PETITIONER:
SALES TAX OFFICER, JODHPUR AND ANOTHER

Vs.

RESPONDENT:
M/S. SHIV RATAN G. MOHATTA

DATE OF JUDGMENT:
12/02/1965

BENCH:
SIKRI, S.M.
BENCH:
SIKRI, S.M.
GAJENDRAGADKAR, P.B. (CJ)
HIDAYATULLAH, M.
SHAH, J.C.

CITATION:
1966 AIR 142 1965 SCR (3) 71
CITATOR INFO :
RF 1975 SC1652 (12)

ACT:
Constitution of India. Arts. 226 and 286(1)(b)--Questions of fact to determine whether sale in the course of import--Therefore if State sales tax leviable--Whether should be decided in writ proceedings.

HEADNOTE:
The Sales Tax Officer rejected the assessed's claim that he was not liable to be assessed to sales tax in respect of certain .sales of cement imported from Pakistan because (i) he was not a. dealer within the meaning of s.2(f) of the Rajas than Act 29 of 1954, and (ii) the sales in question were in the course of the import within the meaning of Art. 286(1)(b) of the Constitution. In the order of assessment, there was no discussion of the question of applicability of Art. 286(1) (b).

The assessee therefore filed a petition under Art. 226 challenging the assessment order on the grounds taken before the Sales Tax Officer and also claiming that the latter had failed to consider the impact and effect of Art. 286(1)(b)on the facts of the case. The State objected to the maintainability of the petition on the ground that the petitioner should have availed of the alternative remedy of appeal provided under the Rajasthan Sales Tax Act, but the High Court overruled this objection for the reason, inter alia, that the petitioner had challenged the appellant's jurisdiction to assess him to. sales tax in view of the. provisions of Art. 286(1) (b). Upon dealing with the merits of the case, the High Court held that on the facts of the case it was clear that the sales in question took place when the goods were in the course of import and therefore, by virtue of Art. 286(1)(b) were not liable to sales tax. The court therefore quashed the order of assessment.

On appeal to this Court, it was contended on behalf of the State that the High Court should have refused to entertain the petition as many of the crucial facts had not been brought on the record by the respondent, and further-more, it was not established that the cement was

sold in the course of import into India.

HELD: The High Court should not have decided the disputed questions of fact, but should merely have quashed the assessment order on the. ground that the Sales Tax Officer had not dealt with the question raised before him and remanded the case. [77 B]

OBITER: The High Court should have declined to entertain the petition, as in this case there were no exceptional circumstances to warrant the exercise of the extraordinary jurisdiction under Art. 226. It was not the object of Art. 226 to convert High Courts into original or appellate assessing authorities whenever the assessee chose to attack an assessment order on the ground that a sale was made in the course of import and was therefore exempt from tax. The fact that an assessee might have to deposit sales tax when filing an appeal could not in every case justify his bypassing the remedies provided by the Sales Tax Act. There must be something more in a case to warrant the entertainment of a petition under Art. 226, something going to the root of the jurisdiction of the Sales
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Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act. [75 G, H]

A.V. Venkatesweran v. Ramchand Sobhraj Wadwani, A.I.R. 1961 S.C. 1506, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION:Civil Appeal No. 652 of 1964,

Appeal from the judgment and order dated May 7, 1963 of the Rajasthan High Court in D.B. Civil Misc. Writ Petition No. 157 of 1962.

G.C. Kasliwal, Advocate-General for Rajasthan. K.K. Jain, for the appellants.

M.D. Bhargava and B.D. Sharma, for the respondent.

The Judgment of the Court was delivered by

Siki, J. This appeal by certificate of fitness granted by the Rajasthan High Court is directed against its judgment dated May 7, 1963, quashing the order of assessment dated March 5, 1962, made by the Sales Tax Officer, Jodhpur City, in so far as it levied sales tax on the turnover of Rs. 23,92,252.75 np.

The respondent, M/s Shiv Ratan G. Mohatta, which is a partnership firm having its head office at Jodhpur, hereinafter referred to as the assessee, claimed before the Sales Tax Officer that they were not liable to be assessed to sales tax in respect of the above turnover because, firstly, the assessee was not a dealer within s. 2(f) of the Rajasthan Sales Tax Act (Rajasthan Act XXlX of 1954) with respect to this turnover, and secondly, because the sales were in the course if import within Art. 286 (1)(b) of the Constitution. Although the Sales Tax Officer set out the facts of the case relating to the second ground, he deemed it sufficient to assess this turnover on the ground that the assessee was a dealer within s. 2(f) of the Rajasthan Sales Tax Act, without adverting to the second ground. The facts on which the assessee had relied upon to substantiate his second ground were these. The Zeal-Pak Cement Factory, Hyderabad (Pakistan), hereinafter called the Pakistan Factory, manufactured cement in Pakistan. The Pakistan Industrial Development Corporation, hereinafter called the Pakistan Corporation, entered into an agreement with M/s Milkhiram and Sons (P) Ltd., Bombay, for the export

of cement manufactured in Pakistan to India. The State Trading Corporation of India entered into an agreement with the said M/s Milkhiram & Sons for the purchase of, inter alia, 35,000 long tons of cement to be delivered to it F.O.R. Khokhropar in Pakistan, on the border of Rajasthan. The State Trading Corporation appointed the assessee as its agent, broadly speaking, to look after the import and the sale of the imported cement. The modus operandi adopted by the assessee for the sale of the cement was as follows. It would obtain from a buyer in Rajasthan an order under an agreement, a sample of which is on the record
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The agreement fixed the price and the terms of supply. By one clause the assessee disclaimed any responsibility regarding delay in dispatch and non-receipt of consignment or any loss, damage or shortage in transit due to any reason whatsoever. The agreement further provided that "all claims for loss, damage or shortage, etc., during transit will lie with the carriers and our payments are not to be delayed on any such account whatsoever." It was further provided in the agreement that the dues were payable in advance in full, or 90% in advance and the balance within 15 days of billing plus sales tax and other local taxes. Clause 6 of the agreement is in the following terms:

> "A Post Card Loading Advice will be sent to you by the Factory as soon as the wagons are loaded in respect of your orders, and it will be your responsibility to arrange for unloading the consignment timely according to Railway Rules. Ourselves. and the suppliers will not be responsible for demurrage etc. on any account whatsoever. If the consignment reaches earlier than the Railway Receipt, it is the responsibility of buyer to arrange for and get the delivery timely against indemnity bond etc. All the Railway Receipts etc. will be sent by registered post by the Suppliers in Pakistan.".

After this agreement had been entered into, the assessee would send despatch instructions to the Pakistan Corporation. These instructions indicated the name of the buyer-consignee and the destination, and provided that the railway receipt and D/A should be sent by registered post to the consignee. These instructions were sent with a covering letter to the Pakistan Corporation requesting that these instructions be passed on to the Pakistan Factory for necessary action. The Pakistan Corporation would then forward these despatch instructions to the Zeal-Pak Cement Factory. Later, the Pakistan Factory would advise the consignee that they had "consigned to the State Bank of India, Karachi, the particular quantity as per enclosed railway receipt and invoice." The State Bank of India, Karachi, would endorse the railway receipt in favour of the consignee and send it to him by post. The consignee would take delivery either by presentation of the railway receipt or by giving indemnity bond to the Station Master undertaking to deliver the railway receipt on its receipt.

The Sales Tax Officer did set out most of these facts and the contentions of the assessee in the assessment order but disposed of the case with the following observations:

> "All the above went to prove that the assessee was an Agent of the non-resident dealer for the supplies in the State. The Assessee was an importer and hence submitted an application to the Custom Authority for the

same. It booked orders and issued sale bills. Under the terms of an agreement of appointment of Agent, sale was to be effec-
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ted by the Agent. Again while obtaining orders from the buyers under condition 5 Sales Tax was to be paid by the buyers to the assessee.
Thus to all intents and purposes the assessee is a dealer who is liable for payment of Sales Tax to the State. They have rightly collected this amount from the buying dealers and retained with them. This should come to the Government.".

We can find no discussion in the order on the question raised by the assessee that the sales were made in the course of import within Art. 286(1)(b) of the Constitution.

The assessee then filed a petition under art. 226 of the Constitution and raised two contentions before the High Court, namely, (1) that the Sales Tax Officer failed to consider the impact and the effect of Art. 286(1)(b) on the facts of the case, and (2) that the Sales Tax Officer illegally held that the petitioner for all intents and purposes was a dealer liable to pay sales tax. The State raised an objection to the maintainability of the petition on the ground that the petitioner should have availed of the alternative remedy of appeal provided under the Rajasthan Sales Tax Act, but the High Court overruled this objection on the ground that "the contention of the petitioner is that in view of Art. 286(1)(b) of the Constitution, the respondent had no jurisdiction to assess the petitioner to pay the sales tax on the sale of goods in the course of the import into the territory of India", and that even if there was no total lack of jurisdiction in assessing the petitioner to pay sales tax. the principle enunciated in A.V. Venkateswarn v Ram chand Sobharaj Wadhwani (1) applied, and it was a case which should not be dismissed in litnine.

Then the High Court proceeded to deal with the merits of the case. It first dealt with the question whether the petitioner was a dealer within the meaning of s. 2(f) of the Rajasthan Sales Tax Act, and came to the conclusion that the petitioner must be deemed to be a dealer within the said s. 2(f).

Then it proceeded to deal with the question whether the sales had taken place in the course of import. The High Court held that in the circumstances of the case these sales had not occasioned the movement of goods but it was the first sale made by M/s Milkhiram and Sons to the State Trading Corporation which had occasioned the movement of goods. Secondly, it held that in the circumstances of the case "the property in goods after the delivery had been taken by the petitioner on behalf of the State Trading Corporation passed to the State Trading Corporation and simultaneously to the ultimate buyers. Thus the property in the

(1) [1962] 1 S.C.R. 753.

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goods passed to the ultimate buyers in Rajasthan when the goods had not reached the territory of India and were in course of import. In view of the authority of their Lordships of the Supreme Court in J. V. Gokal and Co. (Private) Ltd. v. The Assistant Collector of Sales Tax (Inspection) & Others, (’), it must be taken that the sale took place when the goods were in the course of the import

and they should not be liable to the payment of the Sales Tax by virtue of Art. 286(1)(b).". In the result, the High Court quashed the order of assessment in so far as it sought to levy tax on the turnover in dispute. The Sales Tax Officer, Jodhpur, and the State of Rajasthan having obtained certificate of fitness from the High Court filed this appeal.

The learned Advocate-General has raised two points before us: First, on the facts of this case the High Court should have refused to entertain the petition, and secondly, that it has not been established that the cement was sold in the course of import within Art. 286(1)(b).

Regarding the first point, he urges that an appeal lay against the order of the Sales Tax Officer; no question of the validity of the Sales Tax Act was involved and the taxability of the turnover depended on where the property passed in each consignment. This involved consideration of various facts and, according to him.the crucial facts had not been brought on the record by the assessee on whom lay the onus to establish that the sales were in the course of import. He says that the assessee should have proved that each railway receipt was endorsed by the State Bank of India, Karachi, to the buyer before each consignment crossed the frontier.

We are of the opinion that the High Court should have declined to entertain the petition. No exceptional circumstances exist in this case to warrant the exercise of the extraordinary jurisdiction under Art. 226. It was not the object of art. 226 to convert High Courts into original or appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax. It was urged on behalf of the assessee that they would have had to deposit sales tax, while filing an appeal. Even if this is so. does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under art. 226, something going to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act. But as the High Court chose to entertain the petition, we are not inclined to dismiss the petition on this ground at this stage.

(1)[1960] 2 S.C.R. 852.

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Regarding the second point, the learned Advocate-General .argues that the onus was on the assessee to bring his case within Art. 286(1)(b) of the Constitution in respect of the sales to the various consignees. He says that there is no evidence on record as to when the State Bank of India endorsed the railway receipt in favour of the ultimate buyer in respect of each consignment and without this evidence it cannot be said that the title to the goods passed to the ultimate buyer at Khokhropar or in the course of import. He further urges that it would have to be investigated in each case as to when the State Bank endorsed the railway receipt and when the goods crossed the customs barrier. He says that it is not contested that the ultimate buyer took delivery of goods without producing the railway receipt by virtue of special arrangements entered into with the railway, and according to him. it is only when the delivery was taken by the buyer in Rajasthan that the title passed. By that time, according to him, the course of

import had ceased.

We do not think it necessary to consider the various arguments addressed by the learned Advocate-General or the soundness of the view of the High Court on this point, because we are of the opinion that the High Court should not have gone into this question on the facts of this case. The Sales Tax Officer had not dealt with the question at all, and it is not the function of the High Court under art. 226, in taxing matters, to constitute itself into an original authority or an appellate authority to determine questions relating to the taxability of a particular turnover. The proper order in the circumstances of this case would have been to quash the order of assessment and send the case back to the Sales Tax Officer to dispose of it according to law. Under the Rajasthan Sales Tax Act, and other Sales Tax Acts, the facts have to be found by the assessing authorities. If any facts are not found by the Sales Tax Officer, they would be found by the appellate authority. and it is not the function of a High Court to find facts. The High Court should not encourage the tendency on the part of the assesses to rush to the High Court after an assessment order is made. It is only in very exceptional circumstances that the High Court should entertain petitions under art. 226 of the Constitution in respect of taxing matters after an assessment order has been made. It is true, as said by this Court in A. V. Venkateswarn v. Ramchand Sobharaj Wadhwani(1) that it would not be .desirable to lay down inflexible rules which should be applied with rigidity in every case, but even so when the question of taxability depends upon a precise determination of facts and some of the facts are in dispute or missing, the High Court should decline to decide such questions. It is true that at times the assessee alleges some additional facts not found in the assessment order and the State, after a fresh investigation, admits these facts, but in a petition under art.

(1)[1962] 1 S.C.R. 753.

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226 where the prayer is for quashing an assessment order, the High Court is necessarily confined to the facts as stated in the order or appearing on the record of the case. In this case, as already indicated, we have come to the conclusion that the High Court should not have decided disputed questions of fact, but should merely have quashed the assessment order on the ground that the Sales Tax Officer had not dealt with the question raised before him and remanded the case. Accordingly. we allow the appeal, set aside the order of the High Court, quash the assessment order in so far as it relates to the. turnover of Rs. 23,92.252.75 up, and remit the case to the Sales Tax Officer to decide the case in accordance with law. He will find all the facts necessary for the determination of the question and come to an independent conclusion untrammeled by the views expressed by the High Court. We may make it clear that we are not expressing any view whether the finding of the High Court that the property in the goods passed simultaneously at Khokhropar to the State Trading Corporation and the ultimate buyer is correct or not. There would be no order as to costs in this appeal.

Appeal allowed.

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