriving in or calling at the port of Cochin for outward voyage for consumption of the steamers themselves. Naturally, in these cases the Supreme Court had to express its views on whether transactions of these types constituted export and in doing so had made various observations on the concept of "export". These observations do not assist us in the instant reference. Here the seller contends that it had put the goods on board the vessel named by the purchaser for export to Indonesia. The general observations of the Supreme Court in these and other cases on article 286 would, however, be useful to us and we shall refer to them at the appropriate moment.

11. Mr. Sen Gupta finally relied on the Supreme Court's judgment in Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, , and had strongly urged that the principles decided in this case ought to be applied to the facts of the present reference. The general principles discussed in this-judgment are, no doubt, the guiding principles to be observed in these cases, but the facts were wholly different from the facts that we find from the statement of the case here and the document of 10th September, 1952. In the Coffee Board's case, the Board was functioning under the Coffee Act of 1942 for controlling the sale and export of coffee. For export the Board had specially screened and selected coffee and exposed it in auctions specially held for the purpose. Only registered customers could bid at these auctions. Condition No. 26 of the conditions of sale at the auction was that coffee sold would be exported within three months to the destination stipulated in the catalogue or to any other foreign country. The buyer was under an obligation under condition No. 29 to produce evidence of the export. The buyer had to pay a penalty under condition No. 30 if within the specified period or any extended period it failed or neglected to export as required. And under condition No. 31 the unexported coffee could be seized and dealt with by the Board. The Supreme Court was of the view that the sales effected by the Coffee Board were not sales in the course of export as those sales did not occasion the export of goods. The reason was that there were two independent sales involved in the export programme. The first was the sale by the Coffee Board as seller to the export-promoter. Then there was a sale by the export-promoter to a foreign buyer. Of the latter sale, the Supreme Court said, the Coffee Board did not have any inkling when the first sale took place. In other words, the Coffee Board sale was not in any way related to the second sale. Therefore, the first sale, according to the Supreme Court, had no connection with the second sale which was in the course of export, that is to say, the movement of goods between an exporter and an importer.

12. When we pointed out to counsel for the respondent that the facts in the Coffee Board case widely differed from the facts of this reference he said to us that in every transaction of this nature one had to find out an Indian seller or exporter and a foreign buyer or importer, but on examining the terms of the agreement between the parties herein one would not be able to trace who the foreign buyer or importer was. In this connection the observations of the Supreme Court at page 540 are as follows:

We have thus to see whether the sale is one which is connected with the export of the goods from this country to an importer in another country. The course of export can only begin if there is movement from an exporter to an importer as the result of the sale, and then only the sale can be said to occasion the export.

13. We have to appreciate that these observations were made in the context of the facts in the Coffee Board case. In the present case the applicant, we find, as exporter took out the bill of lading in the name of the importer. Secondly, it is clear from the terms of the contract that the goods which were to be placed on

board were to bear shipment marks for various places in Indonesia. Thirdly, the export was taking place under an export licence held not by the purchaser but by the seller who had also paid the customs duty. On these facts it is reasonable to conclude that the terms of the contract show that the applicant was the exporter and the Netherland Selling Organisation Ltd. was the importer of the goods and the intention of the parties was that as a result of this contract the goods would move from India to Indonesia.

14. We may now refer to the principles judicially determined on what constitutes sale or purchase occasioning an export. The Supreme Court has expressed its views from time to time and all its decisions up to 1963 have been summarised in the case of *The Cement Marketing Company of India (Private) Ltd. v. The State of Mysore* [1963] 14 S.T.C. 175. There is also another judgment in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, . Broadly speaking, the tests laid down by the Supreme Court are that a sale occasions an export--

- (a) when the export is an incident or covenant of the sale;
- (b) where the export is a part of or is connected with the activity of sale ;
- (c) where the export is a direct result of the sale; and
- (d) where the export and the sale constitute parts of an integrated activity.

15. In our case in the second paragraph of the statement of the case we are told that the Netherland Selling Organisation Ltd. had entered into an agreement with the applicant-dealers for purchase of linseed oil on f.o.b. Calcutta terms. We have, therefore, to examine the features or incidents of a f.o.b. contract and then decide whether the sale and the export in the instant case constituted an interlinked or integrated activity.

16. In Mulla's Sale of Goods Act, third edition, at pages 167 to 168, all the relevant English and Indian authorities on f.o.b. contracts have been summarised and the observations made are as follows:

This is a contract for the sale of goods to be delivered free on board a ship. The buyer must name a ship upon which they are to be delivered and the seller must put them safely on board, meet the cost of doing so, and for the buyer's protection give possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage; there the contractual liability of the seller as seller ceases and the delivery to the buyer is complete as far as he is concerned. The goods are then at the risk of the buyer, he is responsible for the freight, and subject to the seller reserving the right of disposal, the property passes to the buyer : and even if, as sometimes happens, the goods are not specific or ascertained when put on board, as when they are part of a larger quantity, the price being payable against the bill of lading, they are still at the risk of the buyer, he has an insurable interest in them, he must pay the price on presentment of the bill of lading even if the goods have been

lost.

The buyer is not entitled to demand delivery in any other manner than on board a ship, and conversely if the buyer fails to name a ship, the seller's only remedy is to sue for damages for breach of contract; he cannot sue for the price. The condition that the goods should be put on board is one which operates in favour of both parties and cannot be waived by either as if it were a condition inserted for his benefit only. If a port is named, same rule applies.

Although the place for examination is usually the place of delivery, there is no rule that the goods must be examined on or before shipment, which may often be impracticable.

17. It is to be noticed that in a f.o.b. contract delivery of the goods is effected only on board the ship which is named by the buyer. The seller's liability ceases after he has performed his contractual obligation of putting the goods on board the vessel and thereupon the property in the goods passes to the buyer subject to the seller reserving his right of disposal. In the instant case the applicant being the seller had the obligation to put the goods on the ship named by the buyer. The goods were to bear shipment marks indicating, inter alia, that they were being sent to different places in Indonesia. The export was being made under the seller's export licence.

18. The seller, it appears, had made payments of customs duty and Port Commissioners' charges and had complied with the formalities required by the Customs authorities for placing the goods on the vessel. It is interesting to observe in this connection the provisions of Sections 50 and 51 of the Customs Act, 1962. These provisions are as follows:

50. Entry of goods for exportation.--(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel..., a shipping bill...in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill..., shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

51. Clearance of goods for exportation.--Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.

19. These provisions clearly show that the seller in the instant reference after payment of customs duty and Port Commissioners' charges had obtained the customs clearance for exportation before the goods were loaded on the vessel. And the contract between the parties stipulates that payment would be made to the seller only against the presentation of "clean on board" mate's receipt along with the relative G.R. 1 forms in triplicate. It appears that the property in the goods, on the terms of this contract, passed to the buyer upon payment against

mate's receipt and this payment was made after the goods had already been loaded on the vessel for exportation. In any event property did not pass till shipment. The cumulative effect of all these facts, in our opinion, is that the sale in this reference had occasioned the export. In other words, the sale took place in the course of export of the goods out of the territory of India within the meaning of Article 286(1)(b) of the Constitution.

20. Before we close it may be relevant to refer to a few authorities. In *B.K. Wadeyar Vs. Daulatram Rameshwarlal*, , the Supreme Court was dealing with a f.o.b. contract. The Supreme Court has said that in the case of a f.o.b. contract, in the absence of a special agreement, the property in the goods does not pass until the goods are actually put on board. The question, whether there was such an agreement, has to be decided on a consideration of all the surrounding circumstances. In the case of certain sales on f.o.b. contracts, as in this case, the bill of lading was taken in the name of the buyer but was retained by the seller till payment of price and the export was under the buyer's export licence. Moreover, under Clause 5(2) of the Export Control Order, 1954, the goods were to be the property of the licensee at the time of the export. The Supreme Court held that these circumstances would not justify a conclusion that the parties came to a special agreement that though the sales were on f.o.b. contract, property in the goods would pass to the buyer at some point of time before shipment. According to the Supreme Court the intention of the parties that in compliance with the requirements of Clause 5(2) of the Export Control Order the goods shall be the property of the licensee at the time of the export would mean nothing more than that the property in the goods shall pass immediately before the ship goes beyond the territorial waters of the country, or at the earliest when the ship leaves the port.

21. So far as the facts in the present reference are concerned, it seems, as we have said, that property in the goods had passed upon payment against the mate's receipt. In any event, it is certain that property did not pass before shipment of the goods for exportation.

22. In the *State of Travancore-Cochin v. Bombay Co. Ltd.* AIR 1952 S.C. 366 Patanjali Sastri, C.J., observed in paragraph 10 at page 367 :

A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction...

23. To our mind, the terms of the contract of sale, which we were called upon to examine in this reference, satisfy the tests laid down by the Supreme Court in the observations quoted above and the sales are exempt from sales tax under Article 286(1)(b) of the Constitution. The answer to the question referred to us is, therefore, in the affirmative and in favour of the assessee.

24. The assessee is entitled to the costs of this reference.

K.L. Roy, J.

I agree.