

(1973) 07 KL CK 0031

In the High Court Of Kerala

Case No : Writ Appeal No. 76 of 1970

The Sales Tax Officer and Another

APPELLANT

Vs

Dhanrajmal Gobindram

RESPONDENT

Date of Decision : 17-07-1973

Acts Referred:

Citation : (1974) 33 STC 16

Hon'ble Judges : V.P. Gopalan Nambiyar, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : The Government Pleader, for the Appellant; S.A. Nagendran, for the Respondent

Final Decision : Dismissed

Judgement

Viswanatha Iyer, J.—This appeal is by the State and the Sales Tax Officer, Ernakulam, against the decision of our learned brother Isaac, J., in O.P. No. 2888 of 1966. The learned single Judge's judgment is in these terms:

In the light of the decision of this court in The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., at p. 7. (T.R.C. Nos. 40, 41 and 42 of 1968), this O. P. has to be allowed. Accordingly, I quash exhibit P9 and restrain the first respondent from taking any action pursuant thereto against the petitioner. No costs.

2. The State questions the correctness of this decision in this appeal. The facts are as follows:

The respondent is an importer of cotton from foreign countries. The cotton so imported are generally sold to the spinning mills in Kerala and Madras. These transactions were sought to be assessed to sales tax by the sales tax authorities. A notice was issued to the respondent proposing assessment of these transactions. The assessee filed O. P. No. 186 of 1962 against the notice and got the action stayed for some time. That original petition was disposed of by this court on 15th January, 1966, with a direction to the Sales Tax Officer to ascertain

the nature of the transaction after giving a reasonable opportunity to the assessee and then to take a decision. Accordingly, the case was again posted for consideration of the nature of the transaction and the Sales Tax Officer took a decision that the transactions of sale by the assessee to the various mills in Kerala are taxable under the General Sales Tax Act, and that sales to the mills outside Kerala are taxable under the Central Sales Tax Act. The copy of that order is filed in this case as exhibit P9. The respondent challenged this finding and in support of his case produced before this court copies of the same records which he produced before the officer to prove the nature of the transaction. The course of dealings is as follows: The mills have actual user's import licence to import cotton from U.S.A. These mills entered into a contract with the respondent for the purchase of imported cotton. An agreement was entered into between the respondent and the mills and a specimen copy of that agreement is produced in this case as exhibit P7. As per that agreement the respondent undertook to sell the quantity of cotton required by the mills. The rate and other terms of the contract are all mentioned in the agreement. It is also provided that the mills will furnish the import licence for the transaction. The goods supplied cannot be refused by the mills even if the quality of the cotton is inferior to the quality contracted for. The buyers are to accept the cotton at an allowance that may be agreed upon or fixed by arbitration. The various conditions in the contract further stipulate that the change of the insurance rate between the date of contract and shipment will be towards buyer's account. The exchange risk that may be caused by variation of the official exchange rate will be towards buyer's account, any difference in the import duty and other incidental charges between the date of the agreement and the date of delivery will be for buyer's account, the sales are subject to the safe arrival of the steamer, the sellers cannot be called upon to replace cotton and even broken bales in any form unloaded from the steamer must be accepted by the buyers. A letter of authority issued by the Chief Controller of Imports authorising the respondent to import goods as stated in the import licence was also being handed over to the respondent. The terms of the letter of authority provide that the imports made under this letter of authority will be the import of the person or persons in whose favour the sub-authorisation is issued. In this connection it may be stated that the sub-authorisation is in favour of the mills who contracted to purchase the goods from the respondent. The question is whether these facts establish that the sale is in the course of import. In order that a transaction may be a sale in the course of export or import, certain tests have to be satisfied. The Supreme Court had occasion more than once to state the principles that govern a determination of this question (see *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, ; *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, ; *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, and *The State of Bihar and Another Vs. Tata Engineering and Locomotive Co. Ltd.*, In the last case the Supreme Court formulated the principles that have been established by the decided cases thus:

The decided cases establish that sales will be considered as sales in the course export or import or sales in the course of inter-State trade and commerce under the following circumstances:

- (1) When goods which are in export or import stream are sold;
- (2) When the contracts of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place; and
- (3) Where as a necessary incidence of the contract of sale goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place.

3. A reading of the various records produced clearly establish the following facts:

- (1) The mills had an actual user's import licence to import cotton from U.S.A.
- (2) They contracted with the respondent to purchase the said quality of cotton on import.
- (3) They handed over the letter of authority issued by the Import Controller authorising the respondent to make use of the said licence.
- (4) The mills have to accept the goods so imported even if, after an inspection, the goods are found to be of a quality inferior to the quality contracted for.
- (5) The increase in the insurance rates or any difference in the import duty between the date of the agreement and the actual supply of the goods, the difference that may occur on any change in the official exchange rate are all to be borne by the mills.
- (6) The letter of authority further showed that the import made under that letter of authority will be the import of the person in whose favour the licence is issued, namely the mills.

4. The next question is whether the facts of this case justify a conclusion that this case comes within the principles laid down above. These facts establish that if the goods so imported are not utilised by the respondent for the performance of the contract with the mills that will be a violation of the contract. As per the letter of authority the goods shall be deemed to be the goods of the mills and so, if they are diverted, it will constitute a breach of the contract. Therefore, the facts disclose a transaction of sale in the course of import within the meaning of the principles laid down by the Supreme Court in the above-mentioned cases. The counsel for the appellants contended that the existence of two sales here takes the case out of a case of sale in the course of import and he relied on the decision in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, That was a case of export where the dealings consisted of two independent sales and the inextricable link required between them was not

present. That is not the case here. The contract of sale required the goods to be imported and the import began with an outside purchase by the seller and it is inextricably linked with the sale in question. So the facts in *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, are distinguishable.

5. The decision referred to by the learned single Judge in his judgment was the subject-matter of appeal before the Supreme Court. The Supreme Court decision, *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc.*, The Supreme Court has confirmed the decision of this court and dismissed the appeal. Their Lordships have given considerable weight to the terms of the actual user's import licence and letter of authority and read them as part of the contract that was entered into for the purchase of cotton. Their Lordships have stated further that even without a clause in the letter of authority to the effect that the goods imported under the letter of authority will be the goods of the licensee, the terms of the contract and the import of the goods on the basis of the licence clearly establish that the sale is one in the course of import. In this connection it has to be noticed that the principle laid down by the Supreme Court in *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, wherein their Lordships stated that there must be a proof of an inextricable link between the sale and the export in order to constitute a sale in the course of export is still a fundamental rule to be applied. But, in the matter of proof of the inextricable link, we perhaps notice a different approach by the Supreme Court. The sale of the export quota along with the goods in that case did not constitute the requisite proof. But the transfer of control of an actual user's import licence and the contract of sale in the later case were sufficient to constitute the proof. The facts of this case are practically similar to the facts in *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc.*, Therefore, the finding of the Sales Tax Officer that these transactions do not constitute a sale in the course of import is incorrect.

6. In the result, we hold that the transactions in this case are really transactions of sale in the course of import and are not taxable either under the General Sales Tax Act or under the Central Sales Tax Act. Therefore, we dismiss the appeal; but, in the circumstance, we make no order as to costs.

Gopalan Nambiyar, J.—I agree with the judgment delivered on behalf of the Bench by my learned brother Viswanatha Iyer, J.

2. There are certain regions in this case which give rise to some difficulty, and I am not altogether sure, whether, in the light of the principles laid down in the *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, and affirmed in the *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, and the *Tata Engineering and The State of Bihar and*

Another Vs. Tata Engineering and Locomotive Co. Ltd., the transaction in question can pass as a sale in the course of import. Was there an obligation on the assessee to import in pursuance of the contract?; or if he imported, to sell the imported goods to the mills? Would it not be open to the assessee to say that his contract with the mills was only for the supply of a stated quantity of bales of foreign cotton, and this he could supply by obtaining from some source? In the light of the answer to these, was there an enforceable obligation between the assessee and the mills? These are regions in regard to which I was assailed by some doubts and difficulties in the light of the principle in the Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, The doubts and difficulties only stand enhanced by the fact that the sale of the tea chests in the Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, was with the export quota, and the purchaser of the tea knew that it was for export. With the provisions of the Tea Act superadded, the majority judgment found that an obligation to export did not arise from law, or from contract, or from the nature of the transaction. The dissenting Judges found otherwise, emphasising the thinness of the dividing line. That is further emphasised by the distinction in the majority judgment between sale for export and sale in the course of export. But the latest decision of the Supreme Court in The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., was prepared to find that even in the absence of any arrangement enabling the assessee to import under an import licence of the mills on behalf of the mills, the transaction could still be regarded as a sale in the course of import.