(1959) 09 PAT CK 0006

In the Patna High Court

Case No : Miscellaneous Judicial Case No. 593 of 1957

William Jacks and Company Limited — APPELLANT

Vs

The State of Bihar — RESPONDENT

Date of Decision : 21-09-1959

Acts Referred:
Constitution of India, 1950 — Article 286

Citation : (1960) 11 STC 242

Hon'ble Judges : Ramaswami, C.J;Choudhary, J

Bench : Division Bench

Advocate : A.K. Mitter, for the Appellant; The Government Advocate, for the Respondent

Judgement

Ramaswami, C.J. and Choudhary, J.—In this case the assessee is an incorporated company carrying on the business of supply of engineering equipment and machineries to a number of registered dealers within the limit of the State of Bihar and also to the Damodar Valley Corporation. For the period from the 26th January, 1950, to the 30th September, 1951. the assessee was ordered to pay sales tax to the extent of Rs. 41,246 and odd by the Superintendent of Sales Tax, Central Circle, Bihar. The assessment was made u/s 13 of the Bihar Sales Tax Act. The assessee took the matter in appeal to the Deputy Commissioner of Sales Tax, but the appeal was dismissed with some modification. The assessee applied in revision before the Board of Revenue, but the revision application was dismissed with a direction that the claim of the assessee for deduction on account of sales to registered dealers for the period in question should be further investigated.

2. As required by the assessee the Board of Revenue has referred the following questions of law for the opinion of the High Court u/s 25(1) of the Bihar Sales Tax Act:-

(1) Whether the sales by the petitioner of goods which were actually delivered in Bihar as a direct result of such sales for the purpose of consumption in Bihar

during the period 26th January, 1950, to 30th September, 1951, were sales, which took place in the course of inter-State trade or commerce within the meaning of Article 286(2) of the Constitution of India [as it stood prior to the passing of the Constitution (Sixth Amendment) Act, 1956] and as such were not liable to the levy of Bihar sales tax, or whether in view of the subsequent passing by Parliament of the Sales Tax Laws Validation Act, 1956, (Act VII of 1956) such sales became liable to the levy of Bihar sales tax for any part of the above period, say from 1st April, 1951, up to 30th September, 1951.

(2) Whether the goods delivered to the Damodar Valley Corporation in Bihar were imported into Bihar from outside the territory of India against their specific orders and such sales are exempt from sales tax.

3. As regards the first question, it is clear that for the period from the 26th January, 1950, to the 31st March, 1951, the assessment is covered by the Sales Tax Continuance Order, 1950, promulgated by the President and the assessment of the tax for this period is not liable to be attacked on the ground that there is a violation of the provisions of Article 286(2) of the Constitution. For the second period, namely, from the 1st April, 1951, to the 30th September, 1951, the assessment is covered by the provisions of the Sales Tax Laws Validation Act, 1956 and the imposition of sales tax for this period also is legally valid. In this connection counsel on behalf of the assessee referred to the decision of the Andhra Pradesh High Court in Government of Andhra Vs. Nooney Govindarajulu, in support of his argument that Section 33 of the Bihar Sales Tax Act, introduced by the Adaptation of Laws (Third Amendment) Order, 1951, did not create a liability to tax and the language of the section showed that it was intended as a restriction on the taxing power conferred under the Act and did not enlarge the scope of that power. There is no merit in this argument as the decision of the Andhra Pradesh High Court has been expressly overruled by the Supreme Court in M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, . The Supreme Court expressly overruled the Andhra Pradesh High Court''s decision on this point and approved the decision of the Madras High Court in Mettur Industries Ltd. Vs. The State of Madras, , where it was held by the learned Judges that Section 22 of the Madras Sales Tax Act did in fact levy a tax on the Explanation sales so as to fall within the protection of the Sales Tax Laws Validation Act, namely Act VII of 1956. It was held in that case that the Explanation to Section 22 had the effect of rendering the sale as one inside the State so as to fall within the definition of that word in Section 2(h) of the Act and so it was taxable. It was pointed out by the Supreme Court that in the context of the admitted power of the States to impose tax on sales under Entry No. 54 of the State List, the true scope of Section 22 of the Madras Act is that it does impose a tax on the sales of the character mentioned in the Explanation to Article 286(1)(a) but the imposition is to take effect only when the Parliament lifted the ban. In other words, it was a piece of legislation imposing a tax in praesenti but with a condition annexed that it is to come into force in futuro as and when the Parliament so provides. We, therefore, reject the argument of the

learned counsel for the assessee on this point and hold that the sales by the assessee of goods which were actually delivered in Bihar as a direct result of such sales for the purpose of consumption in Bihar during the period 26th of January, 1950, to 30th of September, 1951, have been validly taxed and the question must accordingly be answered against the assessee and in favour of the State of Bihar.

4. With regard to the second question, counsel on behalf of the assessee referred to the decision of the Supreme Court in State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, , but there is no material in the present case to suggest that the assessee was merely acting as an agent for any foreign seller and there was privity of contract between the Damodar Valley Corporation and the foreign seller. It is true that if the assessee had been able to prove that he was only an agent for the foreign seller and there was privity of contract between the Damodar Valley Corporation and the foreign seller with regard to all the sales, the matter would come within the ambit of the ruling of the Supreme Court in State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, . But in the present case it is not clearly stated by the assessee anywhere nor is there any finding of the taxing authorities that the assessee was merely acting as an agent for the foreign seller with regard to the goods delivered to the Damodar Valley Corporation in Bihar. It also does appear that the contracts of sale were produced by the assessee before the taxing authorities in support of their case. The question whether the assessee was merely acting as an agent with regard to the transctions in question is a question of fact which has not been investigated before any Sales Tax Authority and the question cannot be raised for the first time in the High Court in the hearing of the reference. In the petition of appeal before the Commissioner of Sales Tax the assessee made the following statements :-

3. Your petitioner further submits that its terms of business in respect of its supplies in Bihar are F.O.R. Calcutta and the delivery as well as sale in respect of the goods is effected in Calcutta and there is no actual delivery in Bihar by your petitioner. Under the contract your petitioner was to place the goods on rail in Calcutta and after the delivery agreed upon is made the goods may be despatched and may be brought into actual possession of the purchaser but this process, your petitioner submits, will not constitute delivery. Transference of the goods from the place where constructive delivery takes place (as in the case of a F.O.R. contract) will not be a process in the act of delivery. The ultimate destination may determine the place where the buyer gets actual physical possession of the goods but this your petitioner submits will not be actual delivery of the goods at all, the seller as seller having nothing to do with this subsequent despatch.

5. The Superintendent erred in holding that under the contract with the purchase officer of the Damodar Valley Corporation your petitioner undertook to give actual delivery of the goods in Bihar. Your petitioner submits that sales to

Damodar Valley Corporation were on the basis of delivery F.O.R. Calcutta. The contract referred to in the order of the Superintendent stated that the goods were to be consigned to the Executive Engineer, Tilaiya Railway Station, Kodarma and that your petitioner undertook to give a satisfactory trial run at places of delivery. Your petitioner submits that the undertaking to give a satisfactory trial run at places of delivery and/or payment of 10 per cent. after completion of delivery do not indicate that your petitioner undertook to give actual delivery of the goods at Railway Station, Kodarma, in Bihar. Your petitioner by a F.O.R. contract Calcutta undertook to give constructive delivery at Calcutta and not actual delivery in Bihar. The question whether actual delivery is given at a place or not has nothing to do with the repair of machinery or the mode of payment and the Superintendent erred in holding that because your petitioner undertook to make repairs to the machinery in Bihar your petitioner undertook to give actual delivery in Bihar. The Superintendent also misunderstood the order No. 005036. It is not correct to state that in the order it is stated that delivery should be given at Jhumri Tilaiya, Kodarma. The order stated that the goods were to be consigned to the Executive Engineer, Tilaiya Railway Station, Kodarma. It did not state that the goods were to be delivered by your petitioner at Kodarma. Your petitioner, as stated above, undertook to give constructive delivery at Calcutta and by an agreement with the Executive Engineer the goods were consigned to him but it was not agreed that your petitioner would actually deliver the goods at Kodarma in Bihar.

9. A considerable proportion of the goods delivered to customers in Bihar was imported into Bihar from outside the territory of India against their specific orders and such sales are exempt from sales tax. The learned Superintendent erred in imposing sales tax on such sales.

5. Even in the grounds of appeal the assessee did not claim that they were acting as an agent for the foreign seller with regard to the transaction of supply of goods to the Damodar Valley Corporation and of course there is no finding on this point by the Deputy Commissioner of Sales Tax or of the Board of Revenue. We do not, therefore, consider that it is open to the assessee to raise this question of agency for the first time in the hearing of this reference. It is manifest, therefore, that the assessee has been validly taxed also with regard to the goods delivered to the Damodar Valley Corporation in Bihar and the second question of law referred to the High Court by the Board of Revenue must accordingly be answered against the assessee and in favour of the State of Bihar. The assessee must pay the costs of this reference. Hearing fee Rs. 250.

