
(1982) 05 CAL CK 0005
In the Calcutta High Court
Case No : Civil Rule No. 83 (W) of 1977

Voltas Ltd.

APPELLANT

Vs

Commercial Tax Officer and Others

RESPONDENT

Date of Decision : 06-05-1982

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 5, 6
Constitution of India, 1950 — Article 226, 265, 286, 31

Citation : (1982) 51 STC 151

Hon'ble Judges : M.N. Roy, J

Bench : Single Bench

Advocate : Biswarup Gupta, Jatin Ghose and Molay Kumar Guha, for the Appellant; Samarendra Nath Dutta, for Respondent Nos. 1 and 2 and A.K. Chowdhury, for the Respondent

Judgement

M.N. Roy, J.—The petitioner, Voltas Ltd., is an existing company within the meaning of the Companies Act, 1956 and is a manufacturer of various electrical and engineering goods and has also stated to be carrying on the business of importing into India, amongst others, electrical, mining and engineering goods or equipment on behalf of various customers, including the West Bengal State Electricity Board, Damodar Valley Corporation and Orissa. The rule, with the corresponding interim order of injunction, restraining the respondents concerned, from enforcing or taking any steps pursuant to the concerned orders of assessment, the particulars whereof would be mentioned hereinafter, was obtained by them on 10th January, 1977. Even though the rule was made ready as regards service on 20th March, 1979 and appearances as indicated hereinbefore, were entered, no affidavit-in-opposition was filed and the learned Advocates appearing for the respondents concerned, advanced their arguments or made their submissions, on production of the records.

2. It was stated that if the purchasers could obtain the necessary import licences in their own name and execute letters of authority in favour of the petitioner only, for enabling the importation of goods, they used to undertake or take the

task of importation of such goods as specified. In fact, it has been stated that in the instant case, the actual user's licence was obtained by the consumers and they also obtained the necessary letter of authority from the Chief Controller of Imports and Exports, New Delhi, authorising the petitioner to import on behalf of such actual users, whose particulars would be mentioned hereinafter, such goods as required. It has also been stated that such actual users opened the necessary letters of credit and made remittance of foreign exchange against the licences and to the extent of the values as specified in the letters of authority, which were issued under the provisions of the Import Trade Control Hand Book. A copy of such actual user's licence, as issued to actual user or customer, viz., Damodar Valley Corporation and the corresponding letter of authority, as issued by the office of the Chief Controller of Imports and Exports, have been disclosed and it has been claimed that such letter of authority was issued subject to the following conditions amongst others :

(a) Where an irrevocable letter of credit is opened by the holder of the licence to finance the import of any goods covered thereby, then the authorised dealer in foreign exchange, through whom the credit is opened, shall be deemed to be a joint-holder of this licence to the extent of the goods covered by the credit.

(b) All items imported under it shall be used only in the licence-holder's factory at the address shown in the application against which the licence is issued and no portion thereof will be utilised by the licensee for a unit/purpose other than the one for which the licence in question is issued, or will be sold or permitted to be utilised by any other party. The licensee shall maintain proper account of consumption and utilisation of the goods imported against the licence.

(c) Payments authorised to be made against it shall not cover any commission, discount, or like rebates allowed by foreign suppliers/manufacturers to the concessionaires, i.e., the importers in India. The records as indicated above and produced by the petitioner were specimen copies and the assessment orders which are impeached are in (1) Case No. 63(A) of 1976-76 u/s 11(1) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as the 1941 Act), (2) Case No. 91(A)/72-73 under the 1941 Act, (3) Case No. 97 of 1972-73 u/s 9(3) of the West Bengal Sales Tax Act, 1954 (hereinafter referred to as the 1954 Act) and (4) Case No. 70 of 72-73 u/s 9(3) of the 1954 Act. It should be noted that even though, in this proceeding, the petitioners have challenged the initial lack of jurisdiction to initiation and continuation of the concerned assessment proceedings, they have filed regular appeals, being (1) Appeal No. A-1060/76-77 against Case No. 63(A) of 1975-76, (2) Appeal No. A-829/75-76 against Case No. 91(A)/72-73, (3) Appeal No. 130/76-77 against case No. 97 of 1972-73 and (4) Appeal No. A-937/76-77 against Case No. 70/72-73 and those appeals where comprehensive prayers have been made to set aside the relevant and concerned assessments, are still pending.

3. In these proceedings, the petitioners have stated that they entered into contracts with the relevant purchasers/customers for importation of the goods as

ordered to them by the actual users against their licences and the letters of authority as obtained by those actual users and the contracts in question, besides giving the specifications and relevant particulars of the concerned goods, also mentioned f. o. b. price of the imported materials and such price as mentioned, was for delivery f. o. b. Calcutta and were firm contracts, subject of course to the variation in the rate of exchange and customs duty. The petitioners have mentioned the stipulation with regard to payment as under :

95 per cent payment against each consignment will be paid by our consignee officers against R/R through bank.

Balance 5 per cent payment will also be made by our said consignee officers pertaining to their portion within 30 days from the date of receipt of your 5 per cent bill supported by S.R.V. which will be granted by our officer not below the rank of an Assistant Engineer/Assistant Stores Officer, after due verification of the materials at site.

All bills and papers, in duplicate, should be submitted to our consignee officers along with R/R through bank.

4. The actual contracts were not disclosed with the petition, but the petitioners have craved leave to refer to them, at the time of hearing of the proceedings. In fact, the specimen copy of one such contract and some other relevant records, all xerox copies, were produced by Mr. Gupta, after supplying them to the learned Advocate for the respondents. I direct these copies to be kept in the records of this case.

5. It was the case of the petitioners that most of the contracts by them were entered and placed with the foreign manufacturers through their buying agents abroad and shipments were done usually by those agents who are shown as shippers in the bill of lading. It has also been stated that some of the foreign manufacturers also made or make the shipments directly and in fact in all bills of lading, the names of the petitioners were shown as consignee and they also included the names and particulars of ultimate consignees. It has further been stated that imports were effected by the petitioners on the strength of the letters of authority as mentioned above and so also the letters of credit as opened by them and on due remittances made thereunder. It has been stated further by the petitioners that on arrival of the goods they duly filed the bills of entry for home consumption, giving the necessary particulars of the import licence and showing the customers as licence-holders and on whose account the concerned import was effected. It has been claimed by the petitioners that the goods so imported are supplied to the buyers by them without any further processing in the hands of the petitioners or mixing them with any other indigenous materials. The bills, according to the petitioners, were and are made on the basis of f.o.r. price, which includes the f.o.b. price plus sea freight, at the rate of 1 per cent plus customs duty, if any, depending on the nature of the goods as imported and such billings also included the agreed commission.

6. It has been stated that in due course and in keeping with the procedure as indicated hereinbefore, the petitioners had entered into diverse contracts with various customers/purchasers and as mentioned above, they have imported diverse electrical goods and mining and engineering goods from abroad on behalf of the ultimate customers against the actual user's licence and letter of authority, obtained by those customers. It was also stated that after due supply of the materials, the petitioners had raised or raise bills for the supply of the concerned materials and they also charged the agreed margin for importation on behalf of the customers or such undertaking as taken by them. It would appear from the statement as made, that during the period commencing from 1st September, 1970, to 31st August, 1971 and 1st September, 1971, to 31st August, 1972, the petitioners had supplied imported goods to their different customers/clients of the value of Rs. 4,12,038.00 and Rs. 29,47,885.00 in the manner as indicated hereinbefore. The petitioners have also disclosed the documents relating to such price as mentioned above in the petition and have claimed that it would also establish and prove ex facie on the basis of such documents as disclosed that Damodar Valley Corporation had imported electrical goods of substantial value and according to the petitioners, the said corporation took delivery from the petitioners all shipping documents while the goods were on high seas and long before they reached the port of destination at Calcutta.

7. It has also been stated by the petitioners that they are duly registered as dealers under the 1941 Act and so also under the 1964 Act, apart from the Central Sales Tax Act, 1956 (hereinafter referred to as the 1956 Act). It was claimed that in their relevant returns, showing the respective turnover for relevant period, the petitioners claimed exemption from sales tax on the sales to their diverse customers/clients u/s 5(2)(a)(v) of the said Act, on the basis of sale that took place in the course of import of the goods into the territory of India within the meaning of Section 5 of the 1956 Act. The provisions of the 1956 Act and the State Act being of relevant consideration in the case, are quoted hereunder:

Section 5 of the Central Act is as follows :

When is a sale or purchase of goods said to take place in the course of import or export.-(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

8. Section 5(2)(a)(v) of the State Act provides as follows :

"(v) sales of goods which are shown to the satisfaction of the Commissioner not

to have taken place in West Bengal, or to have taken place in the course of inter-State trade or commerce, within the meaning of Section 3 of the Central Sales Tax Act, 1956, or in the course of import of the goods into, or export of the goods out of, the territory of India, within the meaning of Section 5 of that Act" shall not form part of taxable turnover.

9. It would appear, that the Commercial Tax Officer, respondent No. 1, by his assessment orders as impeached, disallowed the petitioner's claim for exemption of sales tax on the basis of the determinations in the case of Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, . It was the claim of the petitioners that such assessments were made wrongfully and illegally and it was also claimed that the facts of such determinations of the Supreme Court were not applicable in the present case, as no import licence was ever issued to the petitioners.

10. On the basis of such orders of assessment, respondent No. 1 raised a demand on the petitioners for a sum of Rs. 1,11,214.77, which according to the petitioners was wrongful and illegal and it has been claimed that the said authority, who had in the facts and circumstances of the case, disallowed the claim for exemption u/s 5(2)(a)(v) as mentioned hereinbefore, had acted improperly.

11. Mr. Biswarup Gupta, on the facts and circumstances as indicated hereinbefore, claimed and contended that firstly, there was no sale by the petitioners within the State and secondly, if at all and sale if any, being in the course of import, was not taxable and due exemption should have been given to the petitioners in terms of the provisions of the State Acts as mentioned hereinbefore. It was then contended by Mr. Gupta that as the petitioners imported the goods as an agent of the consumers/customers and such goods being irrevocable for those consumers and customers and the import of those goods was inextricably linked up with the contract which the petitioners had with those customers/consumers and the movement of the goods was occasioned by such contract, due exemption should have been given to the petitioner in terms of the provisions of the said Act and such exemption not having been given, the assessment orders as made, became void and irregular. It was also contended by him that the assessment orders and the demands as raised were clearly ultra vires Article 286 of the Constitution of India and so also Section 6 of the 1956 Act and 5(2)(a)(v) of the 1941 Act as mentioned above. It was specifically claimed by him that the orders being placed by or from Voltas Brothers Ltd., upon various foreign manufacturers, the contract between the petitioners and the concerned consumers/customers, does not occasion the movement of the goods from abroad into the territories of India. It was claimed by Mr. Gupta that the conditions, subject to which the letter of authority was issued by the Chief Controller of Imports and Exports, respondent No. 4, should have been read as and in fact, they were a part of the contract between the petitioners and the concerned customers/consumers and in any event, it must have been held that the petitioners could neither import the goods without the letter of authority and

except as the agent for those customers/consumers, under the licence as issued and could not as such sell those goods to anybody other than those to whom the actual user's licence was granted. He claimed further that even under the letter of authority as granted, the authorities concerned should have held that even though the petitioner was authorised to import the goods, the consumers/customers remained the importer and were liable as such. It was the further submissions of Mr. Gupta that the impugned orders and demands, were absolutely ultra vires Article 31 of the Constitution of India as they purported to deprive the petitioners of the right of property without any authority of law and those demands were also ultra vires Articles 265 and 286 of the Constitution of India as being taxed, levied and/or collected without the authority of law. In the case of Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, , the petitioner was an importer and a dealer in non-ferrous metals like zinc, lead, copper, tin, etc. and was on the approved list of registered suppliers to the Directorate General of Supplies and Disposals. Licences were issued to the petitioner by the Chief Controller of Imports and Exports on the basis of Import Recommendation Certificates issued by the DGS and D or other authorities like the State Trading Corporation for supplies against contracts placed by the DGS and D and was held that for effecting sales made by the petitioner as principal to the DGS and D, the petitioner had to purchase goods from foreign sellers and it was these purchases from the foreign sellers which occasioned the movement of goods in the course of import. No movement of goods in the course of import took place in pursuance to the contracts of sale made by the petitioner with the DGS and D. The petitioner's sales to the DGS and D were distinct and separate from his purchases from the foreign sellers. The purchases of the goods and import of the goods in pursuance to the contracts of purchases were, no doubt, for sale to the DGS and D. But it would not follow that the sales or contracts of sales to DGS and D occasioned the movement of the goods into this country. There was no privity of contract between the DGS and D and the foreign sellers. There was no obligation under the contracts on the part of the DGS and D to procure import licences for the petitioner. And, it was the obligation of the petitioner to obtain the import licence. Therefore, even if the contracts envisaged the import of goods and their supply to the DGS and D from out of the goods imported, it did not follow that the movement of the goods in the course of import was occasioned by the contracts of sale by the petitioner with the DGS and D. On the basis of such facts and determinations, Mr. Gupta claimed that the determinations as made therein would not be applicable in the instant case, as no import licence was issued to or in favour of the petitioners and such licence in the instant case was issued directly in favour of the actual users/customers and on application, the respondent, Chief Controller of Imports and Exports, issued the letter of authority permitting the licensee/customers to allow the petitioners to import the goods on their behalf. Other distinguishable factors in this case and from the case as cited above, Mr. Gupta claimed that all documents, which were not the case in the case as cited above, would show that the licence-holders as the customers/ultimate consignee and the goods on importation of subsequent

thereto were never the properties of the petitioners. Mr. Gupta so wanted to claim that on the basis of facts and terms as stipulated in this case and those in the case as cited above, the determinations as made would also be distinguishable.

12. It was then claimed by Mr. Gupta that the determinations in the case of *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc.*, and such decision was followed in subsequent cases, the particulars whereof would be mentioned hereinafter, would apply appropriately in the facts of this case. In the case as mentioned above, the assessee-firm was engaged in the supply of foreign cotton to textile mills in India on the basis of the import licences issued to the mills authorising import of foreign cotton by them. On receiving the enquiries from the mills as regards the quality, price, etc., of the cotton, the firm contacted the foreign suppliers and on the latter agreeing to supply the quantity at the price agreed upon, the firm entered into contract with the mills to supply the cotton. The import licence issued in favour of the mills was made available to the firm for utilisation of the contract. The letter of authority by the Government authorising the firm, to import cotton was issued as an agent of the licensee and the bill of lading obtained by the foreign suppliers on shipment of the goods was also issued in the name of the mills. The price was fixed on c.i.f. terms and the payment was to be made by the mills against the document and on such facts it was held that from the facts it was clear that the assessee could not have sold the goods to anybody other than the licence-holders. The sale effected by the assessee occasioned import of cotton within Section 5(2) and as such was exempt from taxation. In the case of *Dean and Webber Mill Stores Company v. State of Maharashtra* [1977] 39 STC 161, the assessees were carrying on the business of supplying bobbins to textile mills, but they purchased bobbins from manufacturers of bobbins. NBI was also manufacturing bobbins. The assessees were, if not the sole purchasers of all bobbins manufactured by NBI, at least one of their biggest customers. For the purpose of manufacturing bobbins, NBI used to import certain special type of wood from Japan. The question arose whether the supplies of wood made by the assessees under their debit notes to NBI on importing the goods on the strength of the actual user's import licence held by NBI and on the strength of the letter of authority issued by the Joint Controller of Imports and Exports in favour of the assessees were sales effected by the assessees to NBI. The assessees contended that they had merely acted as agents of NBI, or in any event, as their financiers and that there were no sales by them to NBI. It was found by the sales tax authorities and the Tribunal that the debit notes were in respect of the actual expenses incurred by the assessees for taking delivery of the goods, opening the letter of credit and the letter of credit charges, the amount paid to the bank and the customs duty and clearing charges paid by the assessees. The Bombay High Court has observed that the legal effect of the documents on the record left no doubt that in the matter of imports under the contracts the assessees acted as the agents of NBI and that

they did not purchase any of the goods imported under the contracts themselves and that there was no sale of the goods by the assessee to NBI. Thereafter, Mr. Gupta made a reference to the determinations in the case of *Serajuddin and Others Vs. The State of Orissa*, which construed the words "in the course" as used under the provisions of the 1956 Act and has mentioned above that the expression "in the course" implies not only a period of time during which the movement is in progress but postulates a connected relation. Sale in the course of export out of the territory of India means sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities and a transaction of sale which is a preliminary to the export of the commodity sold, may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. To occasion export, there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. Where the sale is effected by the seller and the seller is not connected with the export, which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export. Those apart, it has been held that the crucial words in the section are that a sale or purchase of goods shall be deemed to take place in the course of the export of the goods only if the sale or purchase occasions such export. The distinction between sales for export and sales in the course of export is never to be lost sight of. Mr. Gupta also made a reference to the determinations in the case of *Deputy Commissioner of Sales Tax (Law) v. I.C.I. (P.) Ltd.* [1981] 47 STC 149. That was the case where, the assessee initially entered into written contracts with prospective buyers for the import and sale of the goods. Thereafter, the goods were imported from outside India against actual user's licence of the customers under the letter of authority. In all correspondence and documents including the customs bill, it was required to be indicated that the goods had been imported by the assessee on behalf of the licensees. The invoices from the foreign suppliers were in the name of the assessee; and the assessee in its turn invoiced its customers. However the import was made in bulk on behalf of a number of customers and the supplies to the customers were apportioned in separate lots after clearance from the port. The assessee itself cleared the goods from the port and effected delivery to the customers. The Tribunal found that the sale was in the course of import, that in importing the goods the assessee was only acting as the agent of its customers and that, therefore, the sale was exempted from liability to sales tax u/s 5 of the Central Sales Tax Act, 1956 and on such facts it has been held that it was the contract between the assessee and the customers that resulted in the movement of the goods from the foreign company and in that view it evidenced a sale in the course of import exempted from liability to tax u/s 5(2)

of the Central Act.

13. Mr. Gupta, on the basis of the determinations as indicated above, also claimed that since there was dispute regarding the nature of the transaction and the admitted fact that the petitioner was not the licence-holder and furthermore, as the steps were taken or the contracts were exempted or they were implemented by the petitioners as agents, the assessments as made by the authorities concerned were neither proper nor regular nor with jurisdiction. He also claimed in the facts of the case that there was in fact no sale by the agents, viz., the petitioner and sale to Damodar Valley Corporation were a sale in the course of import, occasioned for the said corporation.

14. On the basis of the pendency of the appeals as indicated hereinbefore and on production of the concerned memorandum of appeals, Mr. Dutta contended that since in these appeals, apart from the point regarding the taxability of the concerned goods being not in the course of import, other grounds on merits have been taken or when such comprehensive appeals, as filed, are pending decision, this Court should not make any interference at this stage and in this jurisdiction. It was also claimed by Mr. Dutta, on a reference to the description of the petitioners as given in the memorandum of appeals, viz. they are agents of foreign manufacturers, that the contentions as raised by Mr. Gupta, cannot be accepted. It was also contended by Mr. Dutta, in view of the pendency of these comprehensive appeals, that part of the points as raised there, which are in issue in this proceeding should not be entertained or quashed. It was also claimed by Mr. Dutta that the assessments as involved in this case, being for different quarters and years, should not also be entertained in one application and as such, the application should be deemed to be not maintainable. It was further contended by Mr. Dutta that in fact no evidence has been adduced by the petitioner before the authorities concerned or even appropriately disclosed in this proceeding, if the sales were in the course of import or sales in West Bengal and if at all, such question could be decided on proper materials by the authorities concerned and not in this case. Mr. Dutta specifically claimed that the concerned agreements, which were and are vital for the appropriate and necessary determination of such points in issue, have not been disclosed.

15. After placing the relevant facts as disclosed in the pleadings of the petitioner and on his construction of them, Mr. Dutta contended that there was no dispute or in holding that the petitioner was joint-holder and the goods, if at all, were transferred at Calcutta Port and as such the sales took place in Calcutta or in the territories of West Bengal. It was claimed that the petitioner was really the consignee who made the bills to their customers, viz., the ultimate consignee. In such view of the matters, Mr. Dutta specifically claimed that sales, if at all, took place at Calcutta and not outside the State. It was contended by Mr. Dutta that the customers/consumers had no connection with the foreign sellers and they were contacted or negotiated by the petitioner, although the licences were in the name of the customers/consumers. In fact, Mr. Dutta also claimed that such

arrangements as pleaded were to facilitate the bringing of the goods in question and actually the petitioner was the agent of the foreign sellers and the goods in question were really transferred by them at the Calcutta Port and within the territories of this State.

16. On such facts and constructions, Mr. Dutta contended further that there was no wrong in assessing the petitioner and when they were not really the agents as claimed. In support of his submissions, reliance was first placed by Mr. Dutta to the determinations in the case of *Rajeswari Mills Ltd. v. State of Madras* [1964] 15 STC 1. In that case the assessee-mill obtained from the Government a licence to import foreign cotton. G to whom a letter of authority was also issued by the appropriate authority imported that cotton, cleared the goods from the customs, railed the goods and sent the railway receipt through bank. The assessee took delivery of the railway receipt from the bank on payment of 90 per cent of the value and cleared the goods from railway. The cotton bales were weighed in the presence of G's representative and the final bill adopting the contracted rate was then drawn up. The tenor of the document containing the terms of the contract was consistent only with a transaction of sale of cotton by G to the assessee. The condition attached to the letter of authority however stated that the person in whose favour it had been issued would act purely as an agent of the licensee and the goods imported would be the property of the licence-holder both at the time of clearance through the customs and subsequent thereto. Treating the transaction as a purchase of cotton from G, the purchase value of cotton was included in the taxable turnover of the assessee under the Madras General Sales Tax Act, 1959. The assessee objected to its inclusion and contended that under the condition of the letter of authority G was only the assessee's agent for the import of cotton and there was therefore no sale by G to it and that in any case the transaction of purchase was in the course of import and was therefore exempt under Article 286(1)(b) of the Constitution and it has been observed on such facts that it could not be said that the contract between G and the assessee was not a sale, though it purported to be a sale and was intended to be a sale by the parties, because of the provisions of the Regulation enabling the Government to treat the imported goods as belonging to the licensee for the purpose of its fiscal policy. The transaction was a sale and G was not a mere agent of the assessee for the import of cotton; that the sale to the assessee was effected after the goods were taken out beyond the customs barrier and it was therefore not hit by the constitutional ban under Article 286(1)(b). It has also been observed that what constitutes agency is the jural relationship of principal and agent. The rights and liabilities of the parties flow from such relationship. An inference of agency should not however be concluded from the subsistence of a few of such rights or liabilities and the imposition of some legal effects inherent in the relationship of principal and agent by a statute is not the formation of agency by the legislature but is only the fastening of a liability or clothing of a right in an individual as if the parties concerned occupied the position of agent and principal. The rights and obligations are the legal incidents of the

relationship, but the relationship is not the resultant of such rights and obligations. Mr. Dutta, then referred to the case of *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, where the assessee entered into a contract with the Director-General of Supplies and Disposals, New Delhi, for the supply of axle-box bodies. The goods were to be manufactured in Belgium according to specifications and the D.G.I.S.D., London, or his representative had to inspect the goods at the works of the manufacturers and issue an inspection certificate. Another inspection was provided for at Madras. The assessee was entitled to be paid 90 per cent after inspection and delivery of the stores to the consignee and the balance of 10 per cent was payable on final acceptance by the consignee. In the case of deliveries on f.o.r. basis the assessee was entitled to 90 per cent payment after inspection on proof of despatch and the balance of 10 percent after receipt of stores by the consignee in good condition. The assessee was entirely responsible for the execution of the contract and for the safe arrival of the goods at the destination. The contract provided that notwithstanding any approval or acceptance given by an inspector, the consignee was entitled to reject the goods, if it was found that the goods were not in conformity with the terms and conditions of the contract in all respects. The manufacturers consigned the goods to the assessee by ship under bills of lading and the goods were cleared at the Madras Harbour by the assessee's clearing agents and despatched for delivery to the Southern Railway in Madras and Mysore. The question was whether the sales by the assessee to the Government departments were in the course of import and exempt from taxation u/s 5(2) of the Central Sales Tax Act, 1956 and on such facts, it has been held that

(i) the expression "occasions the movement of goods" occurring in Section 3(a) and Section 5(2) had the same meaning;

(ii) before a sale could be said to have occasioned the import it was not necessary that the sale should have preceded the import;

(iii) the movement of goods from Belgium into India was incidental to the contract that they would be manufactured in Belgium, inspected there and imported into India for the consignee and was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of the goods being diverted by the assessee for any other purpose and therefore, the sales took place in the course of import of goods within Section 5(2) of the Act and exempt from taxation.

17. In view of the above, Mr. Dutta wanted to contend that the nexus in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, would apply in this case and not the determinations in *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay*, etc. etc., , the more so when the facts in this case were different from those determinations or the basis in *The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay*, etc. etc., and more particularly when the petitioner was the agent of the foreign exporters

and in fact, the import was made and effected by the petitioner. On facts, Mr. Dutta claimed that the petitioner was dealing with the import independently and not otherwise as claimed. Mr. Dutta further wanted to contend and establish that since the petitioner did not disprove the fact of not being the agent of the foreign buyers, the determinations in The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., would not also be applicable and such fact would also take this case out of the mischief of the determinations in Serajuddin and Others Vs. The State of Orissa, .

18. Mr. Chowdhury also referred to the determinations in the case of Rajeswari Mills Ltd. v. State of Madras [1964] 15 STC 1 for the proposition that in case of taxation statutes, each year should be treated as different assessment years and as such, amalgamation of challenges, as in this case, for distinct, specific and different assessment years, would not be permitted, furthermore so when different appeals for different years on different grounds have been filed and they are pending. To support such submissions, reference was made to the observations in the case of Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, and more particularly to these that the jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the article. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily, the court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again, the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce for which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to an assessee to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit, by entertaining a petition under Article 226, the machinery created under the statute to be by-passed and will leave the party applying to it to seek resort to the machinery so set up. These apart, Mr. Chowdhury adopted the other arguments as advanced by Mr. Dutta and on the question of statutory agency or who should be regarded as such, he also referred to the determinations in Rajeswari Mills Ltd.'s case [1964] 15 STC 1 and also claimed that the petitioner having done everything in this matter and as such agent, cannot claim the exemptions as asked for.

19. It was appropriately pointed out by Mr. Ghosh, the learned Advocate

appearing on behalf of the petitioners and assisting Mr. Gupta, that the law with regard to the statutory agent or who is such and the tests to find out the same as laid down in the case of *Rajeswari Mills Ltd. v. State of Madras* [1964] 15 STC 1 is no longer good law in view of the subsequent Bench determinations of the Madras High Court in the case of *Sri Rani Lakshmi Ginning, Spinning and Weaving Mills (Private) Ltd. v. State of Madras* [1972] 30 STC 387. In that case, on the basis of an actual user's licence, the assessee imported cotton from Africa through P and claimed exemption relating to the purchase turnover of cotton u/s 5(2) of the Central Sales Tax Act, 1956. Though the assessing authority did not accept this contention, the Appellate Assistant Commissioner held that the turnover was exempt u/s 5(2) of the Act, but the Board of Revenue, in exercise of its suo motu power of revision, set aside the order of the Appellate Assistant Commissioner relying on the decision of the Madras High Court in *Rajeswari Mills Ltd. v. State of Madras* [1964] 15 STC 1. It has been observed on appeal, that as the decision in *Rajeswari Mills Ltd. v. State of Madras* [1964] 15 STC 1 could not be said to lay down good law in view of the decision of the Supreme Court in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, and as the facts in the present case directly attracted the principles in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, the order of the Board must be set aside.

20. In reply to the arguments as advanced on the maintainability of this proceeding under Article 226 of the Constitution of India, in view of the pendency of the appeals as mentioned hereinbefore, Mr. Gupta claimed that this proceeding would be maintainable as the concerned assessments were absolutely and totally without jurisdiction and were not in accordance with law. Such submissions were made firstly, on the basis of the determinations in the case of *Prosad Kumar Mondal v. Commissioners of Krishnagore Municipality* (1978) 82 CWN 457, a case under the Bengal Municipal Act, 1932 and where, construing Section 148 of that Act, which provides for certain remedies, the court observed that the remedy u/s 148 of the Act is contemplated in cases where there being a bona fide assessment in accordance with law and in substantial compliance with the requirements thereof, there arise errors, irregularities or illegalities in regard to individual cases. Where there has been no assessment (as in the instant case) in the true sense of the term or where the assessment as a whole is ultra vires, the remedy contemplated by Section 148 is no remedy and secondly, on the basis of the determinations in the case of *Electric Lamp Manufacturers (India) P. Ltd. v. Collector of Central Excise, Calcutta and Orissa* (1980) 2 CHN 49. That was a case where the appellant, a manufacturer of diverse electric lamps which are excisable goods, sells its products only to selected companies at a price which represents actual manufacturing cost and manufacturing profit only. But the products of the appellant company have been assessed and duty collected on them not on the prices at which the appellant sells its products to the customer companies, but on the basis of the price list of the said customer companies less the trade discount allowed by these companies. The appellant's case is that it

has been paying the duty on the mistaken belief that the duty was payable on the said basis. The appellant for the first time came to know from the decision of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, that the assessment of excise duty on its products on the said basis was without jurisdiction. Thereupon, the appellant filed a writ application praying inter alia for quashing all assessments made from 1961 till the date of the writ application for direction upon the respondent to refrain from levying and collecting any duty from the appellant on anything else than the manufacturing cost and manufacturing profit and to refund the sum of Rs. 1,98,40,969, with interest thereon illegally levied and collected from the appellant from 1961. The rule as issued on the said application was disposed of by the learned trial Judge disallowing the claim of the appellant for a declaration that all assessments made from 1961 were null and void and refusing to order reassessment for the years in question on the basis of the law laid down in A.K. Roy and Another Vs. Voltas Limited, and on such facts, amongst others, it has been held that when the assessment was for a lump sum and included sums not assessable, the entire assessment was bad in toto. In the instant case, the assessment cannot be split up or dissected. Such determination was made on a consideration of the findings and observations in the case of Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City [1951] AC 786, to which also Mr. Gupta made a categorical reference. On the basis of the decisions in the cases as mentioned hereinbefore, Mr. Gupta claimed that dissection of the prayers in this proceeding, viz., those relating to jurisdiction as raised now and those on merits as are involved in the concerned appeals would be possible and permissible. On the question of possibility of splitting up and dissection, reference was also made by Mr. Gupta to the observations in the case of Kurapati Venkatasatyanarayana and Others Vs. State of Andhra Pradesh, where the Supreme Court has been pleased to hold that even though there was a single order of assessment for the period from 1st April, 1949, to 31st March, 1950, as involved in that case, the assessment could be split up and dissected and the items of sale separated and taxed for different periods and it was open to the court to sever the illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void. In the Electric Lamp Manufacturers' case (1980) 2 CHN 49 the observations as mentioned above were also considered. While on the question of interference, it can be made or possible in this case, in support of his contentions as indicated above, Mr. Gupta also referred to the determinations in the case of Toronto Railway Company v. Corporation of the City of Toronto [1904] AC 809, the observations whereof also lay down that interference, if the assessment is void ab initio, would be possible, even on the face of other remedies available.

21. Mr. Gupta also contended that if all relevant and material facts are available from the pleadings like the present one, the court would not be powerless to mould the prayers necessarily to give complete and effective relief to the party. Such submissions were sought to be supported, firstly on a reference to the case

of Gopi Nath Khanna v. Babu Bansidhar (1905) LR 32 IA 123, wherein it has been observed that when the plaint contains a statement of all the material circumstances, but the prayer of it is inartificially framed, it would be sufficient with the aid of the prayer for further relief, to enable the court to give the plaintiff the appropriate relief, if he was otherwise entitled to it. While on the point, Mr. Gupta secondly referred to the observations in the case of Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, . In that case, it has been observed that Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised was designedly used by the Constitution. The High Court can issue writs in the nature of prerogative writs as understood in England, but the scope of those writs also is widened by the use of the expression "nature", which expression does not equate the Writs that can be issued in India with those in England, but only draws an analogy from them. That apart, the High Courts can also issue directions, orders or writs other than the prerogative writs. The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirements of this country. To equate the scope of the power of the High Court under Article 226 with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with an unitary form of Government to a vast country like India functioning under a federal structure. Such a construction would defeat the purpose of the article itself. But this does not mean that the High Courts can function arbitrarily under this article. There are some limitations implicit in the article and others may be evolved to direct the article through defined channels and a writ of certiorari can be issued only to quash a judicial or a quasi-judicial act and not an administrative act. Before the writ can be issued the following conditions have to be complied with : (1) The body of persons must have legal authority, (2) there must be authority to determine questions affecting the rights of subjects and (3) the body of persons should have a duty to act judicially. A writ of certiorari can be issued to quash a quasi-judicial act of an administrative tribunal or authority. The question whether an act is a judicial act or an administrative one arises ordinarily in the context of the proceedings of an administrative tribunal or authority. An act emanating from an administrative tribunal would not be any the less a quasi-judicial act if the aforesaid tests were satisfied. The English Judges conceived and developed the concept of a quasi-judicial act with a view to keep the administrative tribunals and authorities within bounds.

22. Mr. Gupta argued that in a case like this, the transfer of property as involved, would be immaterial, the more so when, the importation was the incident of the contract and furthermore, as such contract with the purchaser occasioned the movement of the goods and there was no doubt or any dispute that the sale was in the course of import. It was also claimed by Mr. Gupta that because of the

covenant in the contract, the fact whether the petitioner was an agent or not or as claimed and contended by Mr. Dutta, would be immaterial.

23. The existence and availability of other remedy in the statute would ordinarily be a bar to maintain an application under Article 226 of the Constitution of India, but there are exceptional circumstances amongst others like the proceedings being void ab initio or taken in excess of or in abuse of jurisdiction and power, or on total and initial lack of jurisdiction or if they are against principles of natural justice, when the High Court will have and retain the power and jurisdiction to interfere. But, while exercising such power, it should be remembered that it is not all wrong which could be cured by or in a proceeding under Article 226 of the Constitution of India and when it appears that the person or authority asking the necessary correction and interference has not either exhausted all other remedies in the statute or has come to this Court after availing of the other remedy and during the pendency of the same, the High Court should not only use and exercise the necessary power sparingly, but such exercise of power must be with due caution, care and consideration. On the question of maintainability as urged, I thus hold that if the submissions of Mr. Gupta succeed, viz., that the assessments were absolutely and totally without jurisdiction and not in accordance with law, then on the basis of the observations as mentioned above and so also the determinations in the cases of *Prosad Kumar Mondal v. Commissioners of Krishnagore Municipality* (1978) 82 CWN 457, *Electric Lamp Manufacturers (India) P. Ltd. v. Collector of Central Excise* (1980) 2 CHN 49 and *Toronto Railway Company v. Corporation of the City of Toronto* [1904] AC 809, interference in these proceedings, even in spite of availability and pendency of the concerned appeals, may be possible and permissible. The prayers in these proceedings are for commanding the respondents concerned to forthwith recall, cancel, withdraw and rescind the orders of assessments and the corresponding demand and also not to give effect to them or to act on the basis thereof and in support of such prayers, Mr. Gupta practically argued on the question of jurisdiction of the authorities to initiate the assessment proceeding, which submissions are admittedly in issue in the concerned appeals, along with other points on merits, which would require a determination on fact and law. This Court, at this stage, would not be justified and authorised to go into the questions of fact if they could be agitated before and decided by the lower tribunal on the basis of the materials and evidence as adduced and available.

24. While on the point, it should also be remembered that in the case of *Director, Enforcement Directorate, Government of India v. Saroj Kumar Bhotika* (1978) 82 CWN 61, a Bench determination of this Court has observed that if redress can be had through the law under which the action challenged is proposed to be taken, an application for a writ would not be maintainable. But when the challenge is such as cannot be determined by the authority appointed to take action, the writ jurisdiction of the High Court remains unimpaired. In such a case, the Court has to see whether the ground on which the challenge is based can be entertained, tried and determined by the authority created by the statute. In such view of the

matter, perhaps, Mr. Dutta wanted to contend that no interference by this Court and at this stage, should or need be made by this Court, more particularly when the points regarding jurisdiction and those on facts and law are in issue in the pending appeals and can be decided conveniently by the Tribunal. In such view of the matter, Mr. Gupta argued on the possibility of the dissection of prayers and the power of this Court, to have the prayers moulded, for doing effective justice and giving proper relief to the petitioner, on reference to the determinations in the cases of *Electric Lamp Manufacturers (India) P. Ltd. v. Collector of Central Excise* (1980) 2 CHN 49, *Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City* [1951] AC 786 and *Gopi Nath Khanna v. Babu Bansidhar* (1905) LR 32 IA 123.

25. The question thus would be whether such and necessary dissection and splitting up of the prayers in this case, viz., those relating to jurisdiction as raised and those on merits, as one involved in the connected appeals, would be possible and permissible in view of those determinations and also in terms of the determinations in the case of *Kurapati Venkatasatyanarayana and Others Vs. State of Andhra Pradesh*, . In the *Calcutta* case (1980) 2 CHN 49 as indicated, after considering the findings and observations in the case of *Bennett and White*, etc. [1951] AC 786, on facts it was found that dissection was not possible, as the assessment in question could not be split up. The determinations of the Supreme Court in the *Kurapati Venkatasatyanarayana and Others Vs. State of Andhra Pradesh*, are distinguishable on facts. But, one thing is certain, that dissection of prayers or splitting them up for doing real and substantial justice or for ends of justice, if such dissection and splitting up is possible on available facts, materials and pleadings, would be possible and permissible. In short, remedy and relief, for the reasons as indicated hereinbefore, can be given on such dissection and splitting up of the prayers, if the facts and pleadings permit them and not otherwise and furthermore, when such order would not or directly interfere with the other pending proceedings and would not bring a surprise to the other side. In this case necessary and relevant evidence was available, viz., the sales were in the course of import and even though the petitioner was authorised to import the goods, the consumers/customers really remained the importers and were liable as such and the import of the goods was inextricably linked up with the contract. In none of the cases as mentioned above, such contingencies arose.

26. In this case, the questions of jurisdiction as raised, even though are also in issue with other challenges on merits, in the concerned appeals and it may be that if such question of jurisdiction is decided at this stage, they would make the pending statutory appeals, as duly taken and filed, infructuous. To make such pending appeals nugatory or infructuous would not certainly and ordinarily be the intention of an order made on such dissection or splitting up and to grant necessary reliefs on that behalf or in that manner. If the Tribunal, on facts and pleadings, can decide the question of jurisdiction as raised or to decide whether the sales in this case were sales in the course of import or not and thus to find out and determine on that basis the taxability of the petitioner along with other

matters and facts on merits and that too on consideration of the available evidence, I see no reason why the High Court should ordinarily interfere at this stage. But such interference, even on the admitted position as indicated above, would be possible as the determinations in the case of The Deputy Commissioner of Agricultural Income Tax and Sales Tax Central Zone, Ernakulam Vs. Kotak and Co., Bombay, etc. etc., , which determinations again were and are appropriately applicable in this case, have not been applied by the authorities concerned, duly. Such determinations, if applied, would have found that the initiation as made and continuation of the proceedings, on that basis, were absolutely without jurisdiction.

27. As such, it may be safely held and observed that the authorities concerned have not acted duly or in proper use of their jurisdiction and power and furthermore, such initiation and determination being without jurisdiction, viz., was lack of jurisdiction, which would go to the root of the matter and for such reason, interference at this stage would be possible. Since the sale as effected occasioned import of the concerned goods, the petitioners would be entitled to maintain their claim for exemption as mentioned hereinbefore.

28. The rule should thus be made absolute and I order accordingly. There will be no order as to costs.

29. The prayer for stay of operation of the order is refused.