The Commissioner Of Sales-Tax,Eastern ... vs Husenali Adamji And Co on 21 April, 1959

Equivalent citations: 1959 AIR 887, 1959 SCR SUPL. (2) 702, AIR 1959 SUPREME COURT 887

Bench: Natwarlal H. Bhagwati, M. Hidayatullah

PETITIONER:
THE COMMISSIONER OF SALES-TAX,EASTERN DIVISION, NAGPUR

Vs.

RESPONDENT:
HUSENALI ADAMJI AND CO.

DATE OF JUDGMENT:
21/04/1959

BENCH:
DAS, SUDHI RANJAN (CJ)
BENCH:
DAS, SUDHI RANJAN (CJ)
BHAGWATI, NATWARLAL H.
HIDAYATULLAH, M.

CITATION:
1959 AIR 887 1959 SCR Supl. (2) 702
CITATOR INFO :
R 1963 SC1207 (40)
RF 1970 SC1756 (10)
D 1976 SC 410 (13)
RF 1977 SC 879 (24)
E&R 1990 SC1753 (14)

ACT:
Sales Tax-Contract of sale-Construction-Unascertained goods-Levy of tax on goods sent by rail-Place where property in goods Passes-Place of appropriation on delivery-Indian Sale of Goods Act, 1930 (III of 1930), ss. 4, 18, 23, 33, 39-Central Provinces and Berar Sales Tax Act, 1947 (C. P. & Berar XXI of 1947), S. 2(g), Explanation II.

HEADNOTE:
The respondent company was a dealer in matchwood called sawar " and his place of business was situate in Chanda in the erstwhile Central Provinces. Pursuant to an agreement

between the respondent and a match factory, the former loaded diverse quantities of " sawar " logs on railway wagons and despatched the same by rail from Chanda and other railway stations in the Central Provinces to Ambernath, a town in the erstwhile Province of Bombay. Under cl. 4 Of the agreement the goods to be supplied under the contract shall be despatched by the contractor from certain railway stations within the Central Provinces, while cl. 2 reserved the right of the consignee to examine the goods on arrival at. Ambernath and to reject the same if they, were found, in the opinion of the factory manager, not to conform with the specifications. Clause 6 provided that the goods shall be measured under the supervision of the factory's repre-sentative, the decision of the factory manager at Ambernath being binding on the contractor, and-by cl. 7 the prices of the goods shall be " F. O.R. Ambernath ". The course of dealings between the parties was that on arrival of the logs at Ambernath the logs were inspected and measured by the factory manager and the prices, calculated at the agreed rates, were paid to the respondent's agent at Bombay. The question was as to when and where the property in the logs passed from the respondent to the consignee and whether the respondent was liable to pay sales tax under the provisions of the Central Provinces and Berar Sales Tax Act, 1947. At the date when the agreement was entered into, the logs were unascertained goods. There was also no evidence that at that date the particular logs delivered thereunder were in the Central Provinces in the shape of logs at all. The sales tax department levied the tax on the respondent on the grounds, inter alia, that (1) the property in the logs passed from the respondent to the factory consignee under S. 23 Of the Indian Sale of Goods Act, 1930, when the logs were loaded in the wagons at railway stations within the Central Provinces and the railway

703

receipts taken in the name of the factory were forwarded to the latter, and that (2) in any case, as the logs were in the Central Provinces at the date when the contract for sale was made, the transfer in them must be deemed to have taken place there under Explanation II to S. 2(g) Of the Central Provinces and Berar Sales Tax Act, 1947.

Held : (1) that on a proper construction of the contract as a whole the intention of the parties was that the respondent would send the logs by rail from the different stations in the Central Provinces to Ambernath where the factory manager would inspect, measure and accept the same if in his opinion they were of the description and quality agreed upon. Conse-quently, as the respondent sent the logs and left it to the factory to appropriate to the contract such of them as they accepted as of contract quality and description, the property in the logs did not pass to the buyer by the mere delivery to the railway for carriage but passed only at Ambernath when the logs were appropriated by the factory

with the assent of the seller within the meaning of S. 23 of the Indian Sale of Goods Act, 1930.
(2) that Explanation II to s. 2(g) of the Central Provinces
JUDGMENT:

because under the Explanation the goods, in respect of which the contract of sale is made, must, at the date of the contract be in existence in the Central Provinces, that is to say, that the goods must at the date of the contract be there in the form in which they are agreed to be sold and there was no evidence, in the present case, for this.

& CIVIL APPELLATE JURISDICTION: Civil Appeal No. 13 of 1958. Appeal by special leave from the judgment and order dated June 29, 1954, of the former Nagpur High Court in Misc. Civil Case No. 219 of 1952.

R. Ganapathy Iyer and D. Gupta, for the appellant. M. C. Setalvad, Attorney-General for India, K. G. Chondke, J. B. Dadachanji and K. K. Raizada, for the respondents. I. N. Shroff, for the Intervener (State of Madhya Pradesh).

1959. April 21. The Judgment of the Court was delivered by DAS, C. J.-This is an appeal by special leave, against the order of the High Court of Judicature at Nagpur dated June 29, 1954, answering against the appellant certain questions referred to it by the Board of Revenue under s. 23(1) of the Central Provinces & Berar Sales Tax Act, 1947 (hereinafter referred to as "the Act"). The reference arose out of an order of assessment made on the respondent for' payment of sales tax for the period June 1, 1947, to November 12, 1947, on a taxable turnover of Rs. 30,067-9-0.

The facts leading up to the present -appeal may shortly be stated as follows. The respondent deals in matchwood called " sawar " (Bombay- Malabaricum). His place of business is situate at Chanda in the erstwhile Central Provinces. In January 1948 the respondent entered into an agreement with the Western India Match Co. Ltd., which is popularly known and will hereinafter be referred to as " WIMCO " for the supply of a minimum quantity of 2,500 tons of sawar logs during the season 1947-48. This agreement is evidenced by WIMCO's letter dated January 7, 1948, accepting and confirming it. Unfortunately that letter, although a part of the record, has not been printed in the Paper Book. It is common ground, however, that the agreement of sale was subject to the conditions appearing in a formal contract in writing dated March 2, 1945, which is said to have been renewed from year to year. It appears that prior to the execution of the last mentioned contract there was another contract between the respondent and WIMCO which was dated October 18, 1940. Evidently that contract was superseded by the later one of March 2, 1945, the terms and conditions whereof were renewed year after year. It is, therefore, not easily intelligible why both the contracts were filed before the Sales Tax authorities and actually mentioned in the first question that was referred to the Hight Court. Both the contracts have been printed in the Paper Book and reference has been made to some of the terms of both of them in the course of the arguments before us. The reason for referring to the terms of the ,earlier contract is presumably to emphasise the variation in the language used in the corresponding provisions of the later contract as indicative of a definite change in the intention of the parties. It is, therefore, as well that the relevant clauses of both the contracts should be set out here for properly following the arguments advanced on both sides.

Reference may first be made to the earlier contract dated October 18, 1940. Clause I sets out the specifications, that is to say, the dimensions and quality of the logs to be delivered under the contract which need not be reproduced here. The other material clauses, omitting the unnecessary portions thereof, may now be set out:-

> " 2. The Contractor agrees that any logs supplied by him which do not conform with the specification herein shall not be accepted or paid for by the company and he the contractor undertakes to remove all logs so rejected at his own expense from the Company's premises within fifteen days after date of notice to him or his representative from the Company so to remove such logs. Should the Contractor fail to i.e. move such logs from the Company's premises within the period stipulated it is hereby mutually agreed that such failure shall be construed as being the Contractor's consent to relinquish all claims whatsoever to such rejected logs, and the Contractor agrees to such logs thereupon becoming the property of the company and that the contractor shall have no claim whatsoever upon the company for payment either in respect of the supply by him of such rejected logs or arising out of the disposal by the Company of such logs."
>
> " 3. The said goods shall be delivered at Ambernath in the quantities and at the times hereinafter mentioned, i.e., " 4. The goods to be supplied under this Contract shall be despatched by the Contractor from Railway Stations on the B.N.R. and G.I.P.R. Sections between the following Stations :
>
> " 5. Measurements:-The goods under this contract shall be measured under the supervision of the Company's Factory Manager at Ambernath on arrival of the goods at the Factory in accordance with the following stipulations:-
>
> The Contractor agrees to... accept the decision of the Company's Factory Manager at Ambernath as final and binding."

The prices of the logs to be supplied are set out in cl. 6 of the contract as "F.O.R. Ambernath ".

We now pass on to the later contract of March 2, 1945. Clause 1 sets out the specifications of the logs to be supplied under the contract in exactly the same language as in el. I of the earlier contract. The other material clauses, again omitting the unnecessary portions, are as follows:-

> " 2. The contractor agrees that any logs supplied by him which, on arrival at Ambernath, are found in the opinion of the Company's Factory Manager not to conform with the specifications herein shall not be accepted or paid for by the Company, notwithstanding the fact that such logs may have been accepted by the Company's representatives before being railed to Ambernath."

It may be mentioned here that Ambernath is a place situate in the erstwhile province of Bombay and outside the Central Provinces.

> " 4. The goods to be supplied under this contract shall be despatched by the Contractor from railway stations on the B. N. Railway, N. S. Railway and G. 1. P. Railway sections between the following stations.
>
> It is unnecessary to set out the names of the stations which, it may, however, be stated, are all in the erstwhile Central Provinces. Clause 6 provides:
>
> "6. Measurements:-
>
> The goods under this contract shall be measured under the supervision of the Company's representative in accordance with the following stipulations:-
>
> The contractor agrees to accept the decision of the Company's Factory Manager at Ambernath as final and binding."

The prices of the logs to be supplied under the contract are specified as " F.O.R. Ambernath " in cl. 7 which concludes with the following sentence:

> " The money so due and payable shall be paid by the Company to the Contractor when the measurements of the goods have been completed under the supervision of the Company's representative."

Pursuant to the agreement between the respondent and WIMCO, the former loaded diverse quantities of Sawar logs on railway wagons and despatched the same by railway from Chanda or other railway stations in the Central Provinces to Ambernath in the erstwhile province of Bombay and outside the Central Provinces. It is not disputed that on many occasions the representative of WIMCO was present at the railway station when the logs were sorted out and loaded into the wagons. The statement of the case submitted along with the reference under s. 23(1) of the Act is silent on the point as to whether the railway receipts were made out with WIMCO as the consignee; but it is abundantly clear from the order of the Assistant Commissioner, Sales Tax, which is part of the record -and it has not been disputed before us- that " the railway receipt which is a document of title according to s. 2(4) of the Indian Sale of Goods Act is taken in the name of the consignee." The course of dealings between the parties also appears to be that, on arrival of the logs at Ambernath, the consignee buyer WIMCO, paid the railway freight and the logs were inspected and measured by WIMCO's Factory Manager and the prices, calculated at the agreed rates, were paid to the respondent's agent at Bombay. There is no doubt that the price of the logs supplied by the respondent to WIMCO under the agreement and accepted by the latter during the period in question amounted to Rs. 30,067- 9-0. The question for our decision is whether the respondent is liable to pay any sales tax under the Act.

It will be convenient at this stage to refer to the relevant provisions of law applicable to the facts of this case. Section 4 of that Act is the charging section. According to this section safes tax is payable " on all sales effected after the commencement of the Act." " Sale " is defined by s. 2(g) of the Act. At the relevant period, that section, omitting Explanation 1, which is not material for our purpose, ran

as follows:-

> " 'Sale' with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge. ..... Explanation II:-Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall, wherever the-said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar."

The Act being a piece of legislation enacted by the legislature of the erstwhile Province of Central Provinces and Berar, its operation is limited to the territories of that province. Therefore, the question arises: Does the sum of Rs. 30,067-9-0 represent the prices of logs sold by the respondent within the Central Provinces ? Sale being the transfer of property in the goods agreed to be sold, we have to enquire if the property in the goods which fetched the sale proceeds on which the sales tax is sought to be levied was transferred in the Central Provinces as contemplated in the main definition or if those goods were actually in the Central Provinces at the time when the contract for sale as defined in the Sale of Goods Act in respect thereof was made as required by Explanation II set out above. This takes us to the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act is expressed in the words following:-

> "4. Sale and agreement to sell:-(I) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional. (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." There can be no doubt that the agreement pursuant to which the logs were supplied by the respondent to WIMCO was an agreement to sell within the meaning of the above section. There is also no controversy between the parties that at the date when this agreement was entered into, the logs were unascertained goods. The question is: When did that agreement to sell unascertained goods become a sale and where did such sale take place ? In other words, when and where did the property in those goods pass from the respondent to WIMCO ?

The transfer of property in the goods as between the seller and buyer is dealt with in Ch. III of the Sale of Goods Act. Section 18 of the Sale of Goods Act runs thus :

> " 18. Goods must be ascertained:-Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

Passing over ss. 19 to 22 which (except as to sub-s. (3) of s. 19) apparently apply to contracts for the sale of specific or ascertained goods, we come to s. 23 which provides :-

> " 23. Sale of unascertained goods and appropriation :-(I) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (2) Delivery to carrier:-Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Reference may next be made to s. 33 and s. 39(1). Section 33 says:-

> " 33. Delivery :-Delivery of goods sold may be made by doing anything which the parties agreed shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf"

Section 39(1) runs as follows:-

> " 39. Delivery to carrier or wharfinger:-
>
> (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to wharfinger, for safe custody, is prima facie deemed to be delivery of the goods to the buyer."

Keeping the provisions of the above quoted sections of the two Acts in view, we have to decide when and where the property in the logs passed from the respondent to WIMCO. The Assistant Commissioner of Sales Tax assessed the respondent to -a tax of Rs. 939-10-0 and imposed on the respondent a penalty of Rs. 100 under s. 25 of the Act for not having submitted its return in contravention of r. 19 of the Central Provinces and Berar Sales Tax Rules. The Assistant

Commissioner took the view that the loading of the logs into the wagons at railway stations within the Central Provinces and the taking out of the railway receipts in the name of the consignee, WIMCO, and the delivery of the same to WIMCO, had the effect of putting the latter in pos- session of the goods as laid down in s. 39(1) of the Indian Sale of Goods Act and he accordingly held that the sale of the goods took place at Chanda and other railway stations in the Central Provinces and that the assessee was, consequently, liable to pay the sales tax under the Act. The respondent preferred an appeal to the Sales Tax Commissioner who upheld the Assistant Commissioner's order of assessment as well as of the penalty. He laid greater emphasis on Explanation II to s. 2(g) of the Act as over- riding the provisions of the Indian Sale of Goods Act in respect of the transfer of property in the logs and held that as the' logs were in the Central Provinces at the date when the contract for sale was made, the transfer in them must be deemed to have taken place there under that Explanation. He also agreed with the Assistant Commissioner that the delivery of the logs to the railway company and the sending of the documents of title to WIMCO had, under s. 39(1) of the Sale of Goods Act, the effect of putting WIMCO in possession of the logs.

The respondent preferred what in form appeared to be a second appeal to the Board of Revenue. As, however, there could be no second appeal under s. 22(4) of the Act, the Board treated the memorandum of appeal as an application for revision under sub-s. 5 of s. 22 of the Act read with r. 57. Both the members of the, Board of Revenue came to the same conclusion, namely, that the sales were liable to assessment under the Act, but the reasonings adopted by them were somewhat different. Shri Shrivastava, a member of the Board of Revenue, took the view that as soon as logs answering the description agreed upon were brought to the railhead at Chanda and sorted out and loaded in the wagons in the presence of WIMCO's re- presentatives, there was an implied contract of sale of specific and ascertained goods, as evidenced by the conduct of parties and the property in each consignment passed immediately from the respondent to WIMCO at the railway station in the Central Provinces where such implied contracts were made. The Chairman of the Board of Revenue, however, took the view that the contract of sale was made outside the Central Provinces, namely, in Bombay and that, under the Sale of Goods Act, the property in the logs passed to WIMCO in Ambernath outside the province but that as the logs were in the Central Provinces, either in the form of logs or in the form immediately preceding, namely, trees standing on the land which had been impliedly agreed to be severed from the land before actual sale, Explanation II to s. 2(g) of the Act applied and the sale must, accordingly,

-be deemed to have taken place within the Central Provinces and, must, therefore, be liable to sales tax under the Act. The Board rejected the application but remitted the penalty. On the application of the respondent under s. 23(1) of the Act, the Board of Revenue submitted to the High Court a statement of case raising the following questions:-

> " (1) Did the agreements of the kind on record the one dated 18-10-40 and the other dated 2-3-45constitute contracts of sale-either express or implied -in respect of sawar wood supplied by the assessee to WIMCO?
>
> (2) If the answer to question No. I be in the affirmative, did the contracts relate to specific or ascertained goods or to unascertained or future goods?

(3) Did the property in the goods pass to WIMCO by consignment simpliciter at different railway stations within this province, or did it pass at Ambernath when the goods were approved as provided in the contract ?

(4) Was reliance on the definition of I goods' contained in s. 2(7) of the Sale of Goods Act in order in applying Explanation II to s. 2(g) of the Sales Tax Act in cases, where the goods sold were in the form of trees standing on the land in this province at the time of the contract of sale?"

In its judgment dated June 29, 1954, the High Court took the view that the sales in question did not take place in the Central Provinces and Berar and consequently were not "

sales " within the meaning of the Act and, therefore, not liable to tax. It gave the following answers to the above questions:-

" Our answers to the questions referred for decision are :- (1) The agreement in question was an express agreement to sell sawar logs to WIMCO. There was neither an express nor an implied contract each time goods were railed. (2) The-contract was not for delivery of specific goods but of unascertained or future goods by description. (3) The property in the goods did not pass to the buyer by the delivery to the railway for carriage. It passed at Ambernath where the goods were appropriated by the buyer to the contract with the assent of the seller. (4) The word ' goods ' in the definition of I sale in the Sales Tax Act must be interpreted according to its definition in s. 2(d) of the Act and not according to the definition in s. 2(7) of the Sale of Goods Act. The standing sawar trees are not goods within the meaning of the former Act."

The effect of the answers being to nullify the assessment order, the Commissioner of Sales Tax has come up on appeal before us after obtaining special leave of this Court. The answers to the first two questions have not been questioned before us. The main arguments have centred round the answers to questions 3 and 4. The answer to question 3 turned on the construction placed by the High Court on s. 23 of the Sale of Goods Act. After quoting s. 23, the High Court observed as follows:-

" After sorting the logs with the assent of the buyer's representative, the applicant appropriated the logs to the contract by railing them to the buyer's destination at Ambernath. The statement of the case is silent on the point whether the railway receipts were made out with the Company as the consignee. The assent of the representative was provisional and was not binding on the Company. Under the agreement it did not agree to unconditionally appropriate the logs to the contract as soon as they were delivered to the railway with the assent of its representative for carriage to Ambernath. It had expressly reserved its right to reject the goods on examination at Ambernath. The agreement therefore was that the buyer should, with the assent of the seller, appropriate the goods to the contract at Ambernath. The appropriation under s. 23 was not complete till the goods reached Ambernath and were appropriated by the Company to the contract. The appropriation of the goods by

> the applicant at the railheads was conditional on their acceptance by the buyer at Ambernath. There is nothing in the statement of the case to show that the logs were not so appropriated. Therefore, the property in the logs passed to the buyer at Amber nath."

The learned counsel for the department appearing in support of this appeal contends that property in the logs passed from the respondents to WIMCO under s. 23 when sawar logs were brought to the railway station and loaded in the wagon and the railway receipts taken in the name of WIMCO were forwarded to the latter. There was an unconditional appropriation of the goods to the contract by the respondent. There was, according to learned counsel, assent on the part of WIMCO to this appropriation in two ways, namely, (a) expressly given by its representative who was present at the railway station, and (b) impliedly given by WIMCO by having agreed in advance that the goods should be despatched by rail from the stations mentioned in cl. 4 of the agreement, all of which were situate in the Central Provinces.

There is no doubt-and indeed it has been categorically conceded by learned counsel for the department -that the contract was for sale of unascertained goods and consequently the property in them could not, under s. 18, pass unless and until the goods were ascertained. His contention is that logs of the contract quality and description having been unconditionally appropriated by the respondent to the contract without reserving to itself any right of disposal and WIMCO having expressly through its representative or impliedly by the very terms of the contract assented to such appropriation, property in them passed under s. 23 from the respondent to WIMCO at the railway stations within the Central Provinces as soon as the sawar logs were loaded on the wagons and the railway receipts were taken out in the name of WIMCO. It is said that so far as the respondent is concerned it unconditionally appropriated the logs to the contract. Seeing that they were actually accepted by WIMCO on their arrival at Ambernath it is quite clear that the logs were of the contract quality and description. The only question, according to learned counsel for the department therefore, is whether there was assent of WIMCO to such appropriation. It has been found as a fact that WIMCO's representative was not present on all occasions when sawar logs used to be loaded on the railway wagons. There is no evidence that he was actually present when these particular sawar logs, with the sale proceeds of which we are concerned, were put into the wagons. Nor is there an iota of evidence that the representative of WIMCO had any authority to. bind WIMCO by any assent. In view of these difficulties, learned counsel for the department did not press the case of express assent of the representative of WIMCO and concentrated on the case of implied assent. It is quite clear from the language of s. 23 itself, that the appropriation may be by the seller with the assent of the buyer or by the buyer with the assent of the seller, that assent to representation may be express or implied and that it may be given after the appropriation or in advance before such appropriation. Learned counsel for the department lays strong emphasis on the provision of cl. 4 in the contract that the sawar logs should be despatched by rail from certain stations within the Central Provinces and contends that delivery by the seller of sawar logs of the contract quality and description to the railways in terms of the contract without the reservation of any right of disposal has the effect of passing the property therein to WIMCO at the railway stations in the Central Provinces under s. 23 as well as of constituting delivery of them at the railway stations under ss. 33 and 39(1). The argument is prima facie sound unless there be some other provision in the contract to negative this

conclusion, e. g., that the logs must be carried to Ambernath and delivered there (See The Badische Anilin and Soda Fabrik v. The Basle Chemical Works, Bindschedler (1)). Learned counsel for the department does not urge that if the matter had to be decided on the terms of the earlier contract dated October 18, 1940, he could properly say that there was nothing in the contract negativing the idea of the passing of property in the logs within the Central Provinces. The cumulative effect of the provisions of el. 2 that the property in the rejected logs would' pass to WIMCO upon the failure of the respondent to remove the same after rejection, of el. 3 that the goods shall be delivered at Ambernath in the presence of WIMCO's Factory Manager and of el. 6 providing that the prices will be " F.O.R. Ambernath "

> clearly militate against the theory of passing of property immediately on the goods being loaded into the wagons. While not contesting this, learned counsel for the department urges that there is no such contrary intention indicated in the later contract of March 2, 1945, which really governs the case. We are unable-to accept this distinction as of any substance. It is true that in this later contract cl. 2 is differently worded and there is no express provision that the goods should be delivered at Ambernath. There are, nevertheless, several other provisions in the later contract indicating that property in the logs loaded in the wagon will not pass to WIMCO until after the goods arrive at Ambernath and are inspected, measured and accepted by WIMCO's Factory Manager. Clause 2 of the later contract quite clearly reserves the right of WIMCO to examine the goods on arrival and to reject the same if they are found, in the opinion of its Factory Manager, not to (1) [1898] A.C. 200, conform with the specifications. This reservation, which is made notwithstanding the fact that the logs may have been accepted by its representative before they were railed to Ambernath, clearly indicates that the so called acceptance by the representative was not final but was entirely tentative and subject to approval of the logs by WIMCO's Factory Manager at Ambernath after their arrival. This circumstance certainly militates against the property in them having already 'passed to WIMCO at the railway stations in the Central Provinces. The provisions of cl. 6 that the goods shall be measured under the supervision of WIMCO's representative, the decision of its Factory Manager at Ambernath being binding on the respondent and of el. 7 that the prices shall be " F.O.R. Ambernath " and shall be payable after such measurement of the logs by WIMCO's representative further reinforce the conclusion that the intention of the parties was that property in the goods shall not pass until the logs arrive at Ambernath and are there inspected, measured and accepted by WIMCO. In our judgment the prima facie case of what might have been the appropriation of the logs by the respondent by loading on the wagons logs of the contract quality and description with the assent of WIMCO given in .advance by the terms of el. 4 is effectively displaced by the provisions of cls. 2, 6 and 7 of the later contract which clearly indicate a contrary intention. On a proper construction of the contract as a whole the intention of the parties clearly was that the respondent would send the logs by rail from the different stations in the Central Provinces to Ambernath where WIMCO's Factory Manager would inspect, measure and accept the same if in his opinion they were of the description and quality agreed upon. In other words the

respondent sent the logs and left it to WIMCO to appropriate to the contract such of them as they accepted as of contract quality and description. The respondent, therefore, gave in advance its assent to WIMCO's appropriation of the goods at Ambernath.

Therefore, the decision of the High Court cannot be assailed but must be accepted as well-founded in fact and in law. Learned counsel for the department then falls back upon the Argument founded on Explanation- II to s. 2(g) and 'argues, somewhat halfheartedly, that notwithstanding the provisions of the Sale of Goods Act regarding the passing of property in the goods the sale under consideration must be deemed, in the light of that Explanation, to have taken place within the Central Provinces. The question of the constitutional validity of that Explanation was not raised in the High Court and indeed, in view of the decision of this Court in Poppatlal Shah v. State of Madras (1) and other' cases, cannot now be raised and we must proceed on the footing that Explanation 11 did not transgress the legislative competency of the Legislature which enacted the same. It will be noticed that Explanation II can apply only if the goods " in respect of " which the contract of sale is entered into are, at the date of such contract, actually in the Central Provinces. Learned counsel for the department urges that the logs delivered must have been in existence in the Central Provinces either in the shape of ';logs or in the shape of standing timber. There is no evidence that at the date when the agreement for sale was made, the particular logs delivered thereunder were in the Central Provinces in the shape of logs at all. Learned counsel says that, at any rate, they must have been in existence there in the shape of standing timber. Apart from anything else,, the agreement here was riot " in respect of " any standing timber and there was no provision in the agreement as between the respondent and WIMCO for severance of the standing timber before sale under that agreement. In order to attract Explanation II the goods, in respect of which the contract of sale is made, must, at the date of the contract be in existence in the Central Provinces, that is to say, that the goods must at the date of the contract be there in the form in which they are agreed to be sold. There is not an iota of evidence on that point. In our judgment, there is no force in this alternative argument.

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed.

(1) [1953] S.C.R. 677.