

**(1956) 03 MAD CK 0056**  
**In the Madras High Court**  
**Case No : Appeal No. 256 of 1951**

The State of Madras

APPELLANT

Vs

Ramalingam and Co.

RESPONDENT

**Date of Decision :** 05-03-1956

**Acts Referred:**

Evidence Act, 1872 — Section 91

Sales of Goods Act, 1930 — Section 19, 20, 21, 22, 23

**Citation :** AIR 1956 Mad 695 : (1957) ILR (Mad) 212 : (1956) 69 LW 655 : (1957) 8 STC 77

**Hon'ble Judges :** Ramaswami, J; Govinda Menon, J

**Bench :** Division Bench

**Advocate :** The Assistant Government Pleader, for the Appellant; S. Ramachandra Iyer, for the Respondent

**Final Decision :** Allowed

## Judgement

Govinda Menon, J.—This appeal arises out of a suit for the recovery of a sum of Rs. 10,485-3-4 collected by the Government of Madras as sales tax from the plaintiff for the year 1945-46, on the ground that such collection was ultra vires and illegal, because the export trade of the plaintiff during that period was not assessable to any sales tax prior to the amendment by Act XXV of 1947.

2. In the plaint, a list of several exports giving the names of the constituents and the net turnover deducting the freight, and the nature of the contracts have been given, and it is stated that the order of assessment on exports detailed there was wholly ultra vires and beyond the powers of the Government. The lower court agreed with the contentions raised by the plaintiff with regard to a refund of the sum of Rs. 10,325 and decreed the suit to that extent. The State of Madras, through the District. Collector, Tirunelveli, is the appellant herein.

3. Exhibit A-7 contains a list of exports to various foreign countries and the amount of money for which each transaction was entered into. There are 17 transactions listed therein to the total tune of over Rs. 10 lakhs. Items 1 to 5 in

that document deal with contracts for selling fibre to firms in London and Exhibits A-8 to A-12 also relate to these contracts. Items 6 to 8 are with respect to the sale of goods to firms in Australia and Exhibits A-13 to A-15 deal with them. Items 9 and 10 are purchases by Egyptian firms and "Exhibits A-16 and A-17 relate to them. Items 11 to 13 are with respect to sale of goods to New York firms, and Exhibits A-18 to A-20 deal with them. Items 14 to 17 deal with the sale of goods to Colombo and we are not concerned with those transactions in this appeal. It is conceded by the appellant that the appeal does not relate to the three transactions with Colombo and one of the transactions with Egypt.

4. According to P.W. 1, one of the partners of the plaintiff firm, the mode of transactions is in the following manner. Contracts are entered into by correspondence with foreign firms for the sale of quantities of fibre, which are purchased by the plaintiff in open markets in India, or they order manufactured goods. After the goods are shipped, the plaintiff obtains a bill of lading made out in their name as shippers, and draw a bill of exchange along with the bill of lading and invoice. At the instance of the foreign buyer a recognised exchange bank in that country opens a letter of credit with a local bank for a certain sum of money, and when goods are shipped the plaintiff draws a bill of exchange payable 90 days hence, presents the same with the invoice and the shipping documents, to the local bank, who would pay 95 per cent of the amount stated on the invoice, and the documents are handed over to the local bank, who would forward the to the foreign bank on whose instance, they have agreed to pay the money. When the goods reach the foreign port, and the shipping documents along with the bill of exchange and the invoice are received by that foreign bank, the buyer pays the invoice amount on the bills after taking delivery of them, and recovers the goods when they are unloaded. It is also stated that the bill of lading is made out in the name of the consignor as the shipper, and also endorsed in blank. The prices fixed are either C.I.F., that is cost, insurance and freight; or C.F., that is cost and freight alone; insurance to be paid by the purchaser. It is stated that there is no actual delivery of goods but only of documents of title to the goods to the foreign buyer. The contracts are stated to be "D.P." that is demand on payment. Where the contracts are C.I.F., price includes insurance money paid by the seller; it is C.F. where the buyer pays the insurance charges. It is stated by P.W. I that the credit opening bank opens credit on behalf of the purchasers, and those banks are not known to the sellers at all.

5. Exhibits A-9 to A-12, which deal with the export of goods to London, where the buyer is Hindley and Co., show the nature of the transactions. Exhibit A-8 contains a copy of the original letter of credit held by the National Bank of India, Tuticorin, and the terms are mentioned there. In short the correspondence shows that the local branch of the National Bank of India informs the plaintiff that they are in receipt of advice from their London office that the latter have received from Messrs. Hindley and Co., London, an undertaking to honour the bills drawn by the plaintiff on Messrs. Hindley and Co., to the extent of a sum of money being 95 per cent of the invoice value of certain goods on the following

conditions which are : Bills to be drawn payable 90 days after sight and to be accompanied by invoices, full sets of on board bills of lading made out to order and blank endorsed representing shipments of various quantities of goods etc., and insurance including war risk with unlimited transshipment covered in London. Such shipping documents are to be delivered on payment of the bills which should bear the clause, "Drawn under N.B.I. credit numbers dated so and so." There is a clause in that document to the following effect: "Please note that the bank accepts no liability for the above undertaking and that this advice does not release you from the liability attaching to the drawer of a bill of exchange." There are similar clauses in other documents as well.

6. The learned Subordinate Judge was of the opinion that the title in the goods passed to the purchaser only when they paid the money to the bank, which opened the letter of credit and took delivery of the documents, that is, the sale took place in a foreign country and not in India. According to the learned Judge the foreign banks on whose credit bills are negotiated are not agents of the buyer for the purpose of inferring that the right in the goods had passed to the buyer on the mere handing over of the shipping documents to the negotiating bank in India. Such being the case, the learned Judge was of opinion that the intention gatherable from these transactions is that the seller has reserved to himself the *jus disponendi*, or the right of disposal of the goods. He further held that the question that foreign banks have issued letters of credit to the local bank on behalf of the buyers is not indicative of the foreign bank's acting as agents of the buyer for the purpose of inferring that by the act of delivery of the documents the negotiating bank's right in the property has passed, because letters of credit are only for the purpose of enabling the seller to negotiate the bill upon the shipment of the goods, without waiting for the goods or the documents reaching the foreign country. The question which we have to decide is whether the sale takes place within the State of Madras or outside it.

7. The learned Assistant Government Pleader contends that when the foreign bank opened a letter of credit and authorised the negotiating bank in India to pay 95 per cent of the invoice price, on presentation of the shipping documents, the invoices and the bill of lading drawn on the foreign buyer, the property in the goods passed to the buyer, and, therefore, the sales tax is payable in the Madras State. On the other hand, the learned counsel for the plaintiff-respondent contends that when a bill of lading is taken in the name of the seller, as in the present case, the intention is that, the seller does not want to part with the title, and that is why it is not taken in the name of the buyer, in which case alone the title would pass. It is also urged that the discounting of the bill with the negotiating bank is only purchasing or taking endorsement on the bill of exchange by the bank, and if the bill is dishonoured at maturity, the endorsee bank has got the right of recourse against the drawer. The handing over of the bill of exchange endorsed in blank to the negotiating bank is for the purpose of delivery of the bill of lading to the buyer if he pays or meets the bill of exchange. Further the bank is not authorised to hand over the bill of lading if the buyer has

not honoured the bill of exchange by payment on demand. In that case the bill of lading remains the property of the seller, who is liable as the drawer of the dishonoured bill to the negotiating bank. The assets of the seller, namely, the bill of lading will be subject to the banker's lien in case the drawee does not pay the endorsee bank, and even if a lien exists the property still remains with the seller.

8. We have, therefore, to see what is the effect of the opening of a letter of credit. According to the learned counsel for the respondent, a letter of credit is giving credit facilities to the seller on the request of the buyer, who is only a surety and to whom in the ultimate instance resort is to be had. That being the case neither the bank, which opens a letter of credit, nor the negotiating bank is the agent of the buyer to pay the money to the seller, especially since the business is the bank's own, but it takes a surety from the buyer before the banking business is done.

9. In these circumstances, we have to clearly understand the legal relationship that exists between the buyer and the issuing banker, as well as the paying banker and the seller. In Halsbury's Laws of England, Simonds' Edn., Vol. 2, at page 213, a letter of credit is denned as an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit in accordance with the conditions laid down therein. A letter of credit may be addressed (i) as in a traveller's letter of credit, to all the issuing banker's correspondents throughout the world. We are not concerned with such a state of things here. Where the credit is designed to facilitate trade to the beneficiary, the relationship that exists between the buyer and the issuing banker is stated to be as follows :--

Para 399-The buyer who, pursuant to his sales contract, instructs his banker to open a credit undertakes to put the banker in funds, providing the documents against which the banker pays are what the buyer calls for. The banker is bound to apply the funds to the purpose to which they are appropriated ; but if he fails before this is done, the buyer has only a right to prove. The banker must comply rigidly with his instructions, and the same applies to the paying banker (if there be an intermediary banker) the latter being indemnified by the former if he complies strictly with the instructions. There is ordinarily no privity between the buyer and the paying (intermediary) banker.

10. As between the paying banker and the beneficiary, which is the seller, the relationship is found in paragraph 401, at page 216 :

The contract between the paying banker and the beneficiary depends upon the terms in which the former's promise to pay is couched ; it becomes binding, in the case of a confirmed creditor, that is, an irrevocable credit which has been confirmed by the intermediary or paying banker, as soon as the beneficiary acts on the strength of it.

11. In Chitty on Contracts, 21st Edn., the nature of letters of credit, their varieties and the relationship between the banker and seller, the exporter and the purchaser are described at page 185 onwards. In paragraph 350 at page

196, it is stated that where the correspondent does not assume sole liability but forwards to the exporter with or without confirmation a letter of credit issued by the originating banker an agency relationship is more easily imputed. In para 353, the relationship between the originating or the correspondent banker and the exporter is discussed. From the observations of Goddard, Lord Justice, in *J.H. Raymer and Co. v. Hambro's Bank Ltd.* [1943] 1 K.B. 37 one can see the exact jural relationship that exists between the originating banker and the importer, and it is to the effect that the originating banker is employed by the importer on a remuneration to pay money for the importer under certain conditions, The result would be that the bank which opens the letter of credit is an agent of the importer for the payment of the price of the goods to the exporter, when the documents of shipping are handed over to the negotiating bank, which is an agent of the originating banker. The position, therefore, is this. The importer in a foreign country employs a bank in his place by supplying it with funds or securities to be deposited to open a letter of credit and in doing so, the originating banker becomes an agent of the importer. In turn the originating banker may use their agents as negotiating bankers to pay the money to the exporter.

12. The nature of the particular form of the letter of credit, with which we are concerned, has been the subject of a decision in *Chandanmul Benganey v. National Bank of India, Ltd.* ILR (1923) Cal. 43 where both the learned Judges define the import and effect of ordinary letters of credit. Rankin, J., (as he then was) at page 58 lays down the law in the following terms :

In order that the main purpose may be effected, it is every day business for the buyer to arrange with a bank to consent that the seller shall draw on the bank for the purchase price. In this, the common form of a banker's credit, the drawee is the bank and when this procedure is adopted then in ordinary times the seller is not only sure of being paid ultimately, but he will have little difficulty in getting his drafts negotiated at once. Letters of credit are, however, by no means restricted to this form, and in particular there is another form or type of banking facilities, under which the purchaser arranges not that a bank shall be ultimately responsible for payment of the drafts but merely that when the seller draws upon the buyer he will be able to negotiate his draft with a particular bank. Such negotiation is in itself an important credit facility, and it may be important to an exporter who contemplates making different consignments of goods under a contract to know that this facility will be afforded to him for all his consignments and is not likely to be withdrawn in the middle of the transaction. Apart from these considerations it has to be noticed that a bank will frequently be instructed as agent for another bank, or firm, to advise an intending seller of the fact that for certain business between the seller and other people, facilities for negotiation of bills will be afforded or are likely to be afforded by the advising bank.

13. There can, therefore, be no doubt that when the plaintiff drew the bill on the

foreign buyer and had 95 per cent of the price of the goods paid by honouring the bill by the negotiating bank on behalf of the issuing bank, the transaction is as if the buyer at the other end has constituted the issuing bank as his agent for the purpose of paying the part of the purchase price to the seller as and when the goods are shipped. We have also to remember that the contract is C.I.F. in most of the cases, which would mean that the cost price would include the price of the goods, insurance and freight, and that is paid in advance by the seller, which will be paid over to him by honouring of the bills drawn by him on the buyer. Where the contract is C.F., the insurance is paid by the purchaser, and for any loss in transit, the purchaser will be indemnified by the insurers.

14. From the statement of the principles applicable to the present case, we have to find out, after applying the provisions of the Sale of Goods Act as to when the property in the goods passed to the purchaser. According to Section 19 of the Sale of Goods Act, where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend to be transferred, and for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Sections 20 to 24 deal with the rules for ascertaining the intention of the parties as to the time at which the property in the goods passed to the buyer. Section 23, Sub-clause (2), of the Act lays down that where in pursuance to the contract the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods. We are concerned in this case with Section 25, Sub-Clauses (2) and (3). Sub-clause (2) lays down that where goods are shipped and by the bill of lading goods are deliverable to the order of the seller or to his agent, the seller is *prima facie* deemed to reserve the right of disposal. Sub-clause (3) says that where the seller of goods draws on the buyer for the price and transmits the bill of exchange and the bill of lading to the buyer together, to secure the acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading, the property in the goods does not pass to him. This would mean that where the bill of lading is transmitted to the buyer together with the bill of exchange for acceptance, the moment the transaction takes place there is a transfer of the title in the goods to the buyer, if he honours the bill of exchange. But where the bill of exchange is not honoured and the bill of lading is wrongfully retained, the title in the goods does not pass to the buyer. If we consider the fact that the payment of the price by the negotiating bank on the receipt of the shipping documents, the bill of lading and the bill of exchange, is done as the agent of the buyer, then there is no difficulty in holding that the title in the goods would pass when part of the price is paid.

15. On behalf of the respondent our attention was drawn to the decision of the Supreme Court in *The Commissioner of Income Tax, Madras Vs. Mysore Chromite*

Limited, , in which their Lordships held that with regard to the claim of the Government to levy Income Tax on profits, at the earliest the property in goods passed in London where the bill of lading was handed over to the buyer's bank against the acceptance of the relative bill of exchange and accordingly the sales took place outside British India and ex hypothesi the profits derived from such sales arose outside British India. The difference between the facts of this case, and what we have to consider is that the bill of exchange there was drawn on the buyer's bank, where the letter of credit had been opened and negotiated with the bank in India, who are the bankers of the assessee company, and who used to credit the assessee company with the amount of the bill of exchange. In that case it cannot be held that the negotiating bank was the agent of the buyer, and that fact shows the difference between the instant case and that which their Lordships of the Supreme Court had to consider.

16. The nature of a C.I.F. contract is discussed in extenso by McCardie, J., in *Manbre Saccharine Co. v. Corn Products Co.* [1919] 1 K.B. 198, In that case the learned Judge held that a vendor under a C.I.F. contract for the sale of goods who has shipped the appropriate goods under a proper contract of carriage and obtained the proper documents, can effectively tender those documents to the purchaser notwithstanding that he knows at the time of such tender the loss of the goods. The principle that can be gathered from this decision is that when the vendor ships the goods he has done everything expected of him, and for the loss of the goods during carriage he is not responsible, which would mean that the title in the goods passed to the buyer as and when the goods are shipped.

17. Considerable help can also be got from the judgment of Rowlatt, J., in *rquhart Lindsay and Co. v. Eastern Bank, Ltd.* [1922] 1 K.B. 318, for finding out as to when the title in the goods passed. In that case the facts are succinctly stated in the headnote as follows :-

The plaintiffs entered into a contract with buyers in Calcutta to manufacture and ship machinery by instalments over several months at agreed prices, but subject to a stipulation that should the cost of labour or wages increase, there should be a corresponding increase in the purchase price. The buyers were also to open a "confirmed irrevocable credit" in favour of the plaintiffs with a bank in this country, and to pay for each shipment as it took place. In pursuance of this arrangement the defendants, who were the buyers' bankers in London, wrote to the plaintiffs stating that they would pay bills drawn on the buyers to the extent of ₹70,000, the bills to be accompanied by documents and to be received before April 14, 1921, "this to be considered a confirmed irrevocable credit."

18. The plaintiffs shipped two instalments under the contract and received payment under the letter of credit. The buyers then found that the invoices included an increase in the purchase price on account of wages and material, and instructed the defendants only to pay so much of the next invoices as represented the original prices. The defendants accordingly refused to pay the bill presented on the next shipment and the plaintiffs then cancelled the contract,

claiming damages from the defendants as on a repudiation by the buyers ; held, that the credit being irrevocable, the refusal of the defendants to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole, and that the plaintiffs were entitled to damages so reckoned. The basis of this form of banking facility is that the buyer is taken, as between himself and the banker, to accept the seller's invoices as correct. Any adjustment must be made by way of refund by the seller and not by way of retention by the buyer.

19. It is clear from this that when the defendant bank refused to pay the bill presented and the plaintiffs cancelled the contract claiming damages from the defendant as a repudiation by the buyers, the basis of the plaintiffs' claim for damages is the refusal of the buyers to accept the goods, for which the title has passed to the buyer. At pages 324 and 325 in assessing the damages the learned Judge observed as follows:

The damages to which the plaintiffs are entitled are the difference between on the one hand the value of the materials left on their hands and the cost of such as they would have further provided, and, on the other hand, what they would have been entitled to receive for the manufactured machinery from the buyers, the whole being limited to the amount they could in fact have tendered before the expiry of the letter of credit.

20. This also shows that under such conditions, the title in the goods passed to the buyer.

21. We may also refer to the observations of the Privy Council in *The Prinze Adalbert* [1917] A.C. 586. It is unnecessary to refer to the facts, but the observations of Lord Sumner at page 590 are apposite. They are as follows :

Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted.

22. Thus it is the duty of the plaintiffs to show that there are circumstances, which would show that the title in the goods has not passed.

23. Our attention was invited to the decision in *In re Cargo S. S. Rappenfels I.L.R.* (1914) Cal. 334, where Jenkins, C.J., had to consider the question about the passing of title in the case of a confiscation of enemy goods. The facts in that case show that when the bills of exchange were discounted by the Mercantile Bank in Calcutta that bank did not do so as agents of the London Bank.

24. But it is urged on behalf of the respondent that because Exhibits A-8 and A-11 refer to the fact that negotiating bank accepted no liability for the undertaking, and that their advice did not release the drawers of the bill of



exchange from the liability attaching to an ordinary drawer of bill of exchange, it must be deemed as if the plaintiff did not intend to pass title in the goods. We do not think that any such inference is possible.

25. In the view which we take, that the title in the goods passed to the purchaser as and when 95 per cent of the purchase money was paid the sale took place in India and the appeal has to be allowed, and the suit dismissed but in the circumstances without costs throughout.

Ramaswami, J.

26. I agree with the judgment just now delivered by my learned brother and on account of the importance of the subject I have the following to say.

27. In regard to the instant sale, it is common ground that explanation (2) to Section 2(h) of the Madras General Sales Tax Act, which was introduced to solve some of the difficulties in levying sales tax, would not apply and that the definition of "sale" which we have got to consider is that laid down in Clause (h), viz., that in a sale as defined in Clause (h), the following characteristics must be present. There must be:

- (a) a transfer of property
- (b) in goods
- (c) from one person to another
- (d) in the course of trade or business
- (e) for cash, deferred payment, or other valuable consideration.

28. It is difficult to determine the exact time and place of passing of property so as to attract the levy of sales tax. Lord Macmillan in delivering the judgment of the Privy Council in *King v. Dominion Engineering Co., Ltd.* AIR 1947 P.C. 94; observed as follows :

In imposing a sales tax one of the difficulties which confront the legislature lies in the selection of the point of time at which the tax shall attach and become due. In the case of an ordinary retail sale for cash across the counter of a shop the stages of agreement, appropriation of the goods to the contract, delivery, payment of the price and passing of property are all practically simultaneous. But in more complicated transactions for the sale of goods to be produced or manufactured these stages may be spaced in time in various ways.

29. The definition of "sale" in Section 4(1) of the Sale of Goods Act is much simpler and more narrow. It runs as follows :

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price....

Govinda Menon, J.

30. observed in Jayarama Chettiar In re ILR 1949 Mad. 121:

The definition of "sale" in the General Sales Tax Act is, in my opinion, much wider in scope and amplitude than in the Sale of Goods Act. According to this latter Act, a contract of sale of goods is a contract whereby a seller transfers property in goods for a price. The word "price" is defined as money consideration for a sale of goods, so that in the case of a sale or contract of sale under the Sale of Goods Act it is an essential requisite that the consideration should be money. But in order to bring a transaction within the definition of the word "sale" in the Madras General Sales Tax Act, it need not necessarily be that money alone should be the consideration.

31. But neither the Madras General Sales Tax Act nor the Sale of Goods Act tells us where this transfer of property takes place but only that when the transfer of property takes place the transaction would be a completed sale.

32. It is now well settled law, whether under the English Sale of Goods Act or the American Uniform Sales Act, or the Indian Sale of Goods Act, which is based largely upon the English and American Acts, that the controlling factor in determining where the sale takes place is the intention of the parties.

33. Halsbury's Laws of England, 2nd Edn., Vol. 29, para 86, at pages 74-75 has the following to say :

The intention of the parties, as shown by the terms of the contract, the conduct of the parties, and the circumstances of the case, determine the time when, and the conditions subject to which, the property in the goods is to be transferred.

34. A contract of sale must, like all contracts, be construed as a whole. Accordingly, the property in the goods passes where the terms of the contract show a clear intention that it shall pass notwithstanding that there may be an express provision in the contract to the contrary.

35. The rules which follow, other than the rule as to unascertained goods, are rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer where the express contract is silent upon the point. They have no application where the question is expressly dealt with in unequivocal terms in the contract, but like all rules in the Act they will be given weight in construing an express contract which is ambiguous...." (Shaw v. Fefferly (1860) 13 Moo. P.C. 432, McEntire v. Crossley Bros [1895] A.C. 457 and Warburton v. Stamp (1919) 88 L.J.K.B. 1170

36. 46 American Jurisprudence, Section 413, pages 585-586 states:

The cardinal factor, according to both the Uniform Sales Act and the common law, upon which the passing of title between a seller and buyer depends is the intention of the parties. The Uniform Sales Act provides that where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be

transferred, and that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the cases. This is also the rule at common law.

37. The parties to a contract of sale may expressly stipulate as to when title shall pass, and such a provision is ordinarily given full effect as between the parties. But since the parties do not always stipulate in such respect, the courts have adopted, and the Uniform Sales Act has provided, certain rules for determining the intention of the parties, which rules are hereinafter discussed in particularity. These rules are designed to arrive at the intention of the parties as to the passing of title where such intention is not expressed clearly and definitely, and must give way when the intention of the parties otherwise appears. Thus, the Uniform Sales Act states that the rules set out for the ascertaining of intention as to the passing of title apply "unless a different intention appears". Words in a contract of sale denoting a present or future transfer of title are given effect, but they do not conclusively establish a perfected or executory sale where other provisions or circumstances evidence a contrary intention. Thus, when such is apparently the intention of the parties, the contract is deemed executory although the instrument states that the property is "sold" to the buyer, such word being construed as meaning "contracted to be sold". Conversely, although the contract is in terms of future time, as where it recites that the seller has agreed "to sell", it may constitute an executed contract of sale, if such was the intention of the parties and nothing remains to be done on the part of the seller, as between himself and the buyer, before the thing is to be delivered.

38. The place where a sale is consummated has likewise been held, in several instances, to depend upon the intention of the parties." (Illinois C. R. Co. v. U. S. 265 U.S. 209; 68 L. Ed. 983, *Beardsley v. Beardsley* 138 U.S. 262; 34 L. Ed. 928, *Hetch v. Standard Oil Co.* 100 U.S. 124; 25 L. Ed. 554, and *United States v. Woodruff* 22 L. E.d. 863 .

39. 55 Corpus Juris (Section 531) at page 529 states that in general as between parties where neither the Statute of Frauds nor the right of creditors are involved, the question whether or not title is passed to the buyer and if so when, depends on the intention of the parties manifested at the time of the transaction or the making of the bargain ; the parties may make whatever agreement they see fit as to when the title shall pass. The question of transfer of title always involves the intention on the part of the seller to relinquish all further claims or control as owner and on the part of the buyer to assume such control with its consequent liabilities. This intention may be either express or implied. (*Rolfe Hunts v. McHumber Co.* 8 Ala. 487; 62 S. 537, *Merchants Grocery Co. v. Talladege Grocery Co.* 217 Ala. 334; 116 S. 356, *Delaney v. Globe Ship Building Co.* 175 Wis. 167, *Levinson v. Silverman* 89 Cal. 416, *Sempel v. Northern Hardwood Lumber Co.* 142 Iowa 486.).

40. The Indian law on the subject is contained in Section 19 of the Indian Sale of

Goods Act which corresponds to Section 17 of the English Sale of Goods Act, Section 18 (1) of the American Uniform Sales Act (see text of the Act, Appendix V, page 457 of Rameshwar Dial, Indian Sale of Goods Act) and Sections 78 to 84 of the Indian Contract Act. The language of Section 78 of the Indian Contract Act did not express the law so clearly. Its interpretation gave rise to a conflict of opinion. It was held that as soon as a sale denned by Section 77 has taken place property passes and an agreement between the parties postponing it till the price is paid is not valid: Soott and Hodgson, Limited Vs. Keshavlal Nathubhai Shah, , Brij Coomaree v. Salamander ILR (1905) Cal. 816. The preponderant and the better view taken was that property passes when the parties intend it to pass, notwithstanding the defective and rigid language of that section; Abdul Aziz v. Krishnaroy I.L.R.(1916) Cal. 98, Hurbut John Amies Vs. Jal P. Virji, , Baijnath Prasad Singh and Another Vs. The Firm of Nand Ram Das and Another, .

41. A contract of sale is a consensual act. The parties are free to settle any terms they please. And Sub-section (1) of Section 19 gives effect to that basic principle of the law of contract. In formulating that intention the parties may fix any time when the property is to pass. It may be the time of delivery, the time of payment of price, the time of the contract or any other point of time.

42. It is for the court to ascertain the intention of the parties. And sub-section (2) lays down a rule of guidance for them. The intention is to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case. Where the terms of the contract are reduced to writing, Section 91 of the Indian Evidence Act comes into play. The primary evidence from which the intention of the parties is to be gathered then becomes the document itself. Decisions in India as to how far evidence of conduct of parties to modify or vary or even to interpret the written terms of the contract is admissible is not uniform. Sub-section (2) tells of the material to be taken into consideration for ascertaining the intention of the parties.

43. Sub-section (3) lays down the rules to be followed for appraising that material to ascertain that intention. They are not absolute rules, rigid and inflexible. They are only intended to aid the mind in the mental process involved in arriving at a legal finding of fact. The expression "unless a different intention appears" refers to the intention of the parties. If the parties have indicated that all or any one of these rules is not to be applied to their case, the court would respect that intention. Thus, the three sub-sections lay down the steps of a legal process. The court is to find the intention of the parties on the material indicated therein with the aid of rules given in Sections 20 to 24.

44. In practice the method becomes this : The Court first collects the material by allowing the parties to give evidence of the terms of the contract, their conduct in relation to the contract and other surrounding circumstances. Then it sees as to which of the rules in Sections 20 to 24 is applicable and how far the applicability of a particular rule is contra-indicated.

45. In the English Act all the rules are given in one section. In order to understand them it is necessary to read them together. For applying them some of the important points arising for determination are :

(1) Is the contract conditional or unconditional ? If it is conditional, what is that or what are those conditions ? Do they relate to delivery of goods or payment of price ? What is their importance as to a term of the contract? Did the parties intend the transfer of property at some future time and not at the time of the contract ? If so, has that time elapsed ? [Section 4(3) and (4) of the Act].

(2) Does the contract relate to specific or ascertained goods (Sections 20 to 22) or does it relate to unascertained goods ? (Section 23).

(3) Were the goods in a deliverable state at the time of the contract or not ? (Sections 20 and 21).

(4) Where some act or thing remained to be done to or with reference to the goods at the time of the contract it has to be seen by whom it was to be done and the purpose for which it was to be done. Where the act is to be done by the buyer, the property may at once pass at the time of the contract as it is only for the satisfaction of the buyer. Where the act is to be done by the seller, it is to be seen whether it is done by him as seller or only as the agent of the buyer and on his behalf. In the latter case the seller's act is in fact the buyer's and the passing of property is not postponed to the doing of that act. Where the act is to be done by the seller as seller, the purpose of the act is very important. Where it is to be done-

(a) for ascertaining the goods and appropriating them to the contract, Section 23 may apply and its conditions are to be fulfilled ;

(b) for putting them in a deliverable state, Section 21 may apply ; or

(c) for ascertaining the price, Section 22 may apply.

(5) Has the seller by the terms of the contract or appropriation reserved the right of disposal of goods until certain conditions are fulfilled ? (Section 25).

(6) Has there been delivery to (i) the buyer, (ii) to the buyer's agent or (iii) to a carrier ? If it was to a carrier, then whose agent he was or should be deemed to be in the circumstances of the case ? Was that delivery subject to a right of disposal ? [Sections 23(2) and 25].

(7) Whether goods were delivered to the buyer on approval or on sale or return ? (Section 24). (See Rameshwar Dial, Commentary on the Indian Sale of Goods Act, 1930-1953, Bhagirath Publications, New Delhi).

46. Bearing these principles in mind, if we examine the facts of this case, we find that the intention of the parties was that the transfer of property should take place within the State of Madras.

47. The *modus operandi* of the sales in this case was as follows: Messrs.

Ramalingam and Co., fibre etc., dealers, Thachar Street, Tuticorin, either directly or through approved brokers have contacted foreign buyers in London and elsewhere to purchase fibre and other raw products. The goods are specified, namely, No. 1 black dyed bristle fibre sizes 7 inches, 7 1/2 inches, 8 inches, 8 1/2 inches, etc., and by exchange of cablegrams, the quality and quantity and purchase rates have been fixed and confirmed. The Tuticorin dealers have further confirmed this by open letter. There are no conditions in any of these letters and the foreign firms have thereupon resorted to the machinery of financing which has been developed in recent times.

48. In Cheshire and Fifoot's Law of Contracts (1945) at page 283 it is pointed out how this special machinery for financing purchase of this description has been evolved :

The course of international trade during and since the War of 1914 has opened a new gap between business requirements and legal mechanism. The exporter has found himself confronted with peculiar difficulties. He may be dealing with a buyer whose credit is doubtful, or at least unknown ; he may be faced with the possibility of sharp fluctuations in the rate of exchange between the formation of the contract and the date of payments ; and, even if free from these peculiar anxieties, neither he nor the buyer may wish to see their capital frozen during the time which must necessarily elapse before the goods, despatched from the place of manufacture, can be sold by the buyer in his own market: The Kronprinsessan Margareta<sup>1</sup>. To meet these difficulties it has become usual to finance international trade by what are called Bankers' Commercial Credits. From the lawyer's point of view, and reduced to its simplest terms, the device involves three separate transactions.

(1) A clause is inserted in the initial contract of sale, whereby the seller requires payment in a particular manner. The buyer is to ask his bank to open a credit in the seller's favour, which shall remain irrevocable for a given time.

(2) The buyer makes an agreement with his bank, whereby the bank undertakes to open such a credit in return for the buyer's promise to reimburse the bank, to pay a small commission, and to give the bank a lien over the shipping documents.

(3) The buyer's bank notifies the seller that it has opened an irrevocable credit in his favour, to be drawn on as soon as the seller presents the shipping documents.

49. This is precisely the machinery which has been adopted in the instant case. On the sales by the Tuticorin firm having been settled by the buying London firm the latter opened an irrevocable credit in favour of Ramalingam and Co., Tuticorin, for specified sums in sterling representing 95 per cent, of the net invoice amount with a London bank. That London Bank instructed a branch bank at Madras that they had opened an irrevocable credit in favour of Ramalingam and Co., Tuticorin, for specified sums in sterling as against bills to be drawn payable 90 days after sight and to be accompanied by invoices, full sets of on

board bills of lading made out to order and blank endorsed representing shipments of specified quantity of, for instance five tons Tuticorin medium cut and dyed bassine 7 inches and 7 1/2 inches equally at 78 per ton in 1 cwt (ballots) C and F United Kingdom Post Shipment June/ July from Cochin freight paid or deducted and credit reduced accordingly-freight basis 22nd May, 1945, insurance including War Risk with unlimited transshipment covered in London. Such shipping documents are to be delivered on payment of the bills which should bear the clause "Drawn under N. B. 1 credit number cabled 24th May, 1945. Bills fulfilling the above conditions must be negotiated on or before-extended till 30th April, 1946." On receipt of this information from the Madras bank confirmed by them in writing the Tuticorin dealers complied with these conditions and despatched the goods. In the instant case it is also clear that there was no question of the purchaser verifying stock and approving the quality before taking delivery in London. In fact when goods of specified quality are ordered and if the goods are not approved on verification the buyers can claim damages and this would not affect the sale. On receipt of the documents of title along with the bill of exchange the London bank contacted the buyer who had opened an irrevocable letter of credit with them ; and the goods have been cleared and the balance minus the commission etc., due to the seller in Tuticorin had been paid. I need not point out that unless otherwise agreed delivery of goods and payment of price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be willing and ready to pay the price in exchange for the possession of the goods. But it is open to the parties to agree to receive 5 per cent, of the price as one of the terms of the contract of sale subsequently and this will not in any way prevent the passing of the possession of the goods in accordance with the intention of the parties as soon as the 95 per cent, of the price is paid.

50. These clearly establish that the intention "of the parties was that the transfer of property should take place within the State of Madras.

51. The case put forward by the seller is that the credit opening bank acted as an agent of the seller and not as an agent of the buyer, that therefore until the transaction was completed by the London bank receiving the bills of lading etc., and cleared the goods in London, there would be no transfer of property completed and that the reservation in the letter of the Madras bank acting on the instructions of the London bank that the bank accepted no liability for the above undertaking, namely, that of the London buyer to honour the bills of the Tuticorin seller covered by the irrevocable letter of credit representing 95 per cent of the invoice value and that this advice did not release the Tuticorin seller from the liability attaching to the drawer showed a reservation of the right of disposal and this affected the passing of property within the limits of the State of Madras.

52. In order to find out whether the London bank operated as an agent of the London buyer or as an agent of the Tuticorin seller, we must bear in mind the

following considerations. I have already set out by means of an extract from Cheshire's Law of Contracts, how this machinery of commercial irrevocable letter of credit has come to be evolved. A letter of credit is in principle an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit in accordance with the conditions laid down therein. A letter of credit may be addressed where the credit is designed to facilitate trade to another specified banker called the intermediary banker and it may contain instructions to the intermediary banker either to advise the beneficiary of the credit without any commitment or to add his confirmatory undertaking to it in which case the beneficiary has the promise of both the bankers. A commercial letter of credit may be issued by cable; where it is, it is usually confirmed in writing. The banker issuing the credit is called the issuing or opening banker; the second banker, who advises the beneficiary, is an advising, negotiating, confirming or paying banker according to the role he plays. The buyer who pursuant to his sales contract instructs his banker to open a credit undertakes to put the banker in funds, providing the documents against which the banker pays are what the buyer calls for. It is only after this undertaking by the buyer to put the banker in funds and the latter is satisfied with the undertaking that the issuing banker issues the credit at the instance of the buyer through the banker of the other country instructing him to advise the credits to the beneficiary. These irrevocable credits, which is the type of the letter of credit with which we are concerned here, are not negotiable and are only available to the beneficiary. This letter of credit may not be assigned without the consent of the buyer. The issuing banker is bound to apply the funds for the purpose for which they are appropriated : *Farley v. Turner* (1857) 26 L.J. Ch. 710. The banker should comply rigidly and the same applies to the paying banker (if there be an intermediary banker), the latter being indemnified by the former if he complies strictly with his instructions : *Equitable Trust v. Dawson Partners* (1926) 27 C.L.R. 49 , *South African Reserve Bank v. Samuel and Co.* (1931) 40 C.L.R. 291 , *Rayner v. Hambro* [1943] 1 K.B. 37, *Bank Melli Iron v. Barclay* (1951) 2 T.L.R. 1057. There is ordinarily no privity between the buyer and the paying (intermediary) banker: *Calico Printers Association v. Barclays* (1931) 145 L.T. 51 C.A. The contract between the issuing or opening banker and the paying or negotiating (intermediary) banker partakes of a dual nature. The relationship is partly that of principal and principal, partly of principal and agent, mandator and mandatory. In order that the intermediary bank may claim to be reimbursed for any payment he makes under the credit, the paying banker must obey strictly the instructions he receives, for by acting on them he accepts them and thus enters into contractual relations with the opening or issuing banker. In the case of an irrevocable credit which has been confirmed by the intermediary or paying banker, the contract between the paying banker and the beneficiary becomes binding as soon as the beneficiary acts on the strength of the irrevocable credit. A banker issuing an irrevocable credit or a confirmed credit usually undertakes to honour the drafts negotiated, or to reimburse in respect of drafts paid by the paying or negotiating banker, and is thus in the hands of the beneficiary binding against that banker. The credit



contract is independent of the sales contract on which it is based [Halsbury's Laws of England, 3rd Edn. (Simonds), Vol. 2-Banking, Sub-section (2), Commercial Letters of Credit-page 214].

53. This analysis of the irrevocable letter of credit and the respective roles played by the London buyer, the issuing banker, the intermediary banker and the beneficiary shows that the issuing banker acts only as the agent of the buyer and not as the agent of the seller and that the issuing banker does not pay or advance loan to the seller which is repayable by the price of the commodity he contracts to sell.

54. Turning to the other branch of the argument, namely, that the stipulation in the letter that the intermediary banker accepted no liability for the undertaking by the London buyer on the foot of which an irrevocable letter of credit was opened did not release the Tuticorin seller from the liability attaching to the drawer of a bill of exchange stood in the way of the transfer of property within the State of Madras, I have already pointed out that the credit contract is independent of the sales contract on which it is based. The paying banker was in the position of one who had contracted to buy the documents. In regard to the sales contract based upon irrevocable letter of credit the banker must comply rigidly with his instructions and the same applies to the paying banker if there be an intermediary banker. The paying banker would be indemnified by the issuing banker if he complies strictly with his instructions. For instance unless documents tendered under a credit are in accordance with this credit and which are embodied in the promise of the paying or negotiating banker, the beneficiary cannot claim against the paying banker and it is the paying banker's duty to refuse payment. The documents must be those called for and not documents which are almost the same or which will do just as well. Though it has been held that, where a mandate is ambiguous and a paying banker acts in a reasonable way in pursuance of it, he may be protected, it has equally to be held that this rule cannot be stretched so far as to protect a banker who pays against documents describing goods in terms which are similar to but not exactly the same as those stipulated in the credit. In the absence of specific authority as to documents, they must be the usual documents required in the particular trade; they must be merchantable. Therefore to protect themselves in such cases the intermediary banker notifies the beneficiary that negotiation of bills under this credit is entirely optional on his part and this advice does not release the beneficiary from the liability attaching to the drawer of a bill of exchange.

55. This reservation therefore does not affect the transfer of property within the State of Madras in the instant case.

56. On the facts of this case looked at from any point of view there has been no reservation in the right of disposal as viewed in the light of the analysis of Benjamin on Sale (8th Edn.) at page 382. The learned author sums up the eight principles established by authorities. The leading decisions referred to are : *Mirabita v. Imperial Ottoman Bank* (1878) 47 L.J. Ex. 418, *Wait v. Baker* (1848)

17 L.J. Ex. 307, *Gabarron v. Kreeft* (1875) L.R. 10 Ex. 274; 44 L.J. Ex. 238, *Turner v. Liverpool Docks* (1851) 6 Ex. 543; 20 L.J. Ex. 393, *Shepherd v. Harrison* (1871) L.R. 5 H.L.116 ; 47 L.J.Q.B 148, *Tappenbeck: Ex. P. Banner* (1876) 2 Ch.D. 278, *Ogg v. Shuter* (1875) 45 L.J.Q.B. 44, *Vancasteel v. Brooke* (1848) 18 L.J. Ex. 9, *Browne v. Hare* (1858) 29 L.J. Ex 6, *Joyce v. Swann* (1864) 17 C.B. 84; 14 E.R. 258, *Prinze Adalbert* [1917] A.C. 586. *The Parchim* [1918] A.C. 157; 87 L.J. P.C. 18, *Kong v. Brandt* (1901) 84 L.T. 748 and *Wilmshurst v. Bowker* (1844) 10 L.J.C.P. 161, and discussed by him in Chapter VI as follows :-

1. Where goods are delivered by the seller in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it, and the delivery to him being equivalent to a delivery to the buyer.

2. Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. And this rule equally applies to the buyer's own ship, even in cases where the bills of lading show that the goods are free of freight, because owner's property.

3. An entry in the invoice stating that the goods are shipped on account and at the risk of the buyer is not conclusive proof of the property being in the buyer, but may be controlled by the reservation by the seller of the right of disposal.

4. The fact that the goods are by the bill of lading made deliverable to the order of the seller or of his agent, is *prima facie* a reservation of the right of disposal, so as to prevent the property from passing to the buyer.

5. The conclusion that *prima facie* the seller reserves the right of disposal, when the bill of lading is to his order, or that of his agent, may be rebutted by proof that in so doing he did not intend to retain control of the property ; and it is a question of fact what the real intention was. Thus the facts of the case evincing generally an intention to transfer the property, and in particular the fact that the seller puts the bill of lading at the disposal of the buyer, subject only to payment of the price, may show that the seller's intention is merely to preserve his lien.

6. Where a bill of exchange for the price of goods drawn by the seller on the buyer is transmitted to the buyer together with the bill of lading to secure acceptance or payment of the bill of exchange, the buyer cannot retain the bill of lading unless he accepts the bill of exchange ; and if he refuses acceptance or payment, as the case may be, he acquires no right to the bill of lading or the goods of which it is the symbol. And the seller may exercise his right of disposal by selling or otherwise disposing of the goods, so long at least as the buyer remains in default.

7. Where the seller transmits direct to the buyer a bill of lading making the goods deliverable to the buyer's order, unaccompanied by a bill of exchange, whether

drawn by the seller or not, the property in the goods prima facie vests unconditionally in the buyer, and does not revert on dishonour of the bill. The same result follows where the buyer is in return for the bill of lading to pay cash, or to send a banker's draft, or to make a promissory note. The fact that, on the transmission of the bill of lading, the buyer is advised of the drawing of the bill of exchange does not suspend the passing of the property".

8. When the seller deals with the bill of lading only to secure the contract price and not with the intention of entirely withdrawing the goods from the contract, as e.g., by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer, upon the payment or tender by him of the contract price.

57. The facts of the instant case already set out show that all the principles establishing the transfer of property are present in the case and that none of the principles showing reservation of the right of disposal is present in this case.

58. In the result the decree and judgment of the, lower court have got to be set aside and they are hereby set aside. The issues are found in favour of the defendant and the suit is dismissed and this appeal is allowed but in the circumstances without costs throughout.