Gordhandas Lalji vs B. Banerjee & Ors on 7 April, 1958

Equivalent citations: AIR 1958 SUPREME COURT 1006

Bench: S.K. Das, P.B. Gajendragadkar

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           CASE NO.:
Appeal (civil)  300 of 1956

PETITIONER:
GORDHANDAS LALJI

RESPONDENT:
B. BANERJEE & ORS.

DATE OF JUDGMENT: 07/04/1958

BENCH:
S.R. DAS (CJ) & T.L.V. AIYYAR & S.K. DAS & P.B. GAJENDRAGADKAR & V. BOSE

JUDGMENT:
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JUDGMENT with Civil Appeal No. 665 of 1957 1958 AIR (SC) 1006 The Judgment was delivered by GAJENDRAGADKAR, J. :

GAJENDRAGADKAR, J. - Civil Appeal No. 300 of 1956. - The appellant Gordhandas Lalji had filed a petition in the High Court at Calcutta under Article 226 of the Constitution for quashing an order of assessment made by the respondents against him for Rs. 23, 905-11-0 for the year 1949-50 under the Bengal Finance (Sales Tax) Act, 1941 (Act VI of 1941), hereinafter called the Act. Mr. Justice D. N. Sinha who heard the petition rejected all the contentions raised by the appellant and dismissed the petition. An appeal preferred against the order passed by Sinha, J., was dismissed by Chakravartti, C.J., and Lahiri, J. It is against this judgment that the appellant has come to this Court by special leave.

The appellant is a registered dealer under the Act. As required by the Act, the appellant submitted his return for the year 1949-50 which showed that his turnover was Rs. 24, 21, 023-3-3. The appellant's case, however, was that the taxable turnover for the relevant period was 'nil'. He claimed that goods worth Rs. 1, 79, 733-0-0 were sold to registered dealers and were thus exempt from tax under section 5(2)(a)(ii) of the Act. In regard to the balance of goods worth Rs. 22, 41, 490-3-3, they had been dispatched by the appellant or on his behalf to an address outside West Bengal and were thus exempt from tax under section 5(2)(a)(v) of the Act.

In regard to the latter claim for exemption made by the appellant he alleged that, in his usual course of business and on the advices of Shah Narottamdas Harjivandas &

Co., and two other well-known tea exporters and tea merchants of Bombay, he had purchased at the tea auctions in Calcutta various quantities of teas as their agent and on their behalf and for the purpose of direct export to foreign countries. All the said teas carried export quota rights. After different kinds of teas were thus purchased they were mixed and repacked in accordance with the instructions of the principals. The appellant then on similar advice applied for and obtained requisite licences for the export of the said teas from the Joint Controller, Indian Tea Licensing Committee, and the said licences were all in the names of the said principals. Thereafter, in the usual course of business, the appellant put the said teas into ships through clearing or shipping agents and the teas were bound for export overseas. Thus the goods were shipped from Calcutta to destination outside the territories of India in the course of foreign or international trade. Under instructions of the said principals, bills of lading for the said teas worth Rs. 5, 74, 422-7-3 were made out in the names of the said principals as the consignors and the consignees were sometimes the principals themselves and sometimes foreign parties. The appellant alleged that all the said acts and services were done by him in the usual course of business as an agent for the said principals in respect of the said teas. According to the appellant the total cost of the teas thus purchase came to Rs. 4, 37, 656-0-9 whereas the expenses incurred for handling the goods and dealing with them from the stage of purchase to shipment including the appellant's commission at 1 1/2% came to Rs. 1, 36, 766-6-6. That is how the total value of the goods were shown as Rs. 5, 74, 422-7-3. It was in respect of this amount that the appellant claimed exemption under section 5(2)(a)(v) of the Act.The Commercial Tax Officer allowed the claim for exemption under section 5(2)

(a)(ii) of the Act in full, but in regard to the exemption claimed by the appellant under section 5(2)(a)(v) he disallowed it to the extent of Rs. 5, 74, 422-7-3 on the ground that the relevant bills of lading showed the consignor to be not the appellant but the aforesaid three Bombay parties.

In the result, the appellant's taxable turnover was held to amount to Rs. 5, 09, 988-0-0 and on that basis he was assessed to pay the tax at Rs. 23, 905-11-0 and a demand in that behalf was issued.

Against this order an appeal was preferred by the appellant before the Assistant Commissioner but the appellate authority substantially agreed with the view taken by the Commercial Tax Officer and dismissed the appeal. According to the appellate authority, whoever might have physically put the goods in the hold of the ships, the consignors in the bills of lading, which were legal documents of dispatch, must be deemed to be the dispatchers. The appellate authority also held that it could not be disputed that the sales which occasioned the exports were the sales by the Bombay parties and as such there can be no question of the assessee's taking protection under Article 286(1)(b) of the Constitution.

It was this order of the appellate authority that was challenged by the appellant in his petition filed before the High Court at Calcutta. Sinha, J., rejected the petition on two grounds. He held that the

return filed by the appellant was the foundation of the present assessment proceedings and since the return had not been filed on the footing of an agent, the appellant's case that, it regard to the transactions in question, he was no more than an agent acting for his principals in Bombay cannot succeed. The learned Judge also found that the sale of the goods by the appellant to the Bombay parties was complete when it was appropriated to the contract billed for and the price realised. The shipping to foreign ports of the goods thus sold was no part of the sale by the appellant to the Bombay parties; it constituted an event which is post-sale. It was on these findings that the appellant's claim for exemption under section 5(2)(a)(v) of the Act as well as Article 286(1)(b) of the Constitution was rejected. This order was challenged by the appellant by preferring an appeal but Chakravartti, C.J., and Lahiri, J., who heard the appeal were not impressed by the arguments urged on behalf of the appellant. The result was that the appeal failed and was dismissed. The learned Judges of the Appellate Bench observed that the plea that the appellant was an agent was not seriously pressed before them and they held that the plea for exemption under Article 286(1)(b) was not well-founded because the sales in which the appellant was interested were completed as soon as the goods were appropriated to his contracts with the Bombay parties and whether subsequently the Bombay parties consigned the goods to themselves at some place outside India or to other parties was no concern to the appellant. It is against this appellate order that the present appeal has been brought to this Court by the appellant by special leave.The first point which has been raised before us by Shri Veda Vyas on behalf of the appellant is that the High Court was in error in rejecting the appellant's case that, in purchasing the teas in question at the public auction in Calcutta, the appellant was acting merely as an agent for his principals in Bombay. The argument is that, since the appellant purchased the goods not as a dealer for himself or on his own behalf but as an agent for and on behalf of his principals in Bombay, the transactions cannot be treated as a part of the appellant's turnover which could be taxed under the Act. In our opinion there is no substance in this argument. It is significant that the appellant has obtained a certificate under the Act as a dealer and in consequence he is obviously a registered dealer under the Act. Besides the return on which tax has been assessed has been submitted by the appellant in Form No. III on the basis that he is a dealer. In other words, judging the character of the appellant in respect of the transactions in question solely by reference to the return, there could be no doubt that the appellant purports to be a dealer in respect of them and not an agent. It is really difficult to understand why the appellant should have included these transactions in his return at all if he had purchased the teas not for himself but as an agent on behalf of his Bombay principals. "Turnover" as defined by section 2(i) of the Act means "in relation to any period the aggregate of the sale prices or parts of sale prices receivable, or, if a dealer so elects, actually received by the dealer during such period"after making the permissible deductions; and a" dealer"under section 2, sub-section (c), means" a person who carries on the business of selling goods in West Bengal"

> . It would thus be clear that unless the appellant had purchased the teas in question as a dealer he was not required to show these transactions in his return at all. The fact that those transactions were included in his return is consistent only with the theory that the appellant purchased the teas as a dealer within the meaning of the Act and is wholly inconsistent with his case that in these transactions he was concerned only as an agent.Then it is urged that, even if the appellant was a dealer in respect of the relevant transactions, he was entitled to exemption under section 5(2)(a)(v) of the

Act. Under this provision, deduction is climbable in respect of sales of goods which are shown to the satisfaction of the Commissioner to have been dispatched by or on behalf of the dealer to an address outside West Bengal. It would be noticed that this provision would apply only to the sales of goods which are dispatched by or on behalf of the dealer to an address outside West Bengal. In the present case it has been found that the property in the goods had passed in favour of the Bombay merchants long before the goods left West Bengal. Soon after the goods were purchased by the appellant they were appropriated to his contract with the Bombay parties and in consequence property in the goods immediately passed in favour of the Bombay parties and so the despatch of the goods outside West Bengal was not on behalf of the appellant but was by and on behalf of the Bombay parties. Sri Veda Vyas contends that, in recording this finding, a new case has been made against the appellant by the courts below. We are not impressed by this argument. It must be remembered that the only case which the appellant set out before the Sales Tax Authorities was that he was not a dealer in respect of the goods in question but was acting as an agent for the Bombay parties. No attempt was made by the appellant to make out the alternative case that, in case he was a dealer in respect of the goods, title to the goods did not pass in favour of the Bombay merchants until the goods left West Bengal. It was only during the course of argument on the writ petition before Sinha, J., that this point was raised; and in dealing with the point the learned Judge had naturally to consider the question as to when the goods were appropriated towards the contract in favour of the Bombay merchants. Therefore the grievance made by Shri Veda Vyas that in recording this finding a new point has been made against him is without any substance.Shri Veda Vyas then attempted to challenge the correctness of this finding. It is clear that this is a finding of fact and it would normally not be open to the appellant to question the correctness of the findings of fact in appeals under Article 136 of the Constitution. But even on the merits we think the finding in question is perfectly correct. There can be no doubt that, with the unconditional appropriation of the goods to the contract by one of the parties with the consent of the other, property passes from the seller to the buyer. Shri Veda Vyas, however, relies on his conduct and suggests that until the goods were entrusted to the carrier title had not passed to the buyer. The goods were kept in the godown by the appellant. They were unpacked, blended by the appellant, repacked and duly marked before they were transported; and it is emphasized that for all these acts the appellant charged the Bombay parties and in substance included these charges in the price to be recovered from them. Prima facie this conduct may to some extent be in favour of the appellant's contention. But, on the other hand, the correspondence between the appellant and the Bombay parties clearly and unambiguously indicates that the property had passed to the Bombay parties long before the goods were ultimately dispatched from Calcutta. In all the letters, the Bombay parties have consistently referred to the goods as their goods and have given several instructions which would be consistent only with the theory that the title in respect of the goods had already passed to them. The letter written on 30th May, 1950, by Rajnikant & Co., gave particulars as to how the goods had to be blended and told the appellant "blend from our stock and ship for

> Kuweit. Shipment should be in our name". Similarly, on 13th February, 1950, the appellant was asked by the same firm to blend tea "out of our stock according to the list sent with the letter and ship as already directed."

The appellant was also told that the shipment should be in the name of the said Bombay party. Even as to packing, instructions were given by the Bombay party on 7th January, 1950. The appellant was told to pack all goods by single gunny and cross wire and that the marking should be clean. On 15th November, 1949, a letter from the said Bombay party said "Out of our purchased stock please make two blends according to the attached blend list and ship after packing and marking as directed in the list"

> . It would thus be clear that the Bombay party has consistently described the goods as its own and minute directions have been given to the appellant as to the manner in which they should be packed and he has been asked to ship or otherwise transport the goods in the name of the Bombay party. If the appellant agreed to comply with these directions it was obviously because he wanted to do a good turn to his customer. Since the title had passed to the Bombay party the appellant would naturally be entitled to charge for the services rendered by him in the matter of the blending and packing of the goods. He was also allowed to charge the agreed commission. It is well know that sellers are interested in rendering and agree to render such services to their constituents in order to cultivate their goodwill. That is why it would be erroneous to attach undue importance to the fact that the appellant included the other incidental and subsidiary charges in his bill and formally made those charges a part of the price. It cannot be argued that in every case the payment of price is a condition precedent for the passing of the property. We are, therefore, satisfied that the correctness of the finding made by the High Court on the question of appropriation cannot be effectively challenged by the appellant on the materials on record. If the goods were appropriated to the contract by the appellant with the consent, and to the knowledge, of the Bombay merchant, title to the goods clearly passed in favour of Bombay party. Incidentally, the goods sent by the appellant were not the same as the goods originally purchased by him. There has been blending according to the instructions of the Bombay party and that also indicates that the sale of the goods by the appellant to the Bombay party had preceded the blending of several teas which was done under the instructions of the Bombay party on the basis that the title in the goods had already passed to the Bombay party. In that view of the matter section 5(2)(a)(v) of the Act would be wholly inapplicable.Then, as a last resort, Shri Veda Vyas invoked the provisions of Article 286(1)(b) of the Constitution. He urged that the transaction in question had taken place in the course of the export of the goods out of the territory of India and as such it cannot be taxed. The scope and effect of the provisions of Article 286(1)(b) has been considered by this Court on several occasions and it can be stated without any difficulty that in the light of the decisions of this Court the appellant would not be entitled to claim the protection of this article once it is held that the title to the goods had passed in favour of the Bombay party long before the goods were entrusted to the carrier. It is clear that what

is taxed are the sales made by the appellant in favour of the Bombay party and not the sales made by the Bombay party in favour of outsiders. The appellant sold the goods to the Bombay parties who had their place of business in Bombay. As soon as the goods were sold to the Bombay parties the appellant's interest in the goods ceased and whatever happened to the goods subsequently was no concern of the appellant. In fact there is no privity between the appellant and the foreign merchants to whom the goods were ultimately exported. In a sense the finding about the appropriation of the goods which excludes the application of section 5(2)(a)(v) of the Act to the sale made by the appellant would equally exclude the application of Article 286(1)(b) of the Constitution.

The scope and effect of the provisions of Article 286(1)(b) have been considered by this Court in two decisions which are frequently described as the two Travancore cases. In The State of Travancore-Cochin and Others v. The Bombay Co. Ltd. 1952 SCR 1112; 1952 (3) STC 434), it has been held by this Court that sales and purchases which themselves occasion the export or import of the goods as the case may be out of, or into, the territory of India come within the exemption of Article 286(1)(b). It appears from the judgment of Patanjali Sastri, C.J., that the argument urged before the Court in respect of the true construction of Article 286(1)(b) ranged over a very large field and as many as four different constructions were placed before the Court for its acceptance. The first of these was treated by the Court as unduly narrow and the last as unduly wide. In the result this Court held that the transactions in question in the three appeals which were finally disposed of by this judgment attracted the provisions of Article 286(1)(b). It was observed by the learned Chief Justice that "a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of goods to a common carrier for transport our to the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and resultant export form parts of a single transaction."The expression" a series of integrated activities"

, used by the learned Chief Justice in this judgment was subsequently explained by him when he delivered the majority judgment in the next Travancore case in The State of Travancore-Cochin and Others v. Shanmuga Vilas Cashew-Nut Factory and Others 1954 SCR 53; 1953 (4) STC 205). The phrase "integrated activities", observed the learned Chief Justice, "had been used in the previous decision to denote that 'such a sale' (that is to say a sale which occasions the export) cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form part of a single transaction. It is in that sense that the two activities, the sale and the export, were said to be integrated"

. The conclusions which flow from the majority judgment in this case have been thus summed up by the learned Chief Justice :

"(1) Sales by export and purchases by import fall within the exemption under Article 286(1)(b). This was held in the previous decision.

(2) Purchases in the State by the exporter for the purpose of export as well as sale sin the State by the importer after the goods have crossed the customs barrier are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier are within the exemption, assuming that the State power of taxation extends to such transactions."

The same question has been recently considered by this Court in The State of Mysore v. The Mysore Spinning and Manufacturing Co., Ltd., and the Minerva Mills Ltd. (Civil Appeals Nos. 66 to 73 of 1957 - Judgment delivered on February 11, 1958; Since reported in 1958 (9) STC 188). There is no doubt that this decision clearly covers the case before us. Shri Veda Vyas could not seriously dispute this position. He, however, faintly attempted to argue that there are some aspects of the question to which attention of the Court was not drawn in the case of The State of Mysore etc. etc. (Civil Appeals Nos. 66 to 73 of 1957 - Judgment delivered on February 11, 1958; Since reported in 1958 (9) STC 188). We are, however, not impressed by this plea. We hold that, in view of the two Travancore decisions and particularly in view of the recent decision in The State of Mysore etc. etc. (Civil Appeals Nos. 66 to 73 of 1957 - Judgment delivered on February 11, 1958; Since reported in 1958 (9) STC 188), it would be impossible to accept the plea that the sale effected by the appellant in the present case can claim the protection of Article 286(1)(b) of the Constitution.

Shri Veda Vyas relied upon the decision of the Bombay High Court in M/s. Daulatram Rameshwarlal v. B. K. Wadeyar 1957 (8) STC 617; 1958 AIR(Bom)

120) as well as the decision of the Madras High Court in Gandhi Sons, Ltd. v. The State of Madras 1955 (6) STC 694). We are satisfied that these decisions do not support the appellant's case. In the case of M/s. Daulatram Rameshwarlal v. B. K. Wadeyar 1957 (8) STC 617; 1958 AIR(Bom)

120), the Bombay High Court found that the exporter got the delivery of the goods by means of the documents of title after they had crossed the customs barrier and so it was impossible to suggest that he could have made any other use of the goods except exporting them outside India. The appropriation in the said case was conditional upon the payment being made by the exporters on the presentation of the bills of lading and, therefore, it was clear that the sellers wanted to keep the power of disposal over the goods till they had received the payment from the exporters. The facts in the present case, however, are entirely different. Similarly, in the case of Gandhi Sons, Ltd. v. The State of Madras 1955 (6) STC 694), the Madras High Court had held that the property in question did not pass to the buyers until the relevant bills of lading were presented to the buyers or, in any event, at least not until the goods were put on board the vessel at Cochin harbour. In this case again the facts found are very different from the facts before us. We wish to point out that we do not propose to consider the correctness of the conclusions reached by the learned Judges in both these decisions. For the purpose of the present appeal it is enough to state that these cases, even if they are

assumed to be correctly decided, do not support the appellant's contention.In the result the appeal fails and must be dismissed with costs.

Before we part with this appeal, we may refer to one point which has been mentioned by Chakravartti, C.J., in his judgment under appeal. The learned Chief Justice has observed that the appellant had not fully availed himself of the remedies open under the Act. In fact he had preferred an appeal against the original order passed by the Commercial Tax Officer but had not cared to file a revision application against the appellate order. "To my mind", observes the learned Chief Justice, "the case where the only fact to consider is the mere existence of alternative remedy and the case where the alternative remedy has in fact been availed of but not availed of in full stand on different footings."

The learned Chief Justice thought that if the competence of the application for a writ had been challenged in the original Court on this technical ground, speaking for himself, he would have been inclined to consider it more seriously. In the present case we do not propose to express any opinion on this point.

Civil Appeal No. 665 of 1957 has been filed by the same appellant against the order of assessment passed by the Commercial Tax Officer, Calcutta, in respect of the appellant's turnover for the subsequent year 1950-51. The appellant has been assessed to sales tax for Rs. 27, 194-4-9 and the validity of this order is sought to be challenged on the same grounds on which the validity of the order for the previous year was challenged in Civil Appeal No. 300 of 1956. In view of our decision in Civil Appeal No. 300 of 1956, Civil Appeal No. 665 of 1957 also must fail. Shri Veda Vyas requested us to send this appeal back to the appellate authority under the Act with the direction that the merits of the contentions raised by the appellant should be dealt with by the appellate authority. We are not inclined to adopt this course. If the appellant did not pursue his remedy available under the Act and failed to make an appeal in proper time, we see no reason why were should show him special indulgence and send this matter to the appellate authority with the directions as suggested by Shri Veda Vyas.In the result this appeal also fails and must be dismissed with costs.