

PETITIONER:
C.T. LTD., & ANR.

Vs.

RESPONDENT:
COMMERCIAL TAX OFFICER & ORS.

DATE OF JUDGMENT: 29/10/1996

BENCH:
S.P. BHARUCHA. S.C. SEN

ACT:

HEADNOTE:

JUDGMENT:

WITH
C.A. NO. 1621/90, 1622/90
J U D G M E N T

BHARUCHA. J.

There are appeals from the judgments and orders of the West Bengal Taxation Tribunal to which writ petitions filed in the Calcutta High Court by the appellants were transferred.

The position being common, the facts that are referred to are the facts of C.A. No. 1622 of 1990, where Hindustan Sheet Metal Limited is the appellant.

The State Trading Corporation entered into a contract with Government Trading Corporation of Iran unblended Assam tea were to be supplied. In turn, S.T.C. entered into a contract on 4th August, 1986, with the appellants for the tea, to which a copy of S.T.C's contract with the Iranian buyer was annexed.

Pursuant to the contract between S.T.C. and the appellants, the appellants purchased from tea auctions the tea to be supplied under the aforesaid contracts. The deliveries of the tea were made to the Iranian buyer under the aforesaid contracts. In June, 1987, the appellants received letters from the auction brokers from whom the tea was purchased which stated the auction brokers had received notices from the respondent Sales Tax authorities requiring the appellants to pay sales tax upon the purchases of tea from the auction brokers. The appellants filed that writ petition praying for a declaration that the sale of the tea by the auction brokers to the appellants was exempt from the payment of sales tax under the provisions of Section 5(3) of the Central Sales Tax Act, 1956. The writ petition was transferred for hearing to the West Bengal Taxation Tribunal. The Tribunal, after hearing the parties, came to the conclusion that the sales of the tea by the auction brokers to the appellants were not exempt from the levy of sales tax under Section 5(3). Hence, the appeal.

Section 5, sub-sections (1) and (3) read thus:

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"5, When a sale or purchase of goods said to take place in the

course of import or export. - (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. XXX XXX XXX

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after and was for the purpose of complying with, the agreement or order for or in relation to such export.

Learned counsel for the appellants drew our attention to the averments of the appellants in the Special Leave Petition, which had also been made in the proceedings before the Tribunal, and were uncontroverted, to the effect that S.T.C. had introduced what was called the 'consortium approach' in regard to the export of tea from India so as to avoid unhealthy competition between Indian exporters and to obtain the maximum business from Government organisations in foreign countries, like the Iranian buyer, the Government Trading Corporation of Iran. Thereunder, S.T.C. was to act as the agent of the tea exporters for securing orders on their behalf and it was to negotiate on the basis of the individual tea samples of and the prices indicated by each exporter. It was in pursuance of this approach that the contracts between S.T.C. and the Iranian buyer and the appellants and S.T.C. had been entered into; the Iranian buyer had inspected the appellants samples and accepted the appellants price.

Our attention was drawn by learned counsel to the contract between S.T.C. and the appellants, wherein the appellants were referred to as the "shipper" and the Iranian buyer as the "buyer". The contract recited that S.T.C. had entrusted the appellants with "the obligation of supply and shipment of 550.000 M/Tonnes unblended Assam Tea and the shipper had agreed to perform such obligation in terms of the contract between S.T.C. and the Iranian buyer. The tea should be "as per the sample approved by the foreign buyer". The price was quoted and was said to be "inclusive of STC's service charge of 1% of FOB value of the contracted quantity and the same will be recovered from the realisation export proceeds. All other charges including Bank charges for negotiation, LC advising, amendment charges, etc. were to the account of the appellants". Markings would be as required by the Iranian buyer, but the STC's logo would be printed on each tea chest. The Iranian buyer's representatives and surveyors, including STC's personnel, would have access to visit and inspect all phases of the appellants work. The Iranian buyer would also have the right to send its surveying the quantity and quality of tea and all necessary documents would be counter-signed by them and inserted in the Letter of Credit. The Iranian buyer would

open an irrevocable, non-transferable, non-divisible and non-confirmed Letter of Credit in favour of S.T.C., payable against shipping documents, including a full set of clean on board Bills of Lading issued or endorsed to the order of the opening bank in terms of the Letter of Credit. Each invoice was required to contain the necessary proportion of different grades of tea required to maintain the original samples submitted by the appellants and the appellants were required to inform the Iranian buyer as also the surveyors of the required proportions of tea each standard. The contract stated, "All the documents required for negotiation should be prepared in 4 copies except seller's official invoice which should be 5 copies." (Emphasis supplied). Payment would be released to the appellants after negotiation of documents and realisation of the proceeds by STC's bankers on the same had terms and condition under which the proceeds had been received by S.T.C. from their bank. If the documents were not in strict conformity with the terms of the Letter Credit, the payments to the appellants would be released under reserve through their bankers. All documents would be prepared by the appellants marked "A/C STC" in all relevant places and forwarded to S.T.C. for negotiation immediately after shipment. Export benefits arising from the export of the tea under the contract would accrue to the appellant's account fully and the S.T.C. would have no share therein. The conditions stipulated in the Letter of Credit would form an integral part of the contract between S.T.C. and the appellants. The appellants indemnified STC and would keep it indemnified against all taxes, claims, demands, action, losses, costs, expenses, etc. arising out of or in respect of their contract and the contract between S.T.C. and the Iranian buyer. Disputes between the Iranian buyer and S.T.C. arising out of the export contract would be solved amicably, as far as possible, in consultation with the appellants and any agreement arrived by S.T.C. thereafter would be final and binding on the appellants; otherwise, such disputes would be finally and exclusively subject to the jurisdiction of Iranian courts and law. Disputes between S.T.C. and the appellants would also be settled amicably through negotiations; otherwise, in the matter laid down in the arbitration clause in the contract.

Learned counsel for the appellants submitted that under the terms of contract between the appellants and S.T.C., S.T.C. was merely the agent of the appellants and there was no sale of the tea by the appellants to S.T.C. thereunder. The sale of the tea was by the appellants to the Iranian buyer.

Learned counsel cited from the judgment of this Court in the case of the Bhopal Sugar Industries Ltd. vs. Sales Tax Officer, Bhopal, 40 S.T.C. 42, the following :

"It is well-settled that while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word "agent" or "agency" is used or the words "buyer" and "seller" are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said formal status would be conferred. Thus the mere formal description of a person

as an agent or a buyer is not conclusive, unless the context shows that the parties clearly intended to treat buyer as a buyer and not as an agent. Learned counsel as a buyer and not as an agent. Learned counsel for the appellant relied on several circumstances to show that on a proper construction of the agreement it could not, but be held to be a contract of sale. Learned counsel strongly relied on a decision of this Court in Sri Tirumala Venkateswara Timber and Damboo Firm vs. Commercial Tax Officer, Rajahmundry, (1968) 21 S.T.C. 312 at 316 (S.C.), where this Court held the transaction to be a sale in almost similar circumstances. Speaking for the court, Ramaswami, J. observed as follows :

"As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds."

It is clear from the observations made by this Court that the true relationship of the parties in such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship."

In Commissioner of Sales Tax, U.P. vs Bishamber Singh Layaq Ram, 47 S.T.C. 80, this Court had said :

"The crucial test is whether the agent has any personal interest of his own when he enters into the transaction or whether that interest is limited to his commission agency charges and certain out of pocket expenses, and in the event of any loss his right to be indemnified by the principal."

Learned counsel for the appellants drew our attention to the Tea Export License held by the appellants, which was specific for the export of 550 M/tonnes of tea to Iran. This license was requisite under the provisions of Section

17 of the Tea Act, 1953. Our attention was drawn to the invoice issued by the appellants, which stated that the tea had been sold to the foreign buyers and it was signed by the appellants after stating "A/c. The State Trading Corporation of India Ltd.". The Bill of Lading issued in respect of the tea by the Irano-Hind Shipping Company Ltd. showed State Trading Corporation of India Ltd." were typed immediately after the appellant's name and address in the column "Shipper" only to identify the tea with the contract between the Iranian buyer and S.T.C. Learned counsel drew our attention to the fact that the advantage of duty draw back in respect of the aforesaid contract had been received by the appellants. In his submission, the property in the tea had not passed from the appellants to S.T.C. The purchase of the tea by the appellants at the auctions was, therefore, the penultimate sale in the course of export and, therefore, exempt from the levy of sales tax by the provisions of Section 5(3). Learned counsel for the respondent Sales tax authorities submitted that the export sale covered by Section 5(1) was the sale of the tea by S.T.C. to the Iranian buyer; the penultimate sale in the course of export was the sale of the tea by the appellant to S.T.C., which was covered by the provisions of Section 5(3); therefore, the purchase by the appellants of the tea at the auctions was exigible to sales tax.

Learned counsel for the respondents drew our attention to the judgment of this Court in *Mod. Serajuddin vs. The State of Orissa*, 36 STC 136. This was a case in which, admittedly, the Indian company had sold the goods to S.T.C. The situation, therefore, was entirely different and the judgment has no application to the present case, where the contention on behalf of the appellants is that S.T.C. was only the agent of the appellants. We should also note that the judgment in *Mod. Serajuddin* case led to the introduction of sub-section (3) in Section 5 (see Statement of Objects and Reasons thereof) so that the judgment does not reflect the law as it now stands.

Learned counsel for the respondents pointed out that in the contract between the appellants and S.T.C., the appellants were referred to as the shipper not as the seller, whereas the Iranian buyer was referred to as the buyer. Emphasis was laid upon the fact that all documents were required to be prepared by the applications marked "A/C STC" in all relevant places and these were to be forwarded to the S.T.C. for negotiation. It was pointed out that the contract contemplated disputes between the Iranian buyer and the appellants. Learned counsel for the respondents referred to the Bill of Lading and submitted that it had been endorsed in favour of S.T.C. and that, by reason thereof, the property in the tea had passed to the S.T.C. The endorsement was by the typing of the words "A/C. The State Trading Corporation of India Ltd." after the name and address of the appellants in the column "Shipper" upon the Bill of Lading.

In our view, no term in the contract between the appellants and S.T.C. clearly a sale, that is the transfer of property in the tea from the appellants to S.T.C. Such indication as there is to the contrary, particularly the requirement that the appellants should prepare all documents required for negotiation and the "seller's official invoice..... should be in 5 copies". The requirement that the words "A/c STC" be used was only to enable the Iranian buyer to identify the tea as being sent in fulfillment of the obligation under the contract between S.T.C. and itself.

The manner in which the contract between the appellants

and S.T.C. was executed reinforces our view. The Tea Export License for the tea was that of the appellants. The invoice of the appellants showed the Iranian buyer against the column, "Sold To", and no objection in this regard was raised by S.T.C. The duty draw back benefit accrued entirely to the appellants. The Bill of Lading issued by the Irano-Hind Shipping Co. Ltd. showed the Iranian buyer's Teheran bank as consignee of the tea shipped by the appellants.

Certainly, there is no endorsement on the Bill of Lading in favour of S.T.C. that would suggest the transference to it of title in the tea. The typing of the words "A/c The state of Trading Corporation of India" below the name and address of the appellants against the column "Shipper" does not constitute an endorsement. There was no endorsement upon the Bill of Lading signed by or on behalf of the Teheran bank, which is the consignee, or the Iranian buyer.

There is, therefore, nothing in the contract between the appellants and S.T.C. or in the manner of its execution that establishes that there was a transfer of the property in the tea by the appellants to S.T.C. before it was transferred to the Iranian buyer. Hence, the purchase of the tea by the appellants at the auctions in fulfillment of the export obligation to the Iranian buyer was the penultimate sale in the course of export and covered by the terms of Section 5(3). It was, accordingly, exempt from the payment of sales tax.

In the result, the appeals succeed and are allowed. The judgment and order of the Tribunal is set aside and the rule in the writ petitions filed by the appellants is made absolute.

There shall be no order as to costs.