# Kelvinator Of India Ltd vs The State Of Haryana on 23 August, 1973

## Equivalent citations: 1973 AIR 2526, 1974 SCR (1) 463, AIR 1973 SUPREME COURT 2526, 1973 2 SCC 551, 1973 TAX. L. R. 2558, 1974 (1) SCR 463, 32 STC 629, 1973 SCC (TAX) 553, 1975 (1) SCJ 8

## Author: Hans Raj Khanna

## Bench: Hans Raj Khanna, A. Alagiriswami

PETITIONER:
KELVINATOR OF INDIA LTD.

Vs.

RESPONDENT:
THE STATE OF HARYANA

DATE OF JUDGMENT23/08/1973

BENCH:
KHANNA, HANS RAJ
BENCH:
KHANNA, HANS RAJ
ALAGIRISWAMI, A.

CITATION:
1973 AIR 2526 1974 SCR (1) 463
1973 SCC (2) 551
CITATOR INFO :
R 1976 SC1016 (23)
RF 1981 SC 446 (6)
D 1981 SC1604 (12)

ACT:
Central Sales Tax Act, (74 of 1956) S. 3(a)-Scope of-movement of goods when occasioned by sale-Manufacture of goods in one State and sold in another to distributors-Distribution agreement if constitutes contract of safe-Sale of Goods Act (3 of 1930). S. 23-Scope of.

HEADNOTE:
Section 6 of the Central Sales Tax Act, 1956, makes every dealer liable for payment of tax under the Act on all sales-effected by him in the course of interstate trade or

commerce. A sale of' goods can be held to have taken place in the course of interstate trade under s. 3 (a) if it can be shown that the sale has occasioned the movement of goods from one State to another, that is, if, (i) there is a sale, (ii) there is actual movement of goods from one State to another, and (iii) the sale and movement of the goods formed integral parts of the same transaction. A sale being. by the definition in the Act, transfer of property, to be exigible to tax under the Act it must be shown that tie movement was the result of a covenant or incident of the contract of sale' The movement of goods which takes place independently of acontract of sale would not fall within the ambit of s. 3(a). There must be acontract of sole preceding the movement of goods from one State to anotherand the movement of goods should have been caused by and be the result of that contract of sale. If there was no contract of sale preceding the movement of goods the movement can obviously be not ascribed to a contract of sale nor can it 'be said that. the sale has occasioned movement of goods from one State to the other. [471F-473B]

In the present case, the appellant was a manufacturer of refrigerators in Faridabad. Presene refrigerators. were sold with three different trade marks. The sale of each brand was made through a separate distributor in Delhi appointed for that purpose and the appellant entered into an agreement with each of the three distributors. The appellant dealer was bound to sell each of the brands of the refrigerator to one of the distributors. The price of the refrigerators was to be fixed mutually as agreed upon between the appellant and his distributors from time to time. The prices were not settled for each individual machine but periodically. The goods were manufactured in the factory at Faridabad and excise clearance pass was obtained after the payment of excise duty for the transport of goods from the factory to the appellant's godown in Delhi. The excise pass was in favour of self. During the transport of the goods from Faridabad to Delhi the octroi at the barrier was paid by the appellant. At the destination the goods were received by the staff of the appellant and taken to their godown. The purchase orders were placed by the three distributors after the goods reached the Head-office of the appellant at Delhi. In pursuance of the orders given by the distributors the Delhi staff gave delivery of the goods at Delhi under a challan prepared at Delhi. The property in the goods passed at Delhi to the distributors after delivery. The price of the goods was received by the appellant at Delhi and deposited in the appellant's account in its Delhi bank. The refrigerators were also exported putside India.

The High Court, in a reference by the Tribunal, held that the distribution agreements constituted agreements 'of sale, that the refrigerators moved from Faridabad to: Delhi in pursuance of the agreements of sale, and that the appellant

was therefore liable to pay sales-tax under s. 3(a) of the Act.

Allowing the appeal to this Court,

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HELD (1) The three agreements between the appellant and the distributors were merely agreements for distribution and did not constitute contracts of sale. [480B-C]

(a)The number of refrigerators which were to be purchased by each of the distributors was not specified in the distribution agreements nor did the agreements contain the price which was to be charged for each refrigerator. In two of the distribution agreements the minimum number of refrigerators which had been agreed upon to be purchased by the distributors was mentioned but the exact number of refrigerators to be sold by the appellant to those two distributors was still left to the volition of the appellant. The mode of dealing between the parties was that orders were placed by the distributors with the appellant after the refrigerators had reached the appellant's sale-office and godown in Delhi. The price of refrigerators was also to be mutually agreed upon from time to time. The sales by the appellant to the distributor thus depended upon the future agreement between the parties from time to time. Therefore, it was the orders which were placed in Delhi by the distributors and the acceptance thereof by the appellant that resulted in the mutual agreement of sale. The distribution agreement with each distributor only provided the framework within which the different contracts of sale were to be entered into by the distributor with the appellant, and the distribution agreement and contract of sale were distinct transactions. [474B-G]

(b)It is not correct to say that the distributor with whom the first agreement was entered into was bound to purchase all the products of the appellant. The words 'the sale would be as mutually agreed upon from time to time' Would lose all significance if that was the intention of the parties. Also, the facts that subsequently two other distribution agreements were entered into with two others and that the appellant was in a position to export its products to foreign countries during the assessment year, show that there was no such agreement. [474G-475B]

(c)There was no appropriation towards the agreement with each of the distributors, at Faridabad by affixing the name plates to the refrigerators, and hence, there was no sale of refrigerators at Faridabad. There was no evidence to show that. the name plates were actually affixed at Faridabad and not at Delhi. Even if they were so affixed there was nothing to prevent the appellant from changing them because the three different brands of refrigerators were in all respects identical and the name plates were also easily interchangeable. of the sale of the-refrigerators in favour of the distributors had already taken place at Faridabad and the refrigerators had be-en appropriated there would not

have arisenany occasion for the placing of a subsequent order in Delhi by a distributor. But in fact orders in respect of the various refrigerators were placed by the distributors only in Delhi after they had been transported to the Delhi sale-office and godown of the appellant. Since there was no appropriation at Faridabad, there was no legal bar to the changing of name plates by the appellant till such time as orders were placed by the distributors after inspection at Delhi. In answering the question whether the transactions constituted sales in the course of interstate trade or commerce the Court should look not merely at the distribution agreement but should also pay regard to the entire course of dealings between the parties. [475 B-H]

(d)Apart from the fact that the distribution agreements could not be construed as contracts of sale there is no material to show that there was any assent, expressed or implied, by the distributors, to the appropriation of the refrigerators by the appellant at Faridabad; and hence s. 23 of the Sale of Goods Act is not applicable. No authority was given by the distributors to the appellant to appropriate the goods at Faridabad, Further the appellant was not, under the terms of the contract, authorised to do some act or thing with reference to the refrigerators which could not be done until the refrigerators were appropriated. [477 H-478H]

(2)There was no movement of refrigerators from Faridabad to Delhi under a contract of sale. [476G]

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(a)If there is a choice before the parties of so arranging their matters that lift one case they would have to incur liability to, pay tax and in the other case the liability to pay tax would not be attracted, they would Prefer the latter course'There is nothing illegal or impermissible to a party so arranging its affairsthat the liability to pay tax would not be attracted or would be reduced. [476C-D]

The appellant could have sold the refrigerators at either of the two places, Faridabad or Delhi. But liability to pay tax under the Act would arise if the sale of the refrigerators to distributors were to take place at Faridabad and the movement of refrigerators from Faridabad to Delhi were to take place under the contract of sale. So, the parties expressly stated in each of the three distri-bution agreements that it would be in Delhi that the sale would take place to the distributors and the property therein would pass to them. In fact, it was in Delhi that the orders were placed by the distributors, the goods were delivered to the distributors, and the price of the refrigerators was paid. Hence it could not be said that the transport of the refrigerators from Faridabad to Delhi was in pursuance of a contract of sale. The appellant had a godown and sale office in Delhi and there is no evidence that it had a godown in Faridabad. The movement of the goods from Faridabad to the appellant's godown in Delhi can

therefore be ascribed only to the fact that the appellant had a godown facility in Delhi. [476D-G]

(b)The inclusion of the charges for the transport of refrigerators from Faridabad to Delhi in the price payable by the distributors would not show that the movement of refrigerators from Faridabad to Delhi was occasioned by the contract of sale. The price payable by the distributors was the aggregate of the ex-factory price of refrigerators and the transportation charges. As the exfactory price of the refrigerators was fixed from time to time and as the agreements with the distributors provided that the sale of the refrigerators as well as the delivery thereof to the distributors 'would take place in Delhi the distribution agreements provided that the transportation charges would be added to the exfactory price of the refrigerators in calculating the amount payable by the distributors to the appellant. Further, in two of the distribution agreements it was provided that the liability of the appellant for any shortage or damage would cease only after the goods had been inspected by and delivered to the distributors at Delhi. In the 3rd agreement it was provided that the appellant would accept no responsibility for shortage or damage during transit, but even in that case, it was not the distributor but the insurer who would have to bear the loss and the transit insurance expenses were borne by the appellant. [476G477G]

Tata Engineering & Locomotive Co. Limited v. The Assistant Commissioner of Commercial Taxes & Another, [1970] 3 S.C.R. 862, followed.

Tata Iron and Steel Co. Ltd. v. S. R. Sarkar and Ors.. [1961] 1 S.C.R. 379, Ben Gorm Niligiri Plantations Co. Cooncor & Ors. v. Sales Tax Officer. Special Circle, Ernakulam. & Ors. [1964] 7 S.C.R. 706, and Halsbury's Law's of England, 3rd Ed. Vol. 34. pp. 62-63, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2005 (NT) of 1972:.

Appeal by special leave from the order dated the 11th April 1972 of the Punjab and Haryana High Court at Chandigarh, in General Sales Tax Reference No. 8 of 1970.

N.A. Palkhivala, H. L. Sibal, J. B. Dadachanji, A. K. Verma, Kapil Sibal and S. C. Agnihotri, for the appellant. Y.M. Tarkunde, Narendra Goswami and M. N. Shroff, for the respondent.

S. T. Desai, and 1. N. Shroff, for the intervener.

The Judgment of the Court was delivered by KHANNA, J. This appeal by special leave by M/s. Kelvinator of India Ltd. is directed against the judgment of Punjab & Haryana High Court whereby

that court answered the following question referred to it by the Sales Tax Tribunal Haryana in favour of the department and against the appellant "Whether on the facts and circumstances of the case, the agreement between M/s. Kelvinator of India (Assessee) M/s. Spencer & Co. Ltd., Messrs Blue Star Engineering Co,, and M/s.

General Equipment Ltd., in pursuance of which the refrigerators manufactured by M/s, Kelvinator of India at Faridabad moved to Delhi were merely for distribution of goods between the principal and his agents or were agreements of sale between two parties?"

The matter relates to the assessment year 1965-66, i.e. the period from April 1, 1965 to March 31, 1966. The appellant company has a, factory at Faridabad in Haryana. It manufactures refrigerators, deep freezers, compressors and other similar articles. The factory went into production in 1964. Its registered office and sales office are at 19A Alipore Road, Delhi. The appellant has godowns in Delhi having full staff of godown keepers and clerks. The appellant is a registered dealer under the Punjab General Sales Tax Act, 1948 and the Central Sales Tax Act, 1956. 'The registration has been don-- at Faridabad. Refrigerators and other articles are manufactured by the appellant under a collaboration agreement with an American company known as Kelvinator International Corporation. The refrigerators and other articles manufactured by the appellant are marketed under trade marks 'Kelvinator', 'Leonard' and 'Gem'. The entire sale of refrigerators, compressors and spare parts in 1964 was made to Spencer &- Co. Ltd. at Delhi. Such transfers were accepted is genuine by the sales tax authorities. In respect of these sales the department did not take the stand that they were inter-State sales or that the movement of goods -.from Faridabad to Delhi was occasioned by reason of sales made to Spencer & Co. Ltd.

On April 26, 1965 the appellant entered into a distribution agreement with Spencer & Co. Ltd. in respect of refrigerators and other products having Kelvinator trade mark. Similar distribution agreements were entered into with Blue Star Engineering Co. (Bombay) Pvt. Ltd., on September 15, 1965 in respect of Leonard refrigerators and on December 11, 1965 with General Equipment Merchants Ltd. in respect of Gem refrigerators. The agreement with Spencer & Co. was to take effect from April 1, 1965 and the other two agreements from the dates on which they were entered into. The terms of the agreements were substantially similar, except in certain matters with which we arc either not concerned or to which reference would be made hereinafter. The relevant clauses of agreement dated April 26, 1965 are as under

"Whereas in terms of the Manufacturing and Sales Agreement entered into by the Company (the appellant company) with Kelvinator International Corporation, Detroit (Michigar-

U.S.A.), the Company is granted exclusive right and licence to manufacture, assemble and sell the products designed and/or manufactured by the Company under Trade mark "Kelvinator" or any other Trade mark in India (hereinafter called the Territory)

and whereas the Company in its Factory at Faridabad (Punjab) has commenced the, manufacture of Kelvinator Refrigerators, parts and Spare parts etc., and whereas the Distributors (Spencer. & Co. Ltd.) have agreed to be and to act as Distributors of the Company, now it is hereby mutually agreedand declared between the parties hereto as follows :-

1.The Company hereby undertakes to sell and the Distributorshereby undertake to buy all products manufactured by the Company as mutually agreed upon from time to time. The Distributors shall have the right to sell the Company's Kelvinator and such other trademark products, spare parts and parts within the Territory. Due consideration to the recommendations of Distributors in regard to change/alteration in existing products or additions of new products will all the time be given by the Company.

2. All purchases by the Distributors from the Company shall be on principal to principal basis at mutually agreed prices.

3. * * * * *

4. The goods shall, be delivered to the Distributors from the Company's registered office in Delhi and the, property in the same shall pass to the Distributors in Delhi on delivery, where the sale shall always take place.

5.For the purpose of determining the liability of Distri- butors for payment to the Company, the price quoted will be ex-Company's works at Faridabad. The Distributors shall also pay to the Company all the charges on the transport of the goods from the Company's works at Faridabad to the Company's Registered Office in Delhi.

6.The Distributors shall at all times warrant the goods to their customers only on the warranty terms issued by the Company. All goods leaving the Company's factory will pass through rigorous inspection procedures laid down by the Com- pany. No responsibility for shortage or damage occurring in transit will be accepted by the Company.

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Clauses 3, 6, 7 and 8 of agreement dated September 15, 1965 in respect of Leonard refrigerators were as under

"3. For the purpose of clause (1) and in order to enable the Company to arrange its production schedule, the Distributors guarantee and undertake to purchase from the Company a minimum quantity of 1500 Refrigerators per year, at a rate not less than 80 Refrigerators per month. It is agreed that the distributors will be relieved of their

obligation under Ibis Agreement to the extent that the Company is unable to supply the guaranteed minimum quantity of 80 refrigerators per month.

6.For calculating the liability of the Distributors for payment to the Company, the price quoted will be ex-factory Company's works at Faridabad, excluding Central Excise and a11 other taxes, duties and charges (but not octroi charges payable between Faridabad and Delhi which will be to the Company's account) which may be levied or introduced by the Government or any local authority from time to time and which will be charged in addition to the said ex-factory price. The Distributors shall pay to the Company, the transport charges for the goods from the Company's works at Faridabad lo the Company's godowns in Delhi.

7.All the goods shall remain the property of the Company till they reach Delhi and are delivered to the Distributors in Delhi, where alone the property therein shall pass to Distributors. The sale shall always take place in Delhi.

S.All goods leaving the Company's factory will pass through rigorous inspection procedure laid down by the Company, and will be packed in Crates and will be delivered to the Distributors packed as such. The Company in no case, shall responsible for any shortage or damage that may occur in further transit, once the goods have been delivered and inspected by the Distributors in Delhi."

Clause..-, 6, 7 and 8 of agreement dated December 11, 1965 in respect of Gem refrigerators were substantially similar to clauses 6, 7 and 8 of agreement dated September 15, 1965. Clause 3 of agreement dated December 11, 1965 was as under:

"3.In order to facilitate the Company's arrangement of its production schedule, Gem undertakes to buy from the Company a minimum quantity of 2000 refrigerators of both 10.1 cu. ft. and 6.2 cu. ft. capacity in the first year at a rate of not less than 150 refrigerators per month. Likewise, for the and year, Gem agrees to buy 3000 refrigerators and for 3rd year, 4000 refrigerators of both sizes. The Company will, however, incur no liabilities if for any reasons it is unable to make the supply according to the minimum quantities stipulated above. If for some reasons Gem is unable to accept or purchase the respective minimum yearly stipulated quantities, Gem will incur no liability save the cancellation of the Agreement at the Company's choice."

Procedure for transfer of goods from the factory at Faridabad to the appellant's company's sales office and godowns at 19A, Alipore Road, Delhi was described in the objections filed on behalf of the appellant before the sales tax authority as under :

"The company gets the goods cleared from the Excise for destination to its Delhi office godown in piece-meal pay the octroi themselves at the Delhi barrier along with the freight charges and the goods are taken delivery of by its registered office. The

buyer places its specific order according to its requirement and to the extent goods are available at Delhi, delivery is given by the Delhi office after the goods are approved in good condition by the purchaser. That the goods, never move from the factory in pursuance of any contract but are moved as per routine for storage at Delhi in accordance with the company's own convenience. Specific orders are placed by the buyers when the goods are already lying. in stock. The movement of the goods as such is not in furtherance of any contract of sale but move to Delhi independently of any stipulation."

Four affidavits were also filed before the assessing authority. The affidavit is of M. B. Sutaria, Secretary of the appellant company. Relevant parts of this affidavit are as under :

"3. That after the goods are I manufactured in the factory an excise clearance pass is obtained after payment of excise duty for the transport of goods from the factory to the company's godown in Delhi. The excise pass is always for movement of goods in favour of self.

4. That during the transport of goods from Faridabad to, Delhi,the octroi at the barrier is paid by the company.

5. That at destination the goods are received by the com-

pany's staff and taken in their godown.

6.That after the goods have already been received by, the company an order is received from the customer for the supply of good,,;.

7.That in pursuance of the said orders Delhi staff givedelivery of the, goods at Delhi to the customer under a challan prepared at Delhi.

8.That thereafter the bill is raised from Delhi and price of thegoods is received by the Company at Delhi and deposited inthe Company's account in its Delhi Bank."

The other three affidavits were those of V. A. Rao of Spencer & Co., Rajinder Nath Seth of Blue Star Engineering Co. Ltd. and Mrs. Usha Batra of General Equipment Merchants Ltd. In the affidavit of V. A. Rao it was stated "2. That we select the pieces of Refrigerators lying in the godowns of Kelvinator of India Ltd. Delhi and if on inspection we find that pieces of Refrigerators suiting to our requirements, we place specific orders on Kelvinator of India Ltd., Delhi to supply us the goods."

The affidavits of Rajinder Nath Seth and Mrs. Usha Batra contained similar paragraphs. The appellant company took a policy of insurance to cover lorry risk as per Motor Lorry Risk clauses, including theft, pilferage and non-delivery denting scratching and breakage or any other damage due to any external means, including certain other risks from warehouse to warehouse. In the reference order dated April 1, 1971 the Sales Tax Tribunal while dealing with the transport of goods

from Faridabad to Delhi observed :

> "The Refrigerators manufactured by the Company were transferred to its sale, office and godowns at 19A. Alipore Road, Delhi-6 under despatch notes. Necessary entries in the stock register showing receipt were made in the stock register maintained by the Company in the godowns and sale office at Delhi. The issue. entries were also made in such registers. The payments such as freight, octroi, transit insurance and other expenses i.e. upto the stage of sale and delivery- of ,goods to the respective distributors at the sale office at Delhi were borne by the company. The purchasers, namely, the distributors placed their specific orders at various times at Delhi upon examining and finding the suitability of the machines in pursuance of which the refrigerators were delivered against receipt on delivery challans. Bills were raised by the sale office at Delhi and consideration was also received by it."

The assessing authority vide its order dated March 2, 1968 held ,that the transactions between the parties were inter- State sales and liable to be taxed as such. The movement of refrigerators from Faridabad to Delhi was held to be occasioned by the sales to the distributors. At first the sales tax-payable by the assessee was assessed by the Sales Tax Officer to be Rs. 8,14,112.25 at the rate of 10 per cent cf the 'transactions amounting to Rs. 81,41,142.45. Subsequently on review ,application the tax liability was reduced to Rs. 1,59,691.19.

On appeal filed by the appellant, the-Deputy Excise and Taxation Commissioner as per order dated July 24, 1968 held that the distribution agreements were not contracts of sale. It was further held that the refrigerators were transported to Delhi prior to their sale to distributors. The transactions in question were consequently held not to constitute interstate sales. The Excise and Taxation Commissioner thereafter took suo motu action and after hearing both the parties he held as per order dated September 12, 1968 that as soon as the refrigerators were manufactured they were appropriated to the contracts and that movement from Faridabad to Delhi was under the agreement to sell. The matter was then taken up by the assessee in appeal to the Sales Tax Tribunal. The Tribunal as per order dated August 14, 1969 took the view that the agreements with the distributors were agreements of sale and that the sales in question were inter-State sales. The ap- pellant thereafter filed review application but the same was dismissed by the Tribunal on November 24, 1969. Application was thereafter filed before the, Tribunal praying, inter alia, that the, following questions ,of law be referred to the High Court :

> "1. Whether on the facts and circumstances of the case the Sales were local sales of Delhi or were in the course. of inter-State trade and commerce giving rise to the commencement of movements in the State of Haryana.
>
> 2.Whether on the facts and circumstances of the case the distributorship agreements could validly be construed to be contracts of sales even when they lack all the essential ingredients for the formation of the same.

> 3.Whether on the facts and circumstances of the case the movement of the goods from Faridabad to Company's godowns at Delhi at its, own 'risk and cost could be termed to be com- mercial movements warranting the imposition of the tax under the Central Sales Tax Act or inter-departmental movement for facility of better enjoyment of rights."

The Tribunal, however, thought that the question reproduced earlier would combine all the three questions suggested by the appellant. Accordingly the question set out at the beginning of this judgment was referred to the High Court. The High Court in answering the question in favour of the department found that the machines moved from Faridabad to Delhi in pursuance of agreements of sale which had been termed distribution agreements.

In appeal before us, Mr. Palkhiwala on behalf of the appellant company has argued that the three distribution agreements do not constitute contracts of sale. In the alternative, he submits that even if the distribution agreements were construed to be contracts of sale, the move- ment of goods in question from Faridabad to Delhi cannot be said to have been occasioned by the distribution agreements. It is also urged that there was no appropriation of the goods at Faridabad to the contract with any particular distributor. As against that, Mr. Tarkunde on behalf of the respondent contends that the three distribution agreements did constitute contracts of sale and that it were the aforesaid agreements which occasioned the movement of goods from Faridabad to Delhi The appropriation of goods to the contract with each of the distributors also, according to the learned counsel, took place in Faridabad. Before dealing with the contention of the parties, it would be apposite to refer to the relevant statutory provisions and examine the legal position Section 6 of the Central Sales Tax Act (hereinafter referred to as the Act) makes every dealer liable for payment of tax under the Act on all sales effected by him in the course of inter-State trade or commerce. "Sale" with its grammatical variations and cognate expressions, has been defined in section 2(g) of the Act, to mean any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hirre-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods. According to section 3 of the Act, a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase :

> (a) occasions the movement of goods from one State to another: or
>
> (b)is effected by a transfer of documents of title to the goods during their movement from one State to another.

We are concerned in the present case with clause (a) and not with clause (b). A sale of goods can be held to have taken place in the course of inter-state trade under clause (a) of Section 3 of the Act if it can be shown that the sale has occasioned the movement of goods from one State to another. A sale in the course of inter-state trade has three essentials : (i) there must be a sale, (ii) the goods must actually be moved from one State to another, and (iii) the sale and movement of the, goods must be part of the same transaction. The word "occasions" is used as a verb and means 'to cause or to be the immediate cause of'. In the case of Tata Iron and Steel Co. Ltd. v. S. R. Sarkar and Ors;.(1) Shah J.

(as he then was) speaking for the majority observed that a transaction of sale is subject to tax under the Act on the completion of the sale. A mere contract of sale is not a sale within the definition of "sale" in section 2(g). A sale being, by the definition, transfer of property becomes taxable under section 3(a) "if the movement of goods from one State to another is under a covenant or incident of the contract of sale". In Ben Gorm Nilgiri Plantations Co. Cooncor & Ors. v. Sales Tax Officer, Special Circle, Ernakulam & Ors(2) this Court dealt with the provisions of section 5 of the Act which relates to sale or purchase of goods in the course of import or export. It was held that a sale in the course of export predicated con- nection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted without a breach of the contractor the compulsion arising from the nature of the transaction. The export, it was further observed should be inextricably linked up with the sale so that the bond cannot be dissociated the observations in the case of Tata Iron and Steel Co. a s well as Ben Gorim Nilgiri Plantations Co. were relied upon by a Constitution Bench of this Court in the case of Tata Engineering & Locomotive Co. Limited v. The Assistant Commissioner of Commercial Taxes & Another (3) and it was held that the sales to be exigible to tax under the Act must be shown to have occasioned the movement of goods or articles from one State to another and that the movement must be the result of a convenant or incident of the contract of sale. It can, therefore, be said that a sale of goods is in the course of interState trade if the sale and movement of goods from one State to another are integral parts of the same transaction. There must exist a direct nexus between the sale and the movement of goods from one State to the other. In other words the movement should be incident of and be necessitated by the contract of sale and thus be interlinked with the sale of goods.

It is also plain from the language of section 3 (a) of the Act that the movement of goods from on.-. State to another must be under the contract of sale. A movement of goods which takes place independently of a contract of sale would not fall within the ambit of the above clause. Perusal of section 3(a) further makes it manifest that there must a contract of sale preceding the movement of the goods from (1) [1961] 1 S. C. R. 379 (2) [1964] 7 S. C. R. 706.

(3)[1970] 3 S. C. R. 862 one State to another, and the movement of goods should have been caused by and be the result of that contract of sale. If there was no contract of sale preceding the movement of goods, the movement can obviously be not ascribed to a contract of sale nor can it be said that the sale has occasioned the movement of goods from one State to the other.

In the light of the principles enunciated above, it cannot in our opinions be said that the transactions in question amount to sale in the course of inter-state trade. The High Court in the course of its judgment has noted that the following facts were accepted by the departmental authorities :

> "1. The dealer manufactured and sold refrigerators.
>
> 2. These refrigerators were sold with the trade marks of 'Kelvinator', 'Leonard' and 'Gem'.

3.The sale of each brand was made through a separate distributor appointed for this purpose.

4.The manner of movement is laid down in clause 6 of Spencer's agreement and clause 8 of Blue Star and General Equipment Merchants agreements.

5.The dealer is bound to sell a 'Kelvinator' to Spencers, a 'Leonard' to Blue Star and a 'Gem' to General Equipment Merchants.

6. That refrigerators were exported outside India.

7. The price of the refrigerators is fixed as mutually agreed upon from time to time.

8. The property in-goods passes at Delhi after delivery.

9. The prices are not settled for individual machine, but periodically.

10.The purchase orders are placed by the three distributors after the goods reach the head office at Delhi."

It has further been found by the High Court that the appellant had asserted the following facts and the assertion of the appellant was neither rejected by the departmental authorities nor was it dealt with in ,the respective orders :

"1. That after the goods are manufactured in the factory an excise clearance pass is obtained after payment of excise duty for the transport of goods from the factory to the company's godown in Delhi. The excise pass is always for- movement of goods in favour of self.

2.That during the transport of the goods from Faridabad to Delhi, the octroi at the barrier is paid by the Company.

3. That at destination the goods are received by company's staff and taken in their godown.

4. That in pursuance of the,. said orders Delhi staff give delivery of the goods at Del to the customer under a challan pre-pared at Delhi.

5.That thereafter the bill is raised from Delhi and the price of the goods is received by the Company at Delhi and deposited in company's account in its Delhi bank.

6.That all that the assessee does is to manufacture refrigerators and they are branded for the purpose of sale and distribution."

In the face of the facts of the present case, we find it difficult to hold that the sale of refrigerators by the. appellant to the three distributors took place at Faridabad. We are also unable to agree with the High Court that the distribution agreements constituted agreements of sale. It is noteworthy in this context to observe that the number of refrigerators which were to be purchased by each of the distributors was not specified in the distribution agreements, nor did the agreements contain the price which was to be charged for each refrigerator. According to the agreement dated April 26, 1965 the appellant undertook to sell and the distributors undertook to purchase the products of the appellant "as mutually agreed upon from time to time". It is, therefore, plain that sales by the appellant company--to the distributor re,fered to in the distribution agreement dated April 26, 1965 depended upon the future agreement between the parties from time to time. Dis- tribution agreements dated September 15, 1965 and December 11, 1965 no doubt mentioned the minimum number of Leonard and Gem refrigerators which had been agreed to be purchased by the distributors; the exact number of refrigerators to be sold by the appellant to these two distributors was still left to volition of the appellant. The appellant company, it was also mentioned, would incur no liability if it was unable to supply the guaranteed minimum number of refrigera- tors. The mode of dealings between the parties was that subsequent to the distribution agreements, orders were placed by the distributors with the appellant after the refrigerators had reached the appellant's sale office and godown in Delhi. The price of the refrigerators was also to be mutually agreed upon from time to time. It is Plain that it is the orders which were placed in Delhi by the distributors and the acceptance thereof by the appellant that resulted in mutual agreement of sale. It was, in our opinion, the mutual agreement between the parties at 'the time of the placing of the order by the distributor with the appellant which constituted the contract of sale and not the distribution agreement. The distribution agreement with each distributor provided the framework within which the different contracts of sale-were entered into by the distributor with the appellant. This circumstance should not make us lose sight of the fact that the distribution agreements and the subsequent contracts of sale were distinct transactions.

We are not impressed by Mr. Tarkunde's argument that under agreement dated April 26, 1965 Spencer & Co. was bound to purchase all the products of the appellant company. Spencer & Co. undertook to buy the products manufactured by the appellant company subject to the stipulation contained in the words "as mutually agreed upon from time to time". Had it been the intention of the parties that, Spencer & Co. was bound to purchase all products manufactured by the appellant company irrespective of any future agreement between the parties, the words "as mutually agreed upon from time to time" in clause 1 of agreement dated April 26, 1965 would lose all significance. It would not have also in that event been possible for the appellant to enter into the other two distribution agreements of September 15, 1965 and December 11, 1965 regarding Leonard and Gem refrigerators which were manufactured by the appellant. The fact that the appellant was in a position to export its products to foreign countries during the assessment year in question also shows that there was no agreement between the parties that the appellant was bound to sell and Spencer & Co. was bound to purchase all products manufactured by the appellant. The argument that the sale of refrigerators to each of the distributors took place at Faridabad and that it was at Faridabad that the refrigerators were appropriated towards the agreement with each of the three distributors appears to us to be not well-founded. The argument proceeds upon the assumption that trade-mark name plates on, the refrigerators were affixed at Faridabad by the appellant company.

There is, however, no direct material to show that the name plates on, the refrigerators were actually affixed at Faridabad and not in Delhi. Assuming that the name plates were, in fact, affixed to the refrigerators by the appellant at Faridabad, there was nothing to prevent the appellant from changing the name plate of a refrigerator and affixing the name plate of a different brand of refrigerator on the refrigferator from which the name plate was removed. The three different brands of refrigerators were in all respects identical except in respect of the name plate. The said name plates, it has been demonstrated to us,. are easily interchangeable. In the circumstances, the alleged affixation of trade-mark plates to the refrigerators at Faridabad would not neces- sarily show that the appropriation of the refrigerators towards the agreement with a particular distributor took place at Faridabad. A very significant circumstance which should not be lost sight of, in this context is that orders in respect of the various refrigerators were placed by the distributors in Delhi after the refrigerators had been transported to the Delhi sale office and godown of the appellant. If the sale of the refrigerators in favour of the distributor hid already taken place at Faridabad and the refrigerators had been appropriated there towards the sale contract, there would have arisen no occasion for the placing of the subsequent order in Delhi by a distributor with regard to the said refrigerators. The fact that subsequent orders had to be placed by the distributors in Delhi with regard to the different refrigerators after their arrival in Delhi shows that there was no earlier sale or appropriation of those refrigerators towards any contract of sale with the distributors. The stand taken on behalf of the department that the appropriation of the refrigerators took place at Faridabad towards the contracts of sale with the distributors is inconsistent with the entire course of dealings between the parties. It may also be observed that in deciding the question whether the transactions between the parties constituted sales in the course of inter-State trade or commerce, the court should look not merely at the distribution agreements, regard should be had of the en-tire course of dealings between the parties.

Assuming that the distribution agreements constituted contracts of sale, it would still have to be shown that the sale by the appellant to the distributors occasioned the movement of refrigerators from Farida-

bad to Delhi in this respect we find that according to the facts found by the Tribunal the appellant had a godown and sale office in Delhi. There is nothing to show that the appellant has also a godown in Faridabad. The movement of refrigerators from Faridabad to the appellant's godown in Delhi in the circumstances can well be ascribed to the fact that the appellant has a godown facility in Delhi. There were two places at which in the nature of things the appellant could have sold the refrigerators to the distributors. It could be either at Faridabad where the appellant has its factory wherein the refrigerators are manufactured or in Delhi where the appellant has its sale office and godown and where- also the, three distributors have their offices. The selection of place of sale. depended upon mutual agreement between the parties it is also obvious that if there is a choice before the parties of so arranging their matters that in. one case they would have to incur liability to pay tax and in the other case the liability to pay tax would not be attracted, they would prefer the latter course. There is nothing illegal or impermissible to a party so arranging its affairs that the liability to pay tax would not be attracted or that the brunt of taxation would be reduced to the minimum. The appellant company in the present case would incur no liability to pay tax under the Act if it were to transport the refrigerators from its factory in Faridabad to its own office and godown

in Delhi and thereafter to sell them to the distributors. The liability to pay tax under the Act would, however, arise if the sale of the refrigerators to distributors were to take place at Faridabad and the movement of refrigerators from Faridabad to Delhi were to take place under the contract of sale. 'The question with which we are concerned is whether the appellant entered into such an arrangement with the distributors that the liability to pay tax would be attracted and not the other arrangement under which no such liability could be fastened on the appellant. So far as this question is concerned, we find that the parties expressly stated in each of the three distribution agreements that it would be in Delhi that the sale of refrigerators would take place to the distributors and the property therein would pass to them. It was again in Delhi that the refrigerators were delivered to the distributors. The orders for the refrigerators were placed by the distributors in Delhi and it was also here that, the price of refrigerators was paid. Looking to all the facts of the case, we have no doubt that the arrangement between the parties was that refrigerators would be sold by the appellant to the distributors after they had been transported to the sale office and godown of the appellant on Alipore Road, Delhi so that no liability to pay tax under the Act would arise. It cannot in-the circumstances be said that the transport of the refrigerators from Faridabad to Delhi was in pursuance of contracts of sale between the appellant and the distributors.

Reference has been made by Mr. Tarkunde to the fact that the distributors were to bear the freight charges for the transportation of refrigerators from Faridabad to Delhi. In this respect we find that the distribution agreements show that reference was made to transportation charges for determining the amount or price to be paid by the distributors to the appellant company. The price payable by the distributors was the aggregate of the ex-factory price of refrigerators and the transportation charges. As the ex-factory., price of refrigerators was fixed from time to time and as the agreements with the distributors provided that the sale of the refrigerators as well as the delivery thereof to the distributors would take place in Delhi, there was nothing surprising in the clause of the distribution agreements that the transportation charges would be added to the ex-factory prices of the refrigerators in calculating the amount payable by the distributors to the appellant. The inclusion of the charges for the transport of the refrigerators from Faridabad to Delhi in the. price payable by the distributors would not show that the movement of refrigerators from Faridabad to Delhi was occasioned by the contract of sale. The High Court in the course of its judgment has observed-:

> "The freight from Faridabad to Delhi is borne by the Distributors that is the Blue Star and the General Equipment Merchants. Any shortage or damage in transit is also the responsibility of Blue Star and the General Equipment Merchants; the responsibility for this does not fall on the manufacturer."

The observations in the above paragraph that any shortage or damage in transit was the responsibility of the Blue Star and the General Equipment Merchants and the responsibility for that did not fall on the manufacturer is not correct because clause 8 of each of the two agreements dated September 15, 1965 and December 11, 1965 relating to Leonard and Gem refrigerators shows that the liability of the appellant company for any shortage or damage that might occur would cease only after the goods had been delivered and inspected by the distributors at Delhi. The appellant no doubt stipulated in its agreement with Spencer & Co. that it (the appellant) would accept no

responsibility for shortage or damage occurring in transit after the goods had passed through rigorous inspection at the time they left the appellant's factory. This must, however, be regarded in the- nature of things to be a matter of mutual agreement between the parties. Spencer & Co. might well have agreed to bear that loss on the assumption that the advantage of becoming the distributor for sale of Kelvinator refrige- rators would far outweigh the loss borne by the said company in this respect. Indeed, the possibility of any loss being borne by Spencer & Co. because of any shortage or damage occurring in transit of refrigerators from Faridabad to Delhi was only theoretical, is according to the order of reference the expenses of transit insurance were borne by the appellant company. It would thus be the insurer who would have to bear the loss caused by shortage or damage occurring during transit. It may also be mentioned in this context that the octroi charges in connection with the movement of refrigerators from Faridabad to Delhi were paid by the appellant.

We have been referred to section 23 'of the 'Sale of Goods Act. According to that section, 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 assessment of the buyer or by the buyer with the assent of the, seller, the property in the goods thereupon posses to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made. , The said section, in our opinion, cannot be of much avail to the respondent. Apart, from the fact that the distribution agreements cannot, in our opinion, be construed as contracts of We. there- is no material to show that there was any assent expressed or implied by the distributors to the appropriation of. the refrigerators by the appellant at Faridabad. Reference has been made by Mr. Tarkunde to the- following observations on pages 62-63 in Vol. 34 of Halsbury's Laws of England Third Edition "An authority given by one party to the other to appropriate the goods is an implied assent by the party giving the authority to a subsequent appropriation by the other, pro- vided the appropriation is made in accordance with the contract. Such an authority confers an election on the party authorised.

An authority to appropriate is presumed where, by the terms of the contract, one party is to do with reference to the goods some act or thing which cannot be done until the goods are appropriated. When the party authorised has determined his election by doing such act or thing, the appropriation is finally made.

Until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable, unless it has previous to its revocation, been assented to by the other party."

So far as the observations made in the first paragraph reproduced above are concerned, we find that there is no material on the record to show that an authority was given by the distributors to the appellant to appropriate the goods at Faridabad. As such, the aforesaid paragraph cannot be of any material help to the respondent. The second paragraph reproduced above relates to an authority which may be presumed from the fact that one party by the terms of contract is to do with reference to the goods some act or thing which cannot be done until the goods are appropriated. In respect of this paragraph also, as already indicated above, we find that there is no material to show that the appellant was under the terms of contract authorised to do some act or thing with reference to the refrigerators which could not be done until the refrigerators were appropriated. Apart from that we

find that the observation that "until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable' would show that there was no legal bar to the changing of name plates by the appellant company till such time as orders with regard to the refrigerators were placed by the distributors after inspection of those, refrigerators. A case which was considerable bearing on the facts of the' present case is that of Tata Engineering and Locomotive Co. Ltd. V. Assistant Commissioner of Commercial Taxes, Jamshedpur and Anr. (supra). In that case the appellant company, which manufactured trucks and buses in Jamshedpur in the State of Bihar, transferred the vehicles to stock-yards operated by its own personnel in other States and supplied them to the dealers. After the promulgation of the Commercial Vehicles (Distribution and Sale) Control Order, 1963 the appellant issued a circular dated June 14, 1963, to the dealers asking them to submit monthly statements regarding fresh applications registered, retail sales, applications cancelled and stock and sales. , A new form of dealership agreement was also introduced under which the appellant agreed to sell from its works in Jamshedpur or its depots and stockvirds outside the State of Bihar to the dealer the vehicles which shall be allotted at its discretion. Clause 11(b) of :the agreement provided that "the dealer shall mail to the company on the 15th of each month ..... his firm order for purchases to be effected during the next succeeding month and his estimated requirements., for the two months following the next succeeding month In fact however no firm order was called for by the company. Pursuant to authorisation issued by the sales office of the appellant in Bombay, vehicles were transferred from its works at Jamshedpur to the various stockyards in the States. The stocks available in the stock-yards were then distributed from time to time to dealers for which purpose an allocation letter was issued each month by the sales office. There were many instances where vehicles had been actually delivered from the stock- yard prior to the issue of the allocation letter. It was also found that on some occasions vehicles bad been moved from a stock-yard in on-, State to a stock-yard in another. Treating the allocation letters together with their confirmation as transactions of sale, and the movement of vehicles from the works to the stock-yards as the direct result of the allocation so made, the Assistant Commissioner imposed tax under the Central Sales Tax Act, 1956, in relation to the sales during the period April 1, 1964 to March 31, 1966, of vehicles which had moved from Jamshedpur to the stock-yards in the various States. it was held by this Court that the procedure followed by the appellant together with the proved absence of any firm orders, indicated that the allocation letters and the statement's furnished by the dealers did not themselves bring about transactions of sale within the meaning of section 2(g) of the Act. This Court further observed :

> "It would appear from the materials placed before us that generally the completion of the sales to the dealers did not take place at Jamshedpur and the final steps in the matter of such completion were taken at the stock- yards. Even if the appellant took into account the requirements of the dealers which it naturally was expected to do when the vehicles were moved from the works to the stock-yards it was not necessary that the number of vehicles allocated to the dealer should necessarily be delivered to him. The appropriation of the vehicles was done at the stockyards through specification of the engine and the chassis number and it was open to the appellant till then to allot any vehicle to any purchaser and to transfer the vehicles from one stockyard to another. Even the Assistant Commissioner found that on some occasion vehicles had been moved from stockyards in one State to a stockyard in another

> State. it is not possible to comprehend how, in the above situation it could be held that the movement of the vehicles from the works to the stockyards was occasioned by any covenant or incident of the contract of sale."

The facts of the present case have a certain amount of similarity to the facts of the above case and, in our opinion, the dictum laid down therein fortifies us in the conclusion at which we have arrived.

We accordingly accept the appeal and set aside the judgment of the High Court. The answer given by the High Court to the question referred to it is discharged. In our opinion, the three agreements between the appellant and the distributors were merely agreements for the distribution of goods and were not agreements of sale between the parties. It cannot, in our opinion, be said that there was any movement of refrigerators from Faridabad to Delhi under a contract of sale. The question in the circumstances is answered against the department. The transactions between the appellant and the distributors did not, in our opinion, constitute sale in the course of inter-State trade or commerce. As such, there was no liability to pay tax under the Act. The appellant shall be entitled to the costs from the respondent of this Court as well as in the High Court. V.P.S. Appeal allowed.