

(1963) 11 GUJ CK 0008
In the Gujarat High Court
Case No : Sales Tax Reference No. 5 of 1963

The Bharatkhand Textile Mfg. Co.

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 22-11-1963

Acts Referred:

Constitution of India, 1950 — Article 286(2)

Citation : AIR 1964 Guj 219 : (1964) GLR 961 : (1964) 15 STC 885

Hon'ble Judges : J.M. Shelat, C.J;P.N. Bhagwati, J

Bench : Division Bench

Advocate : M.M. Thakore and J.S. Joshi, for the Appellant; J.M. Thakore, General, instructed by M.M. Thakore and M.G. Doshit, Partners of Bhaishankar Kanga and Girdharilal, for the Respondent

Judgement

Bhagwati, J.—The dispute in this Reference relates to certain sales effected by the assessee during the assessment period 1st April 1953 to 31st March 1954. The assessee at the material time carried on business of manufacture and sale of cloth. The mode of business adopted by the assessee in respect of the sales of cloth effected by it was as follows. The assessee entered into contracts of sale of cloth with local buyers. The contracts were entered into by the buyers irrespective of the fact whether they had received any indents from upcountry merchants. The contracts were sometimes oral and sometimes in writing. It was a condition of the contracts that the delivery of cloth would be given at the godown of the buyer or If the buyer instructed the assessee to despatch the cloth by rail to any destination, the assessee would despatch the cloth to such destination and give constructive delivery of the cloth by handing over to the buyer the relative Railway Receipt duly endorsed in favour of the buyer. We may point out at this stage that this condition of the contracts was, according to the assessee, not an express condition hut an implied condition and it was implied from the accepted practice of the assessee. It is difficult to see how any condition of the contracts could be implied from some practice followed by the assessee but we shall deal with that a little later when we examine the arguments

advanced on behalf of the assessee. The buyers thereafter either took delivery of cloth at the godowns or gave instructions to the assessee to despatch cloth to such destinations as they required in which case the assessee despatched cloth to such destinations by rail according to the instructions of the buyers. The assessee made all arrangements for despatch of cloth to such destinations and also made the necessary applications to the Textile Commissioner for permission to despatch the same. The assessee took out the railway receipts in its own name as consignor as well as consignee and endorsed the railway receipts in favour of the buyers and delivered the same to the buyers in performance of the contracts. It was after the railway receipts duly endorsed were handed over by the assessee to the buyers that the buyers made payment of the price to the assessee. This was the modus operandi of the assessee in respect of sales of cloth effected by it as appearing from the statements made by the assessee before the Additional Collector of Sales Tax and the Deputy Commissioner of Sales Tax on 22nd December 1959 and 16th February 1960 respectively being Annexures F and G to the statement of the case. In the course of assessment for the assessment period 1st April 1953 to 31st March 1954 the assessee contended that the sales in which cloth had been despatched by the assessee to destinations outside the State of Bombay were liable to be excluded from the taxable turnover of the assessee. There were two grounds on which the claim for deduction was formulated. The first ground was based on Rule 5(1)(xi) (I)(A) of the Rules under the Bombay Sales Tax Act, 1953, which was the relevant Act in force during the material period. The second ground on which the claim was sought to be sustained was that the sales were in the course of inter-State trade or commerce and were, therefore, exempt from tax by reason of Article 286(2) of the Constitution. It is not necessary to set out exactly what happened before the Sales Tax Officer, the Assistant Collector of Sales Tax and the Deputy Commissioner of Sales Tax beyond stating that both the grounds on which the claim for deduction was made by the assessee were rejected by them. The matter was carried in appeal before the Tribunal. Now, so far as the first ground is concerned, it appears that before the Tribunal some confusion arose in regard to the true basis on which the claim for deduction was made on behalf of the assessee. The claim of the assessee for deduction was presumably based on Sub-clause (a) of Rule 5(1)(xi)(I)(A) but it was sought to be negated by reference to Sub-clause (c) of Rule 5(1)(xi)(I)(A) and the argument advanced on behalf of the State was that the claim for deduction could, if at all, fall only with Sub-clause (c) and since the assessee had not produced certificates from the purchasing dealers in Form Aid as required under that sub-clause, the assessee was not entitled to deduction of the sales from its taxable turnover. The entire argument before the Tribunal therefore, centred round the question whether Sub-clause (c) applied in the facts of the case. The assessee contended that Sub-clause (c) had no application because it applied only where goods were consigned outside India and that it could not possibly apply to sales in which goods were despatched by rail to destinations within India. The Tribunal on a construction of Sub-clause (c) came to the conclusion that that sub-clause was

not confined in its application to sales where goods were consigned outside India but also applied where goods were despatched by rail to destinations within India and that in the latter case it was necessary for the dealer claiming deduction to produce a certificate from the purchasing dealer in Form Aid. The Tribunal held that since the assessee had not produced certificates in Form Aid from the purchasing dealers in respect of the sales sought to be deducted from the turnover, the assessee was not entitled to deduction in respect of such sales. The second ground on which the claim for deduction was based was that the sales were in the course of inter-State trade or commerce and were, therefore, exempt from tax under Article 286(2) of the Constitution. This ground was also rejected by the Tribunal. The Tribunal took the view on a consideration of the facts and circumstances of the case that the sales could not be said to be inter-State sales and were, therefore, not within the inhibition of Article 286(2) of the Constitution. The Tribunal accordingly dismissed the Revision Application of the assessee. The assessee thereupon applied for a reference and on the application of the assessee the Tribunal referred the following two questions, namely:

"(a) Whether the Tribunal was justified in interpreting that Sub-clause (c) of Sub-clause (1) of Clause (xi) of Rule 5(1) of the Bombay Sales Tax Rules, is applicable even to the sales where the goods were despatched, outside the Bombay State, by rails?

(b) Whether on the facts and circumstances of the case the finding of the Tribunal that the sales worth Rs. 6,25,278/- were not in the course of inter-State trade or commerce, is legally tenable?" for the opinion of this Court under the relevant provisions of the Bombay Sales Tax Act, 1953.

2. So far as the first question is concerned, it raises a point as to the construction of Sub-clause (c) of Rule 5(1)(xi)(I)(A). But it is difficult to see how this question can at all arise on the contention of the assessee. The claim of the assessee for deduction could obviously not be granted under Sub-clause (c) of Rule 5(1)(xi)(I)(A) since that sub-clause requires production of a certificate from the purchasing dealer in Form Aid before any deduction can be permitted and the assessee admittedly did not possess any certificates in Form Aid from the purchasing dealers in respect of the sales. The assessee in fact did not rely on Sub-clause (c) and it was, therefore, entirely unnecessary for the Tribunal to consider whether that sub-clause applied in case of sales where goods were despatched by rail to destinations within India. The only part of Rule 5(1)(xi)(I)(A) on which the assessee could rely and on which, we are told by Mr. M.M. Thakore, learned advocate appearing on behalf of the assessee, that the assessee did rely was Sub-clause (a) which provides for deduction of sales where it is shown to the satisfaction of the Collector that the goods sold have been within a period of three months from the date of the sale despatched by the selling dealer according to the instructions of the purchasing dealer to a place outside the State of Bombay or delivered by the selling dealer at a sea port on F.O.B. or F.A.S. basis or at an airport beyond the customs frontier. Though there

is no specific reference to Sub-clause (a) in the order of the Tribunal, it does appear from the facts stated in paragraph 2 of the statement of the case that the assessee must have relied on Sub-clause (a), but the Tribunal, it seems, countered this argument of the assessee by pointing out that it was Sub-clause (c) which applied and since the assessee had not satisfied the requirements of that sub-clause by producing certificates in Form Aid from the purchasing dealers, the assessee was not entitled to claim deduction in respect of the sales. The assessee contended that Sub-clause (c) applied only to sales in which the goods were consigned outside India and had no application where goods were despatched by rail to destinations within India as in the present case, but this contention was negated by the Tribunal and the Tribunal relying on Sub-clause (c), rejected the claim of the assessee. The real question, namely, whether the assessee was entitled to claim deduction under Sub-clause (a) was thus side-tracked and the discussion before the Tribunal centred round the question whether Sub-clause (c) applied. Now as we have pointed out above it was entirely immaterial to consider whether Sub-clause (c) applied. In the first place the assessee did not base its claim for deduction on Sub-clause (c). Secondly the assessee did not possess certificates in Form Aid from the purchasing dealers and the assessee could not, therefore, possibly make a claim for deduction under Sub-clause (c) whatever be the true scope and ambit of that sub-clause. The only question which should, therefore, have been considered was whether the assessee was entitled to claim deduction under Sub-clause (a) but the Tribunal presumably on the erroneous view that the assessee could succeed in its claim for deduction only if the conditions of Sub-clause (c) were satisfied, failed to consider this question. If this question was argued before the Tribunal as perhaps it was, the assessee could have applied to the Tribunal to raise and refer this question to the Court but the assessee did not do so and instead applied for a reference of the first question which raised a point as to construction of Sub-clause (c). The result, therefore, is that there is no question before us raising the point whether the assessee was entitled to claim deduction under Sub-clause (a) and consequently we cannot permit Mr. M.M. Thakore to make an argument based on that sub-clause. The first question as submitted to us, raising as it does a point as to the construction of Sub-clause (c), is entirely unnecessary and we do not see any reason to answer the same.

3. The point for determination which arises in the second question is whether the sales effected by the assessee were sales in the course of inter-State trade or commerce. The assessee contended that the sales were sales in the course of inter-State trade or commerce and were, therefore, exempt from tax under Article 286(2) of the Constitution as it existed at the material time. Now when can a sale be said to be a sale in the course of inter-State trade or commerce? This question is fortunately now no longer open to controversy and there are several pronouncements of the highest Court of the land upon it. Venkatarama Aiyar, J., said in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*,):

"A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied there can be no sale in the course of inter-State trade."

The judgment of Venkatarama Aiyar, J., in this case was of course a minority judgment so far as the main question of construction of Clauses (1) and (2) of Article 286 was concerned, but on the question as to what is the true meaning of an interstate sale, this statement was not contrary to anything stated in the majority judgments and was as a matter of fact accepted as a correct exposition of the true meaning of an inter-State sale in the subsequent decision of the Supreme Court in *Endupuri Narasimham and Son Vs. The State of Orissa and Others*, . In this subsequent decision the same learned Judge speaking on behalf of the Court said that in order that a sale might be inter-State, it is essential that there must be transport of goods from one State to another under the contract of sale and cited in support the aforesaid passage from his judgment in *Bengal Immunity Co.'s Case*, (1955) 2 SCR 603: *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . This theme was again elaborated by the Supreme Court in *The State of Assam Vs. Ramesh Chandra Dey and Others*, , where Hidayatullah, J., observed that "only sales which affect inter-State trade or commerce directly and were an integral part thereof were saved under Article 286(2)". It is, therefore, clear that a sale cannot be said to be an inter-State sale unless there is movement of goods from one State to another under the contract of sale. It must be an integral part of the contract of sale that the goods shall cross the border from one State into another. It is not enough as pointed out by the Supreme Court in *Endupuri Narasimham and Son Vs. The State of Orissa and Others*, and *The State of Assam Vs. Ramesh Chandra Dey and Others*, that the buyer takes delivery of the goods from the seller for the purpose of despatching them to another State nor is it enough that the seller pursuant to the instructions of the buyer despatches the goods across the border to another State. The contract of sale must itself provide as an integral part of it that the goods shall be transported from one State to another. If the contract of sale provides for movement of the goods from one State to another as a necessary incident of its performance, the sale would be a sale in the course of inter-State trade or commerce. In such a case it would not be relevant to inquire where the property passes. The property may pass within the State which seeks to tax the sale, but the sale would nevertheless be an inter-State sale and, therefore, beyond the taxing power of the State.

4. Applying this test let us see whether the sales in the present case could be said to be sales in the course of inter-State trade or commerce. Now the modus operandi of the business of the assessee which we have set out above clearly shows that though the goods in the case of these sales moved from the State of Bombay to another State, such movement of the goods was not under the contracts of sale entered into by the buyers with the assessee. It was not an essential term of the contracts of sale that the goods shall necessarily cross the

border of the State of Bombay and go into another State. There was admittedly no such express term and the only way in which the assessee tried to bring in such a term was by saying that it was an implied term of the contracts of sale and this implication was sought to be drawn by the assessee from what was described as the practice followed by the assessee. Now it is difficult to see how from a mere practice followed by the assessee any term could be implied in the contracts of sale entered into by the assessee with different buyers. We can understand an argument which seeks to incorporate a term in a contract by reason of custom of the trade or by reason of custom of the area in which the business is carried on but it is difficult, to conceive of a position in which a term can be implied in a contract by reason of a practice which is being followed by the seller. We are, therefore, not at all satisfied that there was any implied term in the contracts of sale as suggested by the assessee. But even if the submission of the assessee in this regard were to be accepted and a term were to be implied in the contracts of sale as submitted by the assessee, that would not help the assessee. According to the assessee the implied term of the contracts of sale was that the assessee should give delivery of the goods to the buyers at their godown or should, if so instructed by the buyers, despatch the goods by rail to destinations intimated by the buyers and give constructive delivery of the goods by handing over the relative railway receipts duly endorsed in favour of the buyers. But this implied term clearly shows that under the contracts of sale the goods were not necessarily to go out of the State of Bombay into another State. The goods might under the contracts of sale be taken delivery of by the buyers at their godowns within the State of Bombay or if the buyers so instructed the assessee, the goods might be despatched to other destinations which again might be either within the State of Bombay or outside the State of Bombay depending upon the instructions of the buyers. The buyers had thus an option under the contracts of sale either to take actual delivery of the goods at their godowns within the State of Bombay or to direct the assessee to despatch the goods by rail to destinations within the State of Bombay or outside the State of Bombay according as they required in each case. This option was obviously necessary because, as stated by the assessee itself, the contracts of sale were entered into by the buyers with the assessee irrespective of the fact whether the buyers had received any previous indents from upcountry merchants. It is, therefore, impossible to hold on the facts and circumstances of the present case that it was an integral part of the contracts of sale that the goods shall necessarily be transported from the State of Bombay to another State or that the movement of the goods from the State of Bombay to another State was a necessary incident of performance of the contracts of sale. The sales were, therefore, in our opinion, not sales in the course of inter-State trade or commerce.

5. We may point out, though in the view we have taken it is not necessary to do so, that even if the sales effected by the assessee were inter-State sales, that would not help the assessee. Inter-State sales were exempt from tax under

Article 286(2) but by the very terms of that Article, such exemption was given except in so far as Parliament might by law otherwise provide. Now by the Sales Tax Laws Validation Act, 1956, the Parliament otherwise provided by lifting the ban imposed by Article 286(2) retrospectively for the period 1st April 1951 to 6th September 1955. The result was that so far as inter-State sales effected during this period were concerned, there was no ban of Article 286(2) which operated to prevent the law of any State from imposing or authorizing the imposition of tax on such inter-State sales. The Sales Tax Laws Validation Act, 1956, was challenged before the Supreme Court, but the Supreme Court negatived the challenge by its decision in *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, . It is, therefore, clear that no exemption can be claimed by the assessee even if the sales in question were inter-State sales. Mr. M. M. Thakore relied on Section 46 of the Bombay Sales Tax Act, 1953, and contended that the Sales Tax Laws Validation Act, 1956, could not help the Department to tax inter-State sales since it merely validated the law of a State which imposed or authorized the imposition of tax on inter-State sales but by reason of Section 46, the Bombay Sales Tax Act, 1953 did not impose or authorize the imposition of tax on inter-State sales. A similar contention based on Section 22 of the Madras General Sales Tax Act, 1939, which was in substantially the same terms as Section 46 was advanced before the Supreme Court in *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, but it was pugatived by the Supreme Court. The Supreme Court at pages 319 and 320 of the report in (1958) 9 STC 298: (AIR 1958 SC) observed that the charging Sections of the Madras General Sales Tax Act, 1939, read with Section 22 were in the nature of conditional legislation and that they imposed a tax on inter-State sales conditional on the ban enacted. in Article 286(2) being lifted by Parliamentary legislation and that since the ban imposed by Art. 286(2) was lifted by the Sales Tax Laws Validation Act, 1956, the charge of tax on inter-State sales became effective and could be enforced in respect of the period 1st April 1951 to 6th September 1933 being the period for which the ban was lifted. The same reasoning must govern the decision of the present contention urged by Mr. M. M. Thakore based on Section 46 of the Bombay Sales Tax Act 1953 and it must be held that inter-State sales effected during the period 1st April 1951 to 6th September 1955 can be taxed by the State by reason off the enactment of the Sales Tax Laws Validation Act, 1956, provided those sales otherwise come within the charging provisions of the Act. The sales effected by the assessee in the present case were, therefore, rightly included in the taxable turnover of the assessee and the Tribunal was right in rejecting the claim of the assessee for deduction in respect of those sales.

6. In the result our answer to Question (b) will be in the affirmative. So far as question (a) is concerned, as we have pointed out above, it is not necessary to answer it. The assesses will pay the costs of the Reference to the Commissioner of Sales Tax.