State Of Mysore & Anr vs Mysore Spinning & Manufacturing Co on 11 February, 1958

Equivalent citations: AIR 1958 SUPREME COURT 1002

Bench: S.K. Das, A.K. Sarkar

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           CASE NO.:
Appeal (civil)  66 of 1957

PETITIONER:
STATE OF MYSORE & ANR.

RESPONDENT:
MYSORE SPINNING & MANUFACTURING CO.

DATE OF JUDGMENT: 11/02/1958

BENCH:
S.R. DAS (CJ) & T.L.V. AIYYAR & S.K. DAS & A.K. SARKAR & V. BOSE

JUDGMENT:
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JUDGMENT 1958 AIR (SC) 1002 The Judgment was delivered by BOSE, J. :

BOSE, J. - This judgment will govern Civil Appeals Nos. 66 to 73 of 1957. They arise out of a certificate granted by the High Court of Mysore against a judgment of that Court delivered on 29th September, 1955.

The appellant is the State of Mysore. The respondents are the Mysore and Minerva Mills respectively. The appellant sought to impose a sales tax or certain sales made by the two respondents between 31st March, 1950, and 31st March, 1951. The respondents contended, and still contend that these sales are not taxable because they were made in the course of export and so are exempt under Article 286(1)(b) of the Constitution. The Sales Tax Officer rejected this contention and imposed the tax. Appeals were filed and failed, and also review petitions to the Commissioner of Sales Tax. The matter then came up to the High Court in the following ways.

The assessments were in respect of five quarters. The Commissioner made two references in respect of the first two quarters ending 31st March, 1950, and 30th June, 1950, respectively. These are Civil Petitions Nos. 110 of 1954 and 112 of 1954. The first related to the Minerva Mills and the second to the Mysore.

Writ petitions were filed in the Mysore High Court in respect of the remaining quarters in dispute. Petitions Nos. 26 and 28 of 1954 are against the assessments for

the quarter ending 30th September, 1950. The former is by the Mysore Mills and the latter by the Minerva. Similarly, Writ Petitions Nos. 27 and 29 were in respect of the quarter ending 31st December, 1950, and Nos. 30 and 31 in respect of the one ending 31st March, 1951.

All these eight petitions were heard together and were disposed of by one judgment, the one under appeal. The High Court held that the sales are not taxable but granted the State of Mysore a certificate to appeal here.The facts are not in dispute. Both Mills are two sister textile mills under a common management. They have their registered offices in Bombay and their factories at Bangalore in the State of Mysore. They carry on business at Bangalore as manufacturers and sellers of textile goods, such as cotton and yarn. The bulk of their trade is with exporters at Bombay and other ports such as Calcutta and Madras, that is, the Mills sell to licensed export dealers who export the goods to foreign buyers. In a view cases, the Mills entered into direct contracts with foreign buyers and exported the goods directly. They have not been taxed on those sales and there is no dispute about them. In the rest of the cases, the Mills had no direct contact with any foreign buyer. The licensed exporters at the the ports dealt with them and the Mills dealt with the exporters.

The procedure for export was as follows. During the period in dispute, only duly licensed exporters were allowed to export. We presume that in the few cases in which the Mills exported direct they had a licence to do so. But we are not concerned with those sales and will limit ourselves to the other kind made through duly licensed exporters whom we shall refer to as exporters. In those cases, the first step was for these exporters to obtain a firm offer from a buyer overseas specifying the quality and quantity of cloth or yarn required by the buyer. The second step was for the exporter to produce this offer before the Export Controller and obtain a provisional export licence from him in respect of the goods ordered. The third step was for the exporter to enquire from the Mills whether they could sell, or manufacture, within a reasonable time, goods of the quality and quantity required by the overseas buyer. If the Mills said "yes", the fourth step was for the exporter to enter into a firm contract with the foreign purchaser and the fifth step was for the exporter to enter into a contract with the Mills for the sale of those goods. The Contract had to be marked "for export only" and the prices fixed had to be higher than the inland prices. The specifications and details of the goods had also to be entered. The sixth step was for the exporter, armed with the Mills' contract and the provisional licence, to obtain a final licence from the Export Controller. This licence set out the names of the seller and the exporter and contained a description of the commodities. The seventh step was for the Mills to pack the goods in accordance with the regulations promulgated by the Textile Commissioner and despatch them to the exporter. Among other things, the goods had to be marked clearly "for export only." The eighth step was for the mills to inform the exporter about the despatch of the goods, and the last step was for the exporter to the delivery and ship them overseas.It will be seen that from first to last the Mills had no direct contact with the overseas buyer and that the sales that

occasioned the export were not the sales by the Mills to the exporter. But the Mills contend that, nevertheless, these sales were made in the course of export and so are protected by Article 286(1)(b).

This question was debated at length in various decisions of this Court and we are of opinion that the point is no longer at large. It was directly in issue in The State of Travancore-Cochin and Others v. Shanmugha Vilas Cashew-Nut Factory 1954 SCR 53; 1953 (4) STC 205), and it was held by a majority at page 62 that "the last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business"

is not protected. That is exactly the position here. The only point of distinction between that case and this is that the commodity purchased there with a view to export (raw cashew-nuts) was not quite the same as the commodity exported, namely the kernel that was extracted from the raw nut by certain processes. But despite that, the ratio decidendi of the case rests on the wider ground. In any case the next decision, The State of Madras v. Guruviah Naidu 1955 (6) STC 717, at 721; 1956 AIR(SC) 158 at

161), is directly in point, for there, the commodity that was exported, namely skins, was the same as that which was purchased in the internal market for final export.

The learned counsel for the respondents referred to certain observations in Kailash Nath v. State of U.P. 1957 (8) STC 358; 1957 AIR(SC) 790), but that case is not in point because the Court was construing a certain notification which used the words "with a view to export" and it exempted sales made for that purpose from taxation. The language of Article 286(1)

(b) is different and The State of Madras v. Guruviah Naidu 1955 (6) STC 717, at 721; 1956 AIR(SC) 158 at 161) points out that sales made "for the purpose of export" are not protected unless they themselves "occasion the export." It was argued that the present case is distinguishable from the previous decisions because here Government has itself prescribed the course of the export by (1) prohibiting all export from the country save by or through licensed exporters and (2) directing that all goods for export are to be specially packed and specially marked "for export only." It was said that Government has accepted the ratio of the dissenting judgment in The State of Travancore-Cochin v. Shanmugha Vilas Cashew-Nut Factory 1954 SCR 53 at 96; 1953 (4) STC 205) and has placed the starting point of the stream of export one step higher than the majority had done.

We are unable to accept this contention for two reasons. The first is that even without the Government order the ordinary course of export would take the same procedure and therefore the compulsion of the Government order makes no difference. These sales cannot, under any view, be said to have "occasioned the export."

The second reason is that the right to tax sales is given to the States under entry 54 in List II, therefore, the Centre cannot prevent them form taxing sales that are otherwise taxable either by a Central Act or by rules made under it. Had the States, or one of them, imposed a self-denying restraint on themselves, that would be another matter, for, though they have the power to tax in a certain field, they are not bound to do so and can restrict their rights by legislation as much as they please. But the Centre cannot compel them to do so.

It was also urged that the ban that Government placed on export, save through a licensed exporter, left the Mills with no option but to act in the way they did. The answer to that is that the fact that A cannot export while B can (whatever the reason), cannot turn a transaction that would not be an "export" transaction without the ban into one that is just because A is under a disability.The learned High Court Judges held that the sales are exempt because the exporters must "be deemed to be agents of the foreign buyers" and that therefore "the sales to the agents must be presumed to be sales in favour of the principle."

We are at a loss to understand how this fiction can arise. The legislature can, sometimes, introduce a fiction and decree that that which does not in fact exist must be deemed to exist, but the Courts cannot. No Act of the legislature has been called in aid here and, so far as the facts are concerned, they are found, and indeed were admitted by the respondents, to be precisely the reverse. They never claimed that the exporters were their agents and do not set up such a case even in their statement of the case in this Court, except for a sentence where they say that they urged before the Sales Tax Officer that "all exports out of India had to be made only through license export agents."

But that is incorrect. All that they said there was that they were compelled to sell through licensed exporters because they themselves had no license to export. But however that may be, they dropped that case before the Sales Tax Commissioner, if indeed they had ever set it up, and said :-

> "3. (2) That the sales by the petitioner company in question were no doubt sales to export licence-holders in India and not to overseas buyers direct.
>
> (3) That under the regulations in force the company could not themselves export the goods out of India, and they were obliged to follow the above procedure as under the Cotton Textile (Export Control) Order, it is obligatory to export the goods to overseas markets only through the export licence holders."

The Sales Tax Commissioner held that - There is no doubt that the facts are as stated by the company at ..... 3(2) and 3(3) above.

> "This is clearly not a case of agency because a principal does not sell to his agent and even if this was the only way in which an export could be effected, that would not make the export the agent of the seller because, by the very act of purchase, the exporter became a principle and bought as such.

Quite apart from that, there is nothing to indicate that the exporters were the respondents' agents or that they ever acted as such. All the contracts with them were entered into by them as principals. The learned High Court Judges were therefore under a misapprehension about the facts.

Before us the respondents' learned counsel contended that even if this is not a case of agency in the contractual sense of the term, it is an agency in its wider connotation and he referred to Webster's Dictionary where one of the meanings given to "agency" is "instrumentality." He contended that the Mills exported the goods through the instrumentality of the exporters. In our opinion, the only kind of agency that will serve the respondents is an agent as understood in the law of principal and agent. There were two sales here and both could not have occasioned the export, only the second of the two did that, and the respondents were not parties to it either directly or through the exporters as their agents. It follows that the first sale, with which alone the respondents were associated, did not do that. If it did not, then it hardly matters whether the goods were exported through the instrumentality of the exporters or not because, according to the decisions of this Court, all sales that precede the one that occasions the export are taxable.

The learned High Court Judges also held that if a particular commodity is manufactured "with the main intention for export" then the ultimate sale of that article must be taken as having been affected "in the course of export." Here again, there is an assumption of a fact that is not warranted by the record. There is nothing to show that these goods were manufactured with "the main intention for export" beyond the fact that they were sold to exporters and marked "for export" at the time of despatch. But even if the facts were as stated, that would not help because, as we have already pointed out, this Court has decided that only the sale that occasions the export is exempt and that the sale to the exporter that preceded it is not, even if it was made "with a view to", or "for the purpose of", export.The respondents had an alternative case, namely, that even if these sales were not in the course of export, they were sales made in the course of inter-State trade and commerce and so were exempt under Article 286(2). But the High Court did not go into this because the learned Judges were of the opinion that the question did not arise in view of their decision on the other point.

This point does not seem to have been taken before the Sales Tax Officer nor does it appear to have been raised in the appeals, but it was taken in the review to the Sales Tax, Commissioner. He held that taxes upto 31st March, 1951, were valid because of the President's Continuance Order (No. 7) dated 26th January, 1950. As the High Court has not gone into this we have no facts to go on and so are unable to decide the matter.

As we are in favour of the appellant on the first point, it will be necessary to remand the matter to the High Court to enable it to reach a decision on this point. Remanded

accordingly. Costs will abide the result.

On an application for review of the above judgment, the following order was passed by the Court of 17th April, 1958 :-

VIVIAN BOSE, J. - This petition reveals that there is an accidental slip in our judgment dated 11th February, 1958, which will have to be set right. Mr. H. J. Umrigar, who appeared for the appellant in the appeals, waived notice and appeared without notice to represent the State of Mysore. He also agrees that there is a slip which well need correction.

Towards the end of our judgment we said that the respondents had an alternative case under Article 286(2). This was a mistake. Their alternative case was under Article 286(1)(a). The appellant, and not the respondents, had raised a contention about article 286(2) but we expressed no opinion on it in our judgment and we express no opinion now.Two of the matters that the petitioners (respondents) raised in the High Court are set out in question No. 6. The first part of the question asks :"

In any event, whether the petitioner company's sales do not fall under Article 286(1)(a) of the Constitution "The High Court said that no finding was necessary on this part of the question. Our remand should have directed the High Court to enquire into this instead of on the question under Article 286(2). The second part of question No. 6 is :"

Whether the sales fall under Article 286(2) as held by this Hon'ble Authority.

"The High Court considered this matter and held against the appellant before us that"

the sales in question are not affected by the provisions of Article 286(2) of the Constitution.

"There is therefore a finding on this point but not on the other. Our remand should therefore have been confined to Article 286(1)(a) and not to Article 286(2). We have not considered the position under Article 286(2).

Our order of 11th February, 1958, will accordingly be amended as follows. In the third paragraph from the end of the judgment, in place of the sentence that reads :"

The respondents had an alternative case, namely that even if these sales were not in the course of export, they were sales made in the course of inter-State trade and commerce and so were exempt under Article 286(2)"the following will be substituted :" The respondents had an alternative case, namely, that even if these sales were not in the course of export, they were sales made outside the State of Mysore and so were exempt under Article 286(1)(a)." The remand to the High Court is for final disposal in that court. Each side will bear its own costs in this Court.