

Appeals Nos.

678 and 679 of 1963.

Appeals from the judgment and order dated April 4, 1961 of the Kerala High Court in Tax Revision Nos. 52 & 53 / 1959.

G.B. Pai, T. N. Ramachandra, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for the appellants (in all the appeals).

Govinda Menon and V. A. Seyid Muhammad, for the respondent (in both the appeals).

C.S. Pathak, section N. Andley, Rameshwar Nath and P. L. Vohra, for the interveners (in both the appeals).

March 20, 1964.

The judgment of GAJENDRAGADKAR, C.J., WANCHOO, RAJAGOPALA AYYANGAR AND SIKRI, JJ. was delivered by AYYANGAR J. SHAH, J. delivered a separate Opinion.

AYYANGAR, J. The appellant owns several estates wherein inter alia tea is grown and was assessed to sales tax in respect of the tea sold by it during the years 1954 55 and 1955 56, by the Sales Tax Officer, First Circle, Quilon in the State of Travancore Cochin by his order dated December 23.

In the taxable turnover on which sales tax was computed by the assessing authority were included two items which are the subject of complaint in these two appeals which relate to these two years of assessment.

Before the assessing officer the appellant claimed that certain sales of its tea which were 393 conducted by auction at Fort Cochin a place which at the relevant date was in the Madras State, were sales "outside" the Travancore Cochin State and that consequently these sales were exempted from taxation by the State of Travancore Cochin under article 286(1) (a) of the Constitution.

The Sales Tax Officer rejected this contention and included the sum involved in these sales in the taxable turnover.

An appeal filed to the Appellate Assistant Commissioner also failed, this authority holding that as the tea sold was, at the date of the auction, admittedly in godowns in Willingdon Island in the State of Travancore Cochin, the sales must be deemed to have taken place within taxing State by virtue of a provision in the State Sales Tax Act to which we shall refer later and hence liable to be included in the taxable turnover.

There was a further appeal taken by the Appellant to the Sales Tax Appellate Tribunal which upheld the appellant's contention and set aside the assessment in so far as it included the turnover relating to the auction sales of tea held at Fort Cochin, this turnover amounting to Rs. 56,43,184/11/in regard to the assessment year 1954 55 and Rs. 62,13,604/3/in regard to the assessment year 1955 56 and remanded the case for fresh disposal by excluding these sums from the computation of the taxable turnover.

A revision petition was thereafter filed before the High Court by the State under section 15(b) of the General Sales Tax Act of Travancore Cochin and the learned Judges allowed the Revision and upheld the order of the assessing officer and the Appellate Commissioner holding the turnover represented by these auction sales to be validly taxable under the State law relating to sales tax.

The appellant thereafter applied to the High Court for a certificate of fitness and this having been granted the appeals are now before

us.

Before proceeding further it is necessary to set out the statutory provision contained in the taxing enactment of the State.

The General Sales Tax Act (Act XI of 1125 (ME) 1950) which imposed a sales tax on sales by dealers defines a "sale" by section 2(j) in these terms: " 'Sale ' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge; x x x x Explanation (2) Notwithstanding anything to the contrary in the Sale of Goods Act for the time being in 394 force, the sale or purchase of any goods shall be deemed for the purpose of this Act, to have taken place in the State wherever the contract of sale or purchase might have been made (a) if the goods were actually in the State at the time when the contract of sale or purchase in respect thereof was made .

or (b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in the State at any time after the contract of sale or purchase in respect thereof was made.

" When the Constitution came into force a new section numbered section 26 was inserted by the Adaptation Order bringing the Act into line with article 286(1) of the Constitution and this read: "No law of a State shall impose.

or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place(a) outside the State or (b).

Explanation For the purposes of sub clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

" The position, therefore, was that though cl.

(a) to Explanation 2 to section 2(j) enacted that "notwithstanding anything contrary in the Sale of Goods Act, the sale or purchase of goods shall be deemed to take place in the State if the goods were actually in the State at the time the contract for sale or purchase of goods thereof was made", still by the non obstante provision contained in section 26 a tax on the sale or purchase of goods could not be imposed where such sale or purchase took place "outside" the State of Travancore Cochin.

It is only necessary to add that even if section 26 were ignored still by the terms of article 286(1)(a) the position would be the same and the State could not validly levy a tax on a sale which is "outside" that State.

Now the question is can a sale of the tea effected by the Appellant by auction at Fort Cochin and which were included in its taxable turnover be said to be "outside" the State? The facts in relation to the transaction relating to the sale of the tea and which the learned Judges of the High Court held not to be an "outside" sale

may be stated in their own words: "The sales of teas were concluded at Fort Cochin and the goods were stocked in godowns situated in the Travancore Cochin State.

The deliveries of the goods were also made to the buyers from the godowns in Willingdon island in the Travancore Cochin State.

The Appellate Tribunal has come to the conclusion that the ownership of the commodity having passed in Fort Cochin, the property had not passed within the taxing State, accordingly they would be 'outside' sales for purpose of article 286(1) and exempt from taxation.

" The Appellate Tribunal had recorded a finding that the property in the goods sold passed at Fort Cochin on the fall of the hammer at the auction and the learned Judges of the High Court proceeded on the same basis.

The point on which the, learned Judges differed from the Tribunal was only as regards the effect of the circumstance that the tea sold, was at the point of sale, physically in godowns situated in the State of Travancore Cochin.

The Appellate Tribunal had, in reaching the conclusion in favour of the appellant, as to the taxable character of the turnover represented by these auction sales, referred to a large number of decisions of this Court and to the observations contained in them as well as to several decisions of the various High Courts.

When the matter came up before the High Court the position was, that that Court had after a review of most of the earlier cases which had been referred to by the Tribunal, held in Deputy Commissioner of Agricultural Income tax and Sales tax, Trivandrum vs A.V. Thomas & Co.(1) that the word 'outside sale' in article 286(1)(a) had no reference exclusively to the transfer of the property in the goods according to the provisions of the Sales of Goods Act, and therefore that Explanation 2 to section 2(j) was not violative of article 286(1)(a) and that if at the moment when the property passed, it not being very relevant where the property passed, the goods were in the State of Travancore Cochin, then it was not an "outside" sale quoad Travancore Cochin and could be subjected to sale tax by that State. Before the learned Judges a decision of this Court in India Copper Corporation Limited vs State of Bihar(2) was however relied on as leading to a different result but the learned Judges held that the decision of this Court could be distinguished on the facts and they held that their previous decision reported in A.V. Thomas 's case(1) was still good law and entirely covered the point raised.

The question for consideration in the appeal is the correctness of the view expressed by the High Court.

The decision in Deputy Commissioner of Agricultural Income tax and Sale tax, Trivandrum vs A. V. Thomas & Co.(1) was brought before this Court on appeal and has been reversed (See A.V. Thomas & Co. Ltd. vs Deputy Commissioner of Agricultural Income tax and Sales tax, Trivandrum(3).

In so doing this Court pointed (1) I.L.R. [1960] Kerala 1395.

(2) ; (2)[1963] supp.

2 S.C.R. 608.

396 out that the decision of this Court in the Indian Copper Corporation case(1) had settled the law by laying down that the State (other than a "delivery cum consumption" State) which could tax a 'non explanation sale' (to adopt the phraseology used in

these cases to identify a sale falling outside the explanation to article 286(1)(a)) could only be that State in which the property in the goods passes.

Now, as regards the facts, there is no distinction between the facts in the A. Y. Thomas 's case(2) and the case now under appeal and, indeed, the learned Judges of the High Court have proceeded on that basis.

Dealing with the question as to what is an "outside" sale Kapur, J. speaking for the Court said in the case of A. Y. Thomas & Co.(2) Ltd.: "It has been found and it has not been disputed that the title to the goods in the present case passed at Fort Cochin the question is whether the sale was 'outside sale ' or 'inside sale ' as the expressions have been compendiously used in various judgments to indicate sales taking place within a State or without it.

The Explanation to article 286(1) (a) explains what a sale outside the State is where the Explanation applies the difficulty about the situs is resolved but in a case like the present one the difficulty still remains because the Explanation does not operate in the sense that the rival States claiming to tax the same taxable event are not the States of delivery for consumption in that State and those where the title in the goods passes.

" After referring to the decision in the India Copper Corporation Ltd. vs State of Bihar (1) the Court held that the sale in the case before them was an "outside" sale quoad Travancore Cochin, because the title passed at Fort Cochin in the State of Madras.

On this reasoning this Court reversed the decision in the case of the High Court and held that the sale there in question being an "outside" sale was not taxable by reason of the prohibition contained in article 286(1)(a).

Dealing with the connotation of the expression 'outside ' in article 286(1)(a) this Court had observed, in India Copper Corporation Ltd. vs State of Bihar.(1): "If a single State was designed to have the power to tax any particular transaction of sale, the question that next falls to be considered is the determination of that State in regard to which it could be predicated that the sale in question was not 'outside ' that State or in other words, the determination of the (1) ; (2) [1963] Supp.2 S.C.R.698 397 particular State in regard to which it could be said that the sale was 'inside ' that State. The key to the problem is afforded by two indications in the Article itself: (1) the opening words of Article 286(1) which speak of a sale or purchase taking place and (2) the non obstante clause in the Explanation which refers to the general law relating to sale of goods under which property in the goods has, by reason of such sale or purchase, passed in another State '.

These two together indicate that it is the passing of property within the State that is intended to be fastened on, for the purpose of determining, whether the sale in question is 'inside ' or outside ' the State, and therefore subject to the operation of the 'Explanation ' that State in which property passes would be the only State which would have the power to levy a tax on the sale.

As was explained in the recent decision of this Court in Burmah Shell Oil Storage and Distributing Co. of India Ltd. vs The Commercial Tax Officer.

" It was the principle of law laid down in this passage that was

given effect to by this Court in A. V. Thomas 's case(1) and it was on this basis that the appeal was allowed.

it would therefore follow that the present appeals which are wholly dependent on the correctness of the meaning of the expression 'outside sales ' in article 286(1)(a) which High Court adopted in A. V. Thomas 's case have necessarily to be allowed.

Learned Counsel for the respondent State, however, urged that in the present case a point had been raised before the High Court as to whether on the facts the property in the goods sold by auction conducted at Fort Cochin really passed at Fort Cochin in the Madras State or whether it passed in Willingdon island in Travancore Cochin when the goods were actually delivered to the buyer.

As regards this question of fact or of mixed fact and law the position is this.

The Sales Tax Appellate Tribunal recorded a finding on this matter in these terms: "The question whether the sales took place outside the State or not will have to be decided on the basis of the general law relating to sale of goods.

We hold that in the case of auction sales of full lots the sales were of ascertained goods and hence became complete on the fall of the hammer and that the sales took Place within the Madras State."

In the revision application which the department filed to the High Court this question Whether the property in the goods (1) [1963] Supp. 2 S.C.R. 608.

398 did pass at Fort Cochin was raised but nevertheless the argument before the High Court proceeded wholly on the basis; of the correctness of the finding by the Appellate Tribunal that the property in the teas did pass on the fall of the hammer at Fort Cochin.

The point about the property not having passed in the Madras State does not appear to have been even argued before the High Court.

Even in the statement of the case filed by the respondent it is not stated that this point about the property not having passed at Fort Cochin in Madras was urged before the High Court during the course of the argument.

Before concluding it might be mentioned that in A. Y. Thomas 's case (supra) where, as we have stated earlier, the nature of the transaction was identical with the one in the appeals before us this Court observed: "It has been found and it has not been disputed that the title to the goods in the present case passed at Fort Cochin.

" In these circumstances, we declined to permit learned Counsel for the respondent to urge any ground relating to the property in the goods in the teas sold not having passed in Fort Cochin in the Madras State to be raised, as the point which is not one of pure law was not urged before the learned fudges of the High Court.

The appeals are, therefore, allowed ' and the, order of the High Court reversed and that of the Sales Tax Appellate Tribunal restored.

The appellant will have his costs here and in the High Court one hearing fee.

If the question raised in these appeals were res integra, I would hold that the price obtained at auction sales of tea held at Fort Cochin when the goods were lying in warehouses in the Travancore Cochin State was liable to be taxed under the General Sales Tax Act

(11 of 1125 M.E.), for in my view article 286(1)(a) Explanation, before it was amended by the Constitution (Sixth Amendment) Act, did not altogether exclude the doctrine of territorial nexus in its application to sale tax legislation.

It is settled law in this Court that under the Government of India Act, 1935, the Provincial Legislatures could, relying upon the territorial nexus, levy sales tax upon transactions of sale, not wholly completed within their territory, fixing upon one or more ingredients of a sale furnishing a territorial connection with the taxing Province: Poppat Lal Shah vs The State of Madras(1) and The Tata Iron & Steel Company Ltd. vs The State of Bihar (2).

By the Constitution certain restrictions were placed upon the power of the States (1) ; (2) 399 to legislate in respect of taxes on sales and purchases.

By article 286(1)(a) read with the Explanation, an Explanation sale i.e. a sale in which goods sold were actually delivered in a State for the purpose of consumption in that State was made taxable only by the State in which the goods were delivered for consumption.

But article 286 was, in my view, not intended to exclude the operation of the doctrine of territorial nexus in the field not covered by the legislative prohibitions.

In dealing with the effect of section 33 of the Bihar Sales Tax Act which incorporated the prohibitions imposed by article 286(1) & (2). with the concurrence of section K. Das J., it was observed by me in Indian Copper Corporation Ltd. vs The State of Bihar and others(1) at P. 293: " x x x by enacting that a tax shall not be imposed under the Act when the sale takes place outside the State of Bihar x x, "Only the power to tax "Explanation sales" which do not take place within the State of Bihar is taken away, but not the power to tax "non Explanation sales" in which though under the general law of sale of goods the property passes outside the State, there exists between the taxing power of the State and the sale a nexus as contemplated by the definition of sale in section 2(g).

If the sale is one in which the goods have been delivered outside the State of Bihar, but not as a direct result of the sale or not for the purpose of consumption in the State of first delivery, the sale will not be covered by the Explanation, and the right to tax the sale, if arising otherwise under the Act relying upon the territorial nexus, will not be impaired by the prohibition imposed by cl.

(1)(a)(i) of section 33.

" It may be mentioned that section 33 of the Bihar Sales Tax Act was enacted to give effect expressly to the legislative restrictions imposed by article 286 of the Constitution.

In Indian Copper Corporation Ltd. 's case(1) certain transactions of sale were effected by the assessee after the promulgation of the Constitution, under which the property in the goods passed in the State of Bihar but delivery was effected outside the State of Bihar for consumption also outside Bihar.

In some of these transactions goods were delivered in the State of first destination for consumption therein whilst in others the goods were delivered not for consumption in the State of first delivery.

The assessee contended that both these categories of transactions were exempt from tax under article 286(1)(a) as they were (1) ; 400

outside sales.

This Court unanimously negated the contention of the assessee in respect of sales in which delivery in the State of first destination was not for consumption therein, and the transactions were on that account not "Explanation sales".

It was held that the State of Bihar was competent to tax those "Non explanation sales" in which the property in the goods had passed in the State of Bihar.

But two different grounds were given in support of the conclusion in that case.

My brethren Hidayatullah, Das Gupta and Rajagopala Ayyangar, JJ., were of the view that passing of property within the State alone was intended after the Constitution to be fastened upon for the purpose of determining whether the sale is inside or outside the State, and therefore subject to the operation of the Explanation that State in which the property passes would be the only State, which had the power to tax the sale.

section K. Das.

J., and I were of the view that sale transactions not falling within the constitutional prohibitions remained taxable because in adjudging whether a "non Explanation" sale transaction was "outside the State", the doctrine of territorial nexus could not be wholly excluded from consideration.

In a recent judgment of this Court in A.V. Thomas & Co. Ltd. vs Deputy Commissioner of Agricultural Income tax and Sales tax, Trivandrum(1) this Court held in construing article 286(1)(a) in the light of the Explanation before that Article was amended by the Constitution (Sixth Amendment) Act, that: Where the Explanation to Article 286(1)(a) of the Constitution of India is inapplicable, it is the 'passing of property within the State ' that is intended to be fastened on for the purpose of determining whether a sale is 'inside ' or 'outside ' the State.

Therefore subject to the operation of the 'Explanation ', that State in which the property in the goods passes would be the only State which would have the power to levy a tax on the sale.

" In A. V. Thomas & Co. Ltd. 's case(1) chests of tea were stored in warehouses at Willingdon Island in the Travancore Cochin State, but auctions of the tea chests were held at Fort Cochin which was at the material time within the State of ' Madras, and after the price was paid at Fort Cochin delivery orders were given to the purchasers addressed to the warehouse keepers at Willingdon Island and actual delivery was given at the warehouses.

The chests of tea were then sent from Willingdon Island for consumption in other parts of India or were exported out of India.

It was held by the Court in that (1) [1963] Supp. 2 S.C.R. 608.

401 case that the property in the goods passed at Fort Cochin and as the goods were delivered not for the purpose of consumption in any particular State, the sales were not inside the State of Travancore Cochin but were outside that State and were not liable to be taxed under the Travancore Cochin General Sales Tax Act (11 of 1125 ME). The Court observed that in sales which were not "Explanation sales" passing of property within the State was decisive of the liability to pay sales tax.

No opinion was expressed on the question whether the doctrine of

territorial nexus as investing the State with the right to tax a sale transaction outside the legislative restrictions imposed by article 286, was, since the promulgation of the Constitution, rendered ineffective.

As the facts which give rise to this case are substantially the same as the facts on which *A. V. Thomas & Co. Ltd.*'s case⁽¹⁾ was decided, the decision of the appeals must be in favour of the assessee.

It is necessary to record this judgment, lest it be assumed that I agree with the view that the doctrine of territorial nexus in its application to sales tax legislation has, since the enactment of the Constitution, been completely abrogated.

It may be pertinent to note that since the amendment of the Constitution by the Constitution (Sixth Amendment) Act, article 286(1)(a) (which remains unamended) is now free from the shackles of the Explanation which is deleted and by cl.

(2) the Parliament is invested with power to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in cl.

(1), namely, outside the State or in the course of the import of the goods into, or export of the goods out of, the territory of India. Exercising the power under cl.

(2) the Parliament has enacted the (74 of 1956), and by section 4(2) the doctrine of territorial nexus has been given legislative recognition, though in somewhat limited form.

That subsection provides: "A sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State (a) in the case of specific or ascertained goods, at the time the contract of sale is made; and (b) in the case of unascertained or future goods.

at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation.

Where there is a single contract of sale or purchase of goods situated at more places than [1963] Supp.

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402 one, the provisions of this sub section shall apply as if there were separate contracts in respect of the goods at each of such places.

" The doctrine of territorial nexus had full play in sales tax legislation under the Government of India Act, 1935: it also applies subject to certain modifications since the amendment of the Constitution by the Constitution (Sixth Amendment) Act.

And I am unable to persuade myself that by the enactment of article 286 of the Constitution, it stood abrogated in the interregnum between the promulgation of the Constitution and the amendment of article 286 by the Constitution (Sixth Amendment) Act.

Appeal allowed.