# Firm Raghubar Dayal Kallu Mal vs State Of U.P., Lucknow And Ors. on 29 July, 1955

## Equivalent citations: AIR1955ALL653, AIR 1955 ALLAHABAD 653

ORDER

Chowdhry, J.

1. These are seven petitions under Article 226 of the Constitution by as many firms carrying on business as wholesale dealers in cloth in Bareilly in the State of Uttar Pradesh against the State, the Sales Tax Commissioner U. P. and the Sales Tax Officer Bareilly, impugning orders of assessment of sales tax passed against them respectively by the Sales Tax Officer Bareilly.

2. This judgment will govern all the seven writ petitions as the grounds on which the orders in question were passed, and those on which those orders are being challenged by the petitioners, are identical.

3. The relevant provisions of the U. P. Sales Tax Act (15 of 1948) hereinafter referred to as the Act, which came into force on 1-4-1948 and was passed by the Provincial Legislature by virtue of the power vested in it under Section 100(3), read with Entry 48 in List II, Schedule 7, Government of India! Act, 1935, may he set forth to begin with. The corresponding power is now conferred on the State Legislature by Article 246(3), read with Entry 54 of List II, Schedule 7 of the Constitution.

In accord with Section 99(1), Government of India Act, corresponding with Article 245(1) of the Constitution, the Preamble of the Act shows that -it provides for the levy o£ tax on the sale of goods in the U. P. Section 2(h) defines 'sale' as transfer of property in goods for valuable consideration and Explanations II and IV lay down what sales may be deemed to have taken place in the State of U. P., the former acting on the pre-constitution principle of territorial nexus and the latter (added by Act 18 of 1953) incorporating the legal fiction contained in the Explanation to Clause (1) of Article 286 of the Constitution.

Incidentally, Section 27, which incorporates the provisions of Clauses (1) and (2) of Article 286 as to restrictions on the taxing power of a State in relation to Sales involving inter-state elements, was added to the Act by the Adaptation of Laws Order, 1950, as amended by the Adaptation of Laws (Third Amendment) Order, 1951, published at p. 129 of Part II of the U. P. Gazette of 5-5-1951. Goods may be divided into three categories as those exempt from taxation (Section 4 and the first proviso to the definition of turnover), those liable to multiple point taxation (Section 3) and those liable to taxation at a single point in the series of sales by successive dealers (Section 3A).

The charging Sections 3 and 3A fix, subject to variation,, the taxable turnover on the aggregate of the proceeds of sale of a dealer (Section 21) and the rate of tax and make the dealer, defined in Section 2(c) as a person or association of persons carrying on personally or through an agent, the business of buying or selling goods in U. P., liable for the same. The dealer has to submit returns in Form IV quarterly or yearly according as he elects the assessment year (Rules 39 and 41(1)) or the previous year (Rule 40 and Section 7(1)) as the basis of assessment.

In the former case there is a single and final assessment and in the latter a provisional, or to-

the best of his judgment, assessment by the Sales Tax Officer, followed by a final assessment, in case the dealer fails to submit the return or submits it without depositing the tax payable on the turnover shown in his return (Rule 41(3)). If a dealer wishes to recover from his customers the sales, tax realised from him, he has to get himself registered under Section 8A of the Act.

The petitioners are such registered dealers. The assessment is subject to appeal (Section 9) and revision Section 10). Under Section 24 the State Government has the power to make Rules to carry out the purposes of the Act.

4. In exercise of the powers conferred by Section 3-A of the Act the State Government declared by Notification No. ST-117/X-923, dated 8-6-1948, that with effect from 9-6-1948, proceeds of sale of goods entered in column 2 of the Schedule appended to the notification shall not be included in the turnover of any dealer except at the point in the series of sales by successive dealers mentioned in column 4 under the circumstances shown in column 3 of the Schedule, and that the rate of tax in respect of the turnover of the aforesaid goods shall be as entered in column 5.

Turnover in respect of mill-made cloth imported from outside U. P., with which the present cases are concerned, is liable to tax at six pies per rupee at the point of sale by the importer. The U. P. Sales Tax Rules, framed by the State Government under Section 24 of the Act, define importer, as respects goods imported into Uttar Pradesh from any other State of India, as meaning "(a) in a case where the goods are not imported for the purpose of re-sale in the same condition as they were imported by the person who imported them, the dealer in such other State, who made the sale as a direct result of which the goods are imported into Uttar Pradesh :

> (b) in a case where the goods are imported for the purpose of re-sale in the same condition as they were imported by the person who imported them, the dealer who makes the first sale after the sale as a direct result of which the goods were imported into Uttar Pradesh; and
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> (c) in a case where the goods are imported into Uttar Pradesh otherwise than as a direct result of a sale, the dealer Who makes the first sale after such import."

5. The Constitution guarantees freedom of trade, commerce and intercourse throughout the territory of India (Article 301), but that is subject to the power of a State Legislature to tax goods imported from other States or impose such reasonable restrictions on the said freedom as may be

required in the public interest (Article 304). This taxing power of a State is in its turn subject to the restrictions (I) that it shall be non-discriminatory (Article 304(a)(2) that it shall not exceed the territorial jurisdiction conferred on it by Article 245(1) by Imposing; or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State (Article 286(1)(a)), and (3) that it shall not exceed the subject-matter jurisdiction prescribed by Article 246 by taxing sales that take place in the course either of import and export of goods or of inter-State commerce or trade (Article 286(1)(b) and (2)), both of these being Union' subjects (Entries 83 and 42 of List I of Schedule 7 of the Constitution).

Any tax on sale or purchase of goods which fails to steer clear of these restrictions will there fore be ultra vires the State Legislature.

6. Coming now to the facts of the present cases, the affidavits and rejoinder-affidavits filed by the petitioners and the counter-affidavit filed by the Sales Tax Officer, Bareilly show that it is common ground between the parties that the petitioners are dealers as defined in the Act; that the cloth the sale of which was the subject of the impugned taxation was mill-made cloth purchased by the petitioners from outside U. P., the modus operandi being that the sellers outside U. P. were both the con signers and the consignees in the railway, receipts under which the goods were imported within the State of U. P. by rail, deliveries from the railway were taken by the petitioners' on the railway receipts being endorsed in their favour by the said sellers or by their banks in Bareilly, and prices were paid by' the petitioners to the sellers in the former case directly and in the latter through the banks; and that the cloth thus purchased by the petitioners was then 'sold by them in the same condition to other dealers in U. P., but not to consumers.

7. Cause of action arose to the petitioners in the following circumstances. Being of the view that turnover in respect of mill-made cloth imported from outside U. P. was not liable to assessment to sales tax, the petitioners thought that they were under no obligation to realise, and they did not in fact realise, any sales tax, and they submitted, on being required to do so, their returns in Form IV under protest to the Sales Tax Officer, Bareilly, for the two quarters ending June 30 and September 30, 1954, declaring their turnovers for the said quarters but without making in either case deposits in the treasury of the amounts of tax due on the said, turnovers.

Overruling the objections of the petitioners, the Sales Tax Officer held them by orders dated 8-11-1954, liable to pay the tax as. 'importers' and, determining their turnover for the said quarters to the best of his judgment at certain enhanced figures, he provisionally assessed them to various amounts of tax on those figures and served them with notices of demand and with notices calling upon them to appear for final assessment.

The petitioners waited on 18-11-1954, in deputation of the Sales Tax Officer for a clarification of the situation arising out of what they describe as an unwarranted and illegal assessment, but without avail. They then petitioned the Commissioner of Sales Tax U. P. for setting aside the provisional assessments and for stay or realisation of the tax. By an order dated 22-11-1954, the Commissioned informed the petitioners that if they filed affidavits declaring the sales of ex-U. P. cloth for the quarters an question and deposited the tax due in full on or before 21-12-1954, realisation of the

excess tax if any, assessed for the said periods would be stayed pending final assessment.

8. On 15-12-1954, the present petitions were filed impugning the impost on a number of grounds, complaining that the fundamental right of carrying on trade or business guaranteed to the petitioners by Article 19(1)(g) of the Constitution bad in consequence been infringed, and praying that it be declared that the U. P. Sales Tax Act is ultra vires the State Legislature, that a writ of certiorari be issued quashing the order dated 8-11-1954, passed by the Sales Tax Officer, Bareilly, that a writ of prohibition be issued ordering the Sales Tax Officer not to tax the petitioners with sales tax on cloth obtained by them from states outside U. P., that a writ of mandamus be issued ordering the Sales Tax Officer or any other officer of the State of U. P. not to realise the tax imposed on the petitioners, and that an ad interim order be passed staying realisation of the tax.

On the same date ad interim orders' were issued staying realisation of the tax imposed on the petitioners and the taking of any further proceeding of assessment against them.

9. In the Sales Tax Officer's counter-affidavit the assessment orders have been justified as legal and valid, and it has been objected that the petitioners had not adopted the normal course of obtaining relief by filing appeals under Section 9 of the Act. This objection was not pressed in the form in which it has been pleaded, and rightly, in view of its being well-established that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the Court, as in the present case, with, an allegation that his fundamental right had been infringed and sought relief under Article 226. -- 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 (A) and --'Himmat Lal v. State of M. P.', AIR 1954 SC 403 (B).

It may be added that infringement of fundamental fights has not been alleged by the petitioners in these cases merely to get their petitions under Article 226 admitted. There is no doubt that the various p leas on which the validity of assessment orders as been challenged have been found to be untenable, but the tenability or untenability of those pleas was a matter of considerable controversy, as will presently appear, and so could not have been, foreseen.

These are not, therefore, cases of the petitioners having merely come to the court with allegations of their fundamental right having been infringed but of their having done so in the bona fide belief of their allegations being well-founded. The aforesaid objection, as pleaded, has therefore no force. (10) The form in which the said objection was argued on behalf of the opposite parties was that if the decision of the writ petitions depended on any question of fact, as, for example, whether the cloth in question was delivered in this State or sold by the petitioners for consumption, and that question of fact was not capable of being determined on mere affidavits, the writ petition should be dismissed on that ground alone.

Any such controversial question of fact either does not arise in these cases, or it need not be decided by this Court for the disposal of these petitions, as will be shown at its proper place.

11. There are quite a number of grounds on which the petitioners pray for the aforesaid reliefs, but the only ones pressed in argument were (1) that the petitioners are not importers as defined in the U. P. Sales Tax Rules; (2) that even if they be importers the definition of that term, is illegal and inoperative (a) as it is ultra vires the Rule-making power of the State Government and (b) as it amounts to delegation of legislation outside permissible limits; and (3) that the Act or the Rules, in so far as they permitted assessment of the sales in question, are ultra vires the State Legislature since the assessment is in conflict with the provisions of Article 286 of the Constitution. None of these grounds, however, has any force.

12. Taking the first ground, the question is whether the petitioners are importers within the definition of that term in Rule 2(d-l), U. P. Sales Tax Rules. The definition has already been reproduced, and it shows that the term importer has been defined in three senses in Clauses (a), (b) and (c) of the Rule. It being common ground that the goods in question were imported for the purpose of re-sale in the same condition in which they were imported, Clause (a) has no application since it applies to the case where the goods are not imported for the purpose of re-sale in the same condition as they were Imported.

Clauses (b) and (c) both apply to cases where goods are imported in Uttar Pradesh, but whereas the former applies to the case where the import takes place as a direct result of sale, the latter applies to the case where the import is otherwise than as a direct result of' a sale. It was pleaded in the counter-affidavit of the Sales Tax Officer, filed on behalf of the opposite parties, that the cloth in question was imported in U. P. as a direct result of sale.

This was traversed in the rejoinder affidavit of the petitioners and their learned counsel sought to find support for the contention that the cloth was imported into U. P. otherwise than 'as a direct result of sale from the fact that in the railway receipts the consignor and consignee of the cloth was the dealer residing outside U. P. Now it has been seen that admittedly the railway receipts were either sent by the outside dealer endorsed in favour of the petitioners, in which case the petitioners remitted the price direct to the outside dealer, or they were endorsed in favour of a Bareilly bank and the latter re-endorsed them in favour of the petitioners, in which case the price was paid by the petitioners to the bank.

The two procedures are indicative of the two ways which the outside dealer adopted for realising the price of cloth sold by him to the petitioners, one directly and the other through his bank. But in either case the cloth was imported into U. P. as a direct result of sale.

This was patently so in the case's where the outside dealer sent the railway receipts already endorsed in favour of the petitioners, for in these cases, irrespective of the fact that the price was payable in future, the despatch of cloth was attributable to one and only one fact, namely, that the status of the outside dealer as seller and that of the petitioners as purchasers had already been determined. In other words, the goods in question were being imported into U. P. as a direct result of sale and clause' (b) is clearly applicable in respect of these goods. Import of cloth into U. P. in the other case in which the railway receipt was first endorsed by the outside dealer in favour of a Bareilly bank and again by the bank in favour of the petitioners, is attributable to no different cause.

The petitioners have not cleared it in their affidavits as to why such a procedure was adopted in some cases. It has not been clarified, that is to say, whether in these cases the status of the petitioners as purchasers of those goods had not been determined before their despatch, or at any rate by the time of the entry of the goods into U. P. If it has been, import of these goods would also be as a direct result of sale. If not, it was for the petitioners to have said so, and the fact cannot be presumed in their favour. That being so, the petitioners are not entitled to take their stand on Clause (c), which applies to cases of import of goods otherwise than as a direct result of sale.

13. On the other hand, there are good reasons for holding that Clause (b) applies even in those cases where railway receipts were first endorsed to the bank and then by the bank to the petitioners. Even in these cases property in the goods admittedly passed as a result of sale and not of any contract of a different nature, e.g., gift. It may be that the sale took place after the goods had been imported into U. P., but that would be immaterial.

What Clause (b) requires is that goods, are imported as a direct result of sale. It does hot say anything as to when or where the sale should take place. Nor indeed would that be material provided only it could be said that import was occasioned by sale, irrespective of whether the sale was an already completed, or an, expected transaction.

The Act and the Rules are concerned only with sales, and all that the clause therefore requires is that the motive force behind the import should be none other than sale, the stage at which the sale takes place being immaterial. True, the clause speaks of the import being "as a direct result of sale", but that would still be so if the outside dealer despatches the goods in the expectation of being able to sell them and that expectation is eventually realised. In the present cases, there is no room for the supposition that cloth was sent into U. P. for any other purpose than sale.

If this be not the interpretation put upon the said words in Clause (b), it would be possible to circumvent the provisions of the Explanation to Article 286(1)(9) of the Constitution (to be referred to presently) where also the same words have been used.

14. The question would naturally arise as to what would be an import as an indirect, or non-indirect, result of sale. The answer should obviously be an import between which and. the sale there has intervened some other, motive force as the cause for the import. Suppose A in U. P. purchases goods from B in Bombay and the goods are as a result imported into U. P. That would be a case of import into U. P. as a direct result of sale.

But suppose A in U. P. purchases goods from B in Bombay for C in some place outside U. P., but before A is able to present the goods to C the goods are attached in execution of a decree against A and brought into U. P. In this case import of the goods into U. P. is as a direct result of attachment and only as an indirect result of sale. It should therefore be held that both where railway receipts were sent directly by the dealer outside U. P. endorsed in favour of the petitioners and where they were first endorsed by the outside dealer in favour of his bank in Bareilly and subsequently by the bank in favour of the petitioners, the import of cloth into U. P. was as a direct result of sale, and that the present cases are in consequence governed by Clause (b) of the definition of 'importer'.

15. Having found that the present cases are governed by Clause (b) the essential ingredients of that clause may now be examined in order to find whether the petitioners are importers. The essential ingredients of the clauses are :

1. that the goods are imported into U. P. as a direct result of sale,

2. that the goods are imported for the purpose of re-sale,

3. that the re-sale is to be

(a) in the same condition in which they were imported, and

(b) by the person who imported them, and

4. that, if these conditions are satisfied, the importer would be the dealer who makes the first sale after the sale, referred to in No. (1) above, as a direct result of which the goods were imported into U. P. That the first condition is satisfied has already been found. It is admitted, as adverted to above, when stating facts that are common ground between the parties, that the mill-made cloth in question was re-sold in the same condition in which it was im ported. The second condition and part (a) of the third condition also therefore stand satisfied. As regards part (b) of the third condition, it is necessary that the resale must be by the person, who imported, the goods.

The use of the word 're-sale' denotes that a sale had already taken place, and since the re-sale has to be by die person who imported the goods, that sale should necessarily been in favour of the importer. The person in whose favour the sale has been made and who makes the re-sale is therefore one and the same person, and he is the person who imported the goods.

It has been seen, when discussing the question of whether the cloth in question was imported into U. P. as a direct result of sale, that the seller of the cloth was the dealer outside U. P. and the purchasers the petitioners. It follows therefore that the petitioners are the persons in whose favour the sale was made. They are also the persons who made the re-sales, and they would be the persons who imported the cloth.

The first three conditions therefore stand satisfied. That being so, the dealers who made the first sales after the sales as a direct result of which the cloth was imported into U, P. would, under the fourth condition above, be the petitioners. It has also been seen that the petitioners are dealers as defined in the Act. They are therefore importers within the definition of that term in Clause (b) of Rule 2(d-l), U. P. Sales Tax Rules.

16. Before coming to the next point there is a piece of argument put forward on behalf of the petitioners which has to be dealt with. The argument was that the railway receipt being first endorsed in favour of the bank and then again by the bank in favour of the petitioners, it is the bank

as agent of dealer outside U. P. which is liable to be taxed under the third proviso to the definition of turnover.

Now, under the Explanation to the definition of dealer in Section 2(c) of the Act, the agent of a person resident outside U. P. is the person who carries on the business of buying and selling goods in U. P. on behalf of such a person, and he shall in respect of such business, be deemed to be a dealer for the purposes of the Act. Carrying on the business of buying or selling in U. P. on behalf of the person resident outside U. P. is therefore an essential condition of the particular kind of agent who is to be treated as a dealer under the Act.

That being so, if the person carries on some business other than that of buying or selling on behalf of the person resident outside U. P., he will not be this particular kind of agent and will not therefore be a dealer who could be taxed under the provisions of the Act. Now, it is not contended on behalf of the petitioners that the Bareilly bank carries on the business of buying or selling on behalf of the dealer outside U. P. All that the bank does is to perform its business as such, namely, the business of collecting the price of the goods.

Moreover, the two endorsements do not amount to sale and re-sale within the intendment of clause (b) of the definition of importer, but only a procedure for taking delivery of the goods from the railway. The dealer who is therefore liable to be taxed as importer, as defined in the Act, is not the bank in question but each of the present petitioners. The first point is accordingly decided against the petitioners.

17. The next question is whether the definition of importer is ultra vires the Rule-making power of the State Legislature. In other words, has that definition been framed by assumption or powers in excess of those conferred by the Act? Now, the definition, along with the other Rules, has been framed by the State Government in exercise of the Rule-making authority conferred on it by Section 24 of the Act, which runs as follows :

> "POWER TO MAKE RULES: 1. The Provincial Government may make Rules to carry out the purposes of this Act.
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> 2. In particular and without prejudice to the generality of the foregoing power, such Rules may provide for
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> (a) all matters expressly required or allowed by this Act to be prescribed;
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> (b) the licensing of persons engaged in the sale of goods and the imposing of conditions in respect of the same for the purpose of enforcing the provisions of this Act and fees for licenses;
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> (c) the determination of turnover for the purpose of assessment of tax "under this Act;

(d) compelling the submission of returns and the production of documents and enforcing the attendance of persons and examining them on oath or affirmation;

(e) the appointment, duties and powers of officers appointed for the purpose of enforcing the provisions of this Act; and

(f) generally regulating the procedure to be followed and the forms to be adopted' in proceedings under this Act.

3. The power to make Rules conferred by this section shall be subject to the condition of the' Rules being made after previous publication for a period of not less than four weeks.

4. All Rules made under this section shall be published in the Gazette, and upon such publication shall have effect immediately as if enacted in this Act.

5. All Rules made under this Act shall be laid for not less than seven days before the Legislature as soon as possible after they are made and shall the subject to such modifications as the Legislature may make during the session in which they were so laid."

Now Section 3-A empowers the State Government to select the goods which shall be subject to single point taxation and to fix the single point in the series of sales by successive dealers at which the turnover in respect of those goods is to be liable to tax. The State Government has carried out that purpose by promulgating the aforesaid notification dated 8-6-1948, and framing the definition of importer.

The particular purpose served by the definition of importer is to fix the particular point in the series of sales by successive dealers at which the turnover is to be taxed. That definition therefore not only "carries out the purpose of the Act" under the general power contemplated by Clause (1) of Section 24, but under the specific provisions of Clause (2)(a) of that section it provides for a matter expressly required or allowed by the Act to be prescribed, viz., the matter referred to in Section 3-A. The definition is therefore intra vires the Rule-making power of the State Government.

18. Nor is there any force in the next contention of the petitioners, namely, that the defining of importer by the State Government amounts to delegated legislation. Now there is no doubt that by reason of the State Legislature not having itself the single point of taxation under Section 3-A but left it to be done by the State Government under its Rule-making power, there has been delegation of powers by what is called subordinate legislation.

But due both to the complexity and immensity of the present day legislative function subordinate legislation has become inevitable. Such delegation is permissible so long as the Legislature does not efface itself by setting up a parallel legislative authority and transferring to it the essential legislative function of determining what the law shall be, but confines the delegation to entrustment of, the

duty of filling in matters of detail.

Both the principles underlying delegation and the necessity for the same have been enunciated as follows in the American case of -- Mutual Film Corporation v. Industrial Commission', (1915) 236 US 230 (at p. 245) (C).

> "Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases: but an administrative body may be invested with the power to Ascertain the facts and conditions to which the policy and principles apply. If this could not be done, there would be infinite confusion in the laws, and in an effort to detail and to particularise, they would miss sufficiency both in provision and execution."

19. Their Lordships of our Supreme Court are of the same opinion as regards the limits within which legislative power may legitimately be delegated. It is laid down in -- 'Hari Shankar Bagla v. State of M. p.', AIR .1954 SC 465 at p. 468 (D), as follows :

> "It was settled by the majority judgment in Article 143, Constitution of India and Delhi Laws Act (1912) etc., In re, AIR 1951 SC 332 (E), that essential powers of legislation cannot be delegated. In other words, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a Rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.
>
> The essential legislative function consists in determination or choice of the legislative policy and of formally enacting that policy into a binding Rule of conduct."

20. Applying the above principles to the pre sent cases, the Legislature has fixed the legal principle and laid down the policy under Section 3-A that certain goods may be subjected to only single point taxation in the series of successive sales by dealers in U. P. That principle is clear and is a sufficient enunciation of the legislative policy. In requiring the State Government to fix the particular point in the series of successive sales where the tax is to be imposed the State Legislature has only dele gated the working out of a mere matter of detail of the said policy.

It must, in the result, be held that the definition of importer in the U. P. Sales Tax Rules is not illegal or inoperative by reason either of its being ultra vires the Rule-making power of the, State Legislature or of its amounting to delegation of legislative power outside permissible limits.

21. It now remains to see whether the assessment is in contravention of the provisions of Article 286 of the Constitution. Now, where sale or purchase of goods is purely local in the sense of being intra State, e.g., where they are sold and consumed in the very State where they are manufactured, no difficulty arises. In such a case if that State makes laws for taxing the sale it acts within the bounds of the Constitutional limitations imposed by Article 245 of the Constitution.

The difficulty only arises where commerce becomes inter-State, viz., when it involves more States than one. The goods may be manufactured in one State but sold from State to State. Which State is in such a case to impose, or authorise the imposition of, a tax on sale or purchase without infringing the constitutional limitations? The answer to this question, so far as our Constitution is concerned, is supplied by Article, 286.

It prohibits taxation on sale or purchase of goods by a State where such sale or purchase takes place (1) outside the State, or (2) in the course of the import or export of goods, or (3) in the course of inter-State trade or commerce (except in so far as Parliament may by law otherwise provide). Should the State act otherwise, Article 245 would be contravened in the first case and Article 246 in the other two cases.

The only way for a State to steer clear of these prohibitions would therefore be to tax only those sales or purchases of goods which take place inside that State. Now in order to denote what a sale or purchase outside the State would be within the prohibition contained in Article 286(1)(a), the Explanation appended to Clause (1) of that Article lays down when a sale or purchase should be deemed to have taken place inside a State. As laid down in 'AIR 1953 SC 252 at p. 257 (A)'.

> "It (the Explanation) provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. ... The test of sufficient territorial nexus was thus replaced by a simpler and more workable test: Are the goods actually delivered in the taxing State, as a direct result of a sale of purchase, for the purpose of consumption therein? Then, such sale, or purchase shall, be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

22. It has therefore to be seen whether the sales in question which have, been taxed could be deemed to be sales which had taken, place in the State of U. P. within the four corners of the aforesaid Explanation. That will depend upon the answer to the question : Were the goods actually delivered in U. P. as a direct result of sale or purchase for the purpose of consumption therein? Now in dealing with the question of whether the petitioners were importers within the definition of that term in the U. P. Sales Tax Rules it has been seen that the cloth in question was actually delivered in the State of U. P. as a direct result of sale to, or purchase by, the petitioners.

The only question that remains is whether delivery of cloth in U. P. was made for the purpose of its consumption therein. The argument advanced by the learned counsel for the petitioners in this connection was a two-fold one, namely, firstly, that the Sales Tax Officer had imposed the tax without deciding this point and, secondly, that so far as the present petitions are concerned, the petitioners have proved it unrebuttedly that the delivery of the cloth in question in this State was not for the purpose of consumption therein.

23. So far as the first of these two contentions goes, the argument was that Rule 41 (3) of the U. P. Sales Tax Rules imposes upon the Sales Tax Officer the duty of determining the turnover to the best of his judgment after making such inquiry as he considers necessary; that the orders dated 8-11-1954 passed by the Sales Tax Officer, Bareilly, showed that the only point decided by him was that the petitioners were importers; and that therefore he had not decided, the question" of delivery of cloth in this State for the purpose of consumption therein.

And in this connection it was pleaded, on the authority of -- 'Sakhigopal Cocoanut Growers Co-operative Society v. State of Orissa', AIR 1953 Orissa 334 (F), that it was for the State to show that the deliver took place in U. P. for the purpose of consumption therein. So far as the second contention goes, it was contended that although this plea was specifically taken as ground No. 12, and although it was specifically averred in para 7 of the petitioners' affidavits that the petitioners never sell any cloth to consumers, there was no attempt at a rebuttal of this averment in the counter-affidavits filed on behalf of the respondents.

24. The learned counsel appearing for the State met the above contentions by arguing that the matter was irrelevant, and that, if it was relevant, it should be presumed that the delivery was for consumption in U. P. Before taking up the contentions put forward on behalf of the petitioners, it may be said at once that the arguments advanced by the learned counsel for the State are not tenable.

So far as the first point is concerned, his argument was that the question of delivery of goods for consumption in a State may be relevant for purposes of Article 286(1)(a), but it is quite irrelevant in a case, like the present, where the sale is clearly in U. P. That is, however, only begging the question. The sale cannot be clearly in U. P. unless, as adverted to above, it be a sale of the description contemplated by the Explanation to Clause (1) of Article 286.

If it is not a sale of that description, it cannot be deemed, for purposes of that Article, to be a sale within the State, irrespective of where actually under the general law relating to sale of goods property in the goods may have passed. A similar, argument was advanced before their Lordships of the Supreme Court in the above cited case of AIR 1953 SC 252 (A). The argument was repelled as follows at p, 257, para 13 :

> "On the other hand, the non-obstante clause in the Explanation is said to indicate that apart from cases covered by the legal fiction, the passing of property in the goods is" to determine the place of sale. Thus, both the State of delivery and the State in which the property in the goods sold passes are, it is claimed, empowered to tax. We are unable to accept this view.
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> It is really not necessary in the context to use the word "only" in the way suggested, for when the Explanation says that a sale or purchase shall be deemed to have taken place in a particular State, it follows that it shall be deemed also to have taken place outside the other State. Nor can the non-obstante clause be understood as implying that, under the general law relating to the sale of goods, the passing of the property in

the goods is the determining factor in locating a sale or purchase.

Neither the sale of goods Act nor the common law relating to the sale of goods has anything to say as to what the situs of a sale is, though certain Rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer. That question often raises ticklish problems for lawyers and Courts, and to make the passing of title the determining factor in the location of a case or purchase would be to replace old uncertainties and difficulties connected with the nexus basis with new ones.

Nor would the hardship of multiple taxation be obviated if two States were still free to impose tax on the same transaction. In our opinion, the non-obstante clause was inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it was immaterial where the property in the goods passed, as it might otherwise be regarded as indicative of the place of sale."

So far as the other argument of the learned counsel for the State based on presumption is concerned, it appeared to be based on the circumstance that the sales in question were made by dealers as defined in the Act, viz., by persons carrying on the business of buying and, selling of goods in U. P., after the cloth had been imported into U. P. as a direct result of sale. The implication, in other words, was that the sale in favour of the petitioners by the dealers outside the State acted, so to say, as a buffer which deadened the inter-State character of the transaction, so that whatever sales took place thereafter should be deemed to be sales within the State.

Now, this argument overlooks the fact that the re-sales by the aforesaid U. P. dealers might possibly not have been made for the purpose of consumption in this but in some other State. In the latter case, it will, as adverted to above, be that other State, and not the State of U. P., which will be entitled under the provisions of Article 286 to treat the sales as sales taking place, within its territorial ambit and to tax them as such.

25. Reverting to the arguments of the learned counsel for the petitioners, there is no doubt that the orders of the Sales Tax Officer, Bareilly, do not mention whether the cloth in question had been delivered in U. P. for the purpose of its consumption therein. The only ground on which the order proceeded was that the petitioners were importers, and for the disposal of the cases on that ground it was not necessary to go into the aforesaid question since delivery of goods in U. P. for the purpose of its consumption therein is not one of the ingredients of the definition of imported, It would appear therefore that the only point in issue before the Sales Tax Officer was whether the petitioners were or were not importers. Quite a number of questions could conceivably have arisen before the Sales Tax Officer, but he need have decided only those which actually did arise. The inquiry referred to in Rule 41(3) of the Rules, and also in Section 7 of the Act, implies the giving of an opportunity to the dealer concerned to put forward his own contentions with regard to the case.

It is nowhere alleged by the petitioners that such an opportunity was not given to them. On the contrary, the averments in paras 8, 10 and 11 of the petitioners' affidavits show that they were given

such an opportunity, and that the only way in which they availed themselves of that opportunity was by pleading that the cloth which came into their hands manufactured outside U. P. was not liable to be taxed by any law made by the State Legislature. This contention does not cover the point of consumption under consideration.

In these circumstances, it might well be said that the plea in question relating to consumption was not taken by the petitioners before the Sales Tax Officer because it was a matter of admission that the cloth was delivered in U. P. for the purpose of consumption therein. It might equally be that the question did not arise because it was overlooked both by the Sales Tax Officer and the petitioners.

In any case, the petitioners' are not entitled to any benefit on the mere ground that the impugned orders of the Sales Tax Officer make no mention of the point. It may be stated here in passing that the 'AIR 1953 Orissa case (F)', has no bearing on the facts of the present case since the matter of consumption was specifically in issue in that case both before the Sales Tax Officer and the appellate authority.

26. The other argument advanced on behalf of the petitioners has also no force -- the argument, that is, that on the pleadings in the affidavits of the parties it should be taken as having been established that the delivery of the cloth in question was not for consumption in this State. The plea in question has no doubt been specifically taken as ground No. 12 of the grounds, but the averment in para. 7 of the affidavit in support of the plea does not have the effect or establishing the plea.

The averment is that the petitioners never sell any cloth to consumers. The question under the Explanation to Article 288, however, is not whether the petitioners do or do not sell cloth to consumers, but whether the cloth was delivered in U, P. for the purpose of consumption therein. That purpose might be subserved even though the sales in question by the petitioners were not to consumers, for those who purchased the cloth from them may have sold it to consumers.

The position therefore is that the petitioners have neither proved that the cloth in question was not delivered in U. P. for consumption therein not are they entitled to any benefit by reason of impugned orders not having dealt with the question of delivery of that cloth for consumption in U. P. That should not however result, by reason of all the points raised by them having been decided against them, in an outright dismissal of their petitions, for the omission in the orders may have been due, as remarked already, to both the Sales-tax Officer and the petitioners having overlooked the point.

Due to that being a possibility, it appears to be just and proper to order the Sales Tax Officer concerned to make the final assessment after going into that question. That, of course, means going into the question after giving the petitioners proper opportunity to lay their respective cases before him relating to that question.

27. There is a small point which remains to be disposed of. It was contended on behalf of the petitioners that it may be that the sales in question were sales within the State of U. P. within the purview of the Explanation to Clause (1) of Article 286, but it should still have to be seen whether

they were sales of the nature contemplated by Clause (2) of the Article. If they were sales of that nature, the State would be debarred from taxing them. The contention is wholly without force.

As soon as a State finds that a sale involving inter-State elements becomes intra-State under the Explanation to Clause (1) of Article 286, it has the fullest authority to tax it as a sale which has taken place within that State and it need not embark on a roving inquiry whether it was a sale which had taken place in the course of inter-state trade or commerce, as contemplated by Clause (2) of the said Article. The simple reason for this view is that it would be a contradiction in terms to speak of an intra-State sale having the characteristics of a sale which takes, place in the course of inter-state trade or commerce. The aforesaid contention has been negatived in 'AIR 1953 SC 252 at p. 259 (A)', as follows:

> "We are of the opinion that the operation of Clause (2) stands excluded as a result of the legal fiction enacted in the Explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to interstate dealings is, in our view, to invest what, in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and Clause (2) can, therefore, have no application.
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> It is true that the legal fiction is to operate "for the purposes of Sub-clause (d) of Clause (1)", but that means merely that the Explanation is designed to explain the meaning of the expression "outside the State" in Clause (1)(a). When once, however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the taxing State, it follows as a corollary, that the transaction looses its inter-State character and "falls outside the purview of Clause (2), not because the definition in the Explanation is used for the purpose of Clause (2), but because such sale or purchase becomes in the eye of the law a purely local transaction.
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> It is said that even though all the essential ingredients of a sale took place within one State and the sale was, in that sense, a purely intra-State transaction, it might involve, transport of the goods across the State boundary, and that would be sufficient to bring it within the scope of Clause (2). We find it difficult to appreciate this argument. As already stated, the Explanation envisages sales or purchases under which out-of-State goods are imported into the State.
>
> That is the essential element which makes such a transaction inter-State in character, and if it is turned into an inter-State transaction by the operation of the legal fiction which blots out from view the inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its inter-State character. The statutory 'fiction completely masks the inter-State character of he sale or purchase which, as a collateral result of such masking, falls outside the scope of Clause (2)".

28. In the result, all the grounds urged in this Court have been found to be untenable except that a doubt exists as to whether the delivery of the cloth in question in U. P. was for the purpose of consumption therein. The petitions are accordingly dismissed except that a writ of mandamus shall issue directing the Sales Tax Officer, Bareilly, to make a final assessment as regards the sales in question after due inquiry into the question whether delivery of the cloth in question in U, P. was for purpose of consumption therein, and prohibiting all the three respondents from realising tax from the petitioners unless and until it has been determined as a result of the aforesaid inquiry. In view of this result, there is no orders as to costs.