

PETITIONER:
BAGAL KOT CEMENT CO.

Vs.

RESPONDENT:
STATE OF MYSORE

DATE OF JUDGMENT 27/11/1975

BENCH:
UNTWALIA, N.L.
BENCH:
UNTWALIA, N.L.
GOSWAMI, P.K.

CITATION:
1976 AIR 357 1976 SCR (2) 852
1976 SCC (1) 336

ACT:
Central Sales Tax Act, 1956-S. 2(b)-"dealer" if
includes a del credere agent and a mercantile agent.

HEADNOTE:

By an agreement, the State Trading Corporation appointed the appellant as its selling agent for cement. A term of the agreement was that the agent shall collect State or inter-State sales tax on the sale of cement and pay the same in accordance with law. The appellant paid the sales tax on its annual turnover to the Sales Tax Authorities. Later, however, it filed an appeal stating that it was not a dealer and, as such, was not liable to pay any tax, but that was dismissed. Its appeal to the Appellate Tribunal and later revision application before the High Court were dismissed.

Dismissing the appeal to this Court.

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HELD : (1) The contention that the appellant being an agent of the State Trading Corporation, it was not a dealer as defined in s. 2(b) of the Central Sales Tax Act and hence was not liable to pay any sales-tax thereunder has no substance. Having realised the sales-tax from the various customers and voluntarily paid it as per the return submitted it was ill-advised to take an inconsistent stand of its not being liable to pay sales tax under the Central Sales Tax Act. [853F-G]

(2) From a reading of the terms of the agreement it is abundantly clear that sale was made by the appellant-company as it effected transfer of property in the goods to the customers and realised the sale price from them by issuing invoices in its own name. The restricted definition of the term "dealer" defined in the Central Sales Tax Act is not wide enough to cover all kinds of agents such as a broker or a commission agent simpliciter. The term "dealer" defined in the Central Act, would, however, include a del credere agent or a mercantile agent who carries on the business of buying or selling goods not as an agent simpliciter on behalf of the disclosed principal but as a principal vis-a-vis its customers. [855F-H]

Kandula Radhakrishna Rao and others v. The Province of Madras represented by the Collector of West Godavari, Eluru

and another, A.I.R. 1952 Madras 718, approved.

In the instant case it was the appellant company which carried on the business of selling cement although it was acting as selling agent of the Corporation. The Corporation was not a dealer which effected the sales but it was the company which did so.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 98 of 1971.

Appeal by special leave from the Judgment and Order dated the 26th February 1970 of the Mysore High Court in S.T.R.P. No. 18 of 1969.

D. V. Patel, Vineet Kumar and B. P. Singh for the Appellant.

V. P. Raman, Addl. Sol. General, N. Nettar and R. C. Kaushik for the Respondent.

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The Judgment of the Court was delivered by

UNTWALIA, J. In this appeal by special leave the question for determination is whether the appellant company is a dealer within the meaning of section 2(b) of the Central Sales Tax Act, 1956-hereinafter referred to as the Central Act, liable to pay sales tax thereunder.

The appellant, Bagal Kot Cement Co. Ltd., is a manufacturer of cement. For the period 1st April, 1961 to 31st March 1962 it filed a Return before the Assessing Authority showing a total turn-over of Rs. 1,11,02,243/-. The entire sum was shown as taxable turn-over on which an amount of Rs. 2,25,317.55 had been collected and paid as tax. No claim was made on behalf of the appellant before the Assessing Authority that it was not liable to pay any sales tax. The Authority accepted the Return and assessed the tax as per the appellant's figure. It appears the appellant was advised thereafter to file an appeal before the Deputy Commissioner of Commercial Taxes and take the stand that in respect of the transactions in question it was not a dealer and was not liable to pay any tax. The Deputy Commissioner dismissed the appeal. A second appeal filed by the appellant before the Mysore Sales Tax Appellate Tribunal also failed. The company took up the matter in revision to the High Court under section 23 of the Mysore Sales Tax Act, 1957-hereinafter called the State Act, read with section 9(2) of the Central Act. The High Court dismissed the revision. Hence this appeal.

Under the Cement Control Orders, 1958 and 1961 the appellant was bound to sell the entire quantity of cement to the State Trading Corporation of India Ltd. By an agreement executed between the parties the Corporation appointed the Company as its selling agent for sale of cement to different customers on its behalf at the controlled price and in accordance with the instructions which may be given from time to time by the Corporation. Pursuant to the agreement the company made the inter-State sales and realized sales tax from the customers under the Central Act. Its contention is that being an agent of the State Trading Corporation and having effected all the sales under its direction it was not a dealer as defined in section 2(b) of the Central Act and hence was not liable to pay any sales tax thereunder. The liability was of the Corporation.

In our opinion there is no substance in the appellant's argument. After having realized the sales tax from the various customers and voluntarily and ex-contractu paid it

as per the Return submitted it was ill-advised to take an unsustainable stand of its not being liable to pay sales tax under the Central Act.

There cannot be any doubt that the sales of cement made during the period in question in the course of inter-State trade were exigible to sales tax under the Central Act. The question for consideration is who was liable to pay it ? The liability was of the dealer as defined in section 2(b). If the appellant company was the dealer which had made the sales as defined in section 2(g), then the liability to pay the tax under the charging section 6 was its. If it was not a dealer then obviously it was not liable to pay any tax.

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To determine the point at issue as mentioned above it is necessary to advert to the primary facts and the course of conduct of the business of the appellant as per the terms of the agreement entered into with the State Trading Corporation. The High Court has pointed out that the Deputy Commissioner found:

- (1) The Company was appointed by the State Trading Corporation as its selling agent;
- (2) It had sold cement at the price specified in the Cement Control Order to the customers who held permits from the governmental authorities;
- (3) The customers purchased the cement from the company directly and they were not aware of the identity of the principal namely the State Trading Corporation.

The High Court also refers to the fact that the appellant did not place the relevant papers pertaining to the transactions before the authorities below. But its learned counsel conceded that the invoices were issued by the company, that the company had possession and the custody in the goods and it was authorised to transfer the property of the goods to the purchasers. These facts were not disputed before us. Rather in the special leave petition it is admitted that the invoices were issued by the appellant company in its own name.

We may now refer to some relevant clauses of the agreement between the parties. They are as follows.

- "1. The Corporation hereby appoints the agents to take on its behalf delivery of the entire cement produced at the works of Bagalkot Cement Co. Ltd. and to arrange for the distribution of such cement in accordance with such directions as may be issued by the Corporation from time to time.
2. The Agents may enter into contracts for sale of cement on behalf of the Corporation and shall, inter-alia, arrange for the despatch of cement to the consignees, submit bills for the sales, receive payments in connection therewith and do all acts and things that may be necessary to handle effectively, on behalf of the Corporation, all contracts of sale of cement entered into as aforesaid.
- 7(a) The Agents shall sell cement at such prices as may be indicated by the Corporation from time to time.
- (b) The Agents shall collect State or inter-State sales tax and other local and State Government taxes as may be leviable, and pay the same in accordance with the law. They shall also discharge all liabilities

devolving upon them as dealers under the various sales tax Acts and Rules;

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13. The Agents shall credit to the Corporation at the end of every month the sale proceeds of the cement sold by them at a price referred to in clause 7 above, as reduced by:
 - (a) the amount paid to producers according to the provisions of clause 9 above;
 - (e) the Agents remuneration referred to in clause 8 above."

It would thus be seen from the course of conduct of the appellant's business and the terms of agreement that the Company was not a mere commission agent or broker selling the goods on behalf of its principal-the Corporation. There was no privity of contract between the various customers of cement and the Corporation. No property in the goods sold was passed by the Corporation to them. After taking the symbolical delivery of the entire cement produced at the works of the company as per clause (1) of the agreement the company was in possession and custody of the goods. It was entering into contracts for sale of cement and selling it. The property in the goods was passed on to the buyers by the company. Under clause (7) it was authorised to collect sales tax both on intra-State and inter-State sales, and to discharge its liability devolving upon it as dealer under the various Sales Tax Acts and Rules. As per clause 13 of the agreement only the difference of price after deducting the company's remuneration was to be credited to the Corporation's account.

Section 2(b) of the Central Act reads as follows :

" "dealer" means any person who carries on the business of buying or selling goods, and includes a Government which carries on such business;"

"sale" within the meaning of clause (g) means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration. "sale price" under clause (h) means the amount payable to a dealer as consideration for the sale of any goods. On the facts stated above it is abundantly clear that sale was made by the appellant company as it effected transfer of property in the goods to the customers and realized sale price from them by issuing invoices in its own name. The restricted definition of the term 'dealer' in the Central Act is not wide enough to cover all kinds of agents such as brokers or a commission agent simpliciter as many of the State Acts include them within their definitions. As for example the term 'dealer' defined in section 2(k) of the Mysore State Act includes "a commission agent, a broker or del credere agent or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;" The term 'dealer' as defined in the Central Act would, however, include a del credere agent or a mercantile agent who carries on the business of buying or selling goods not as an agent simpliciter on behalf of the disclosed principal but as a principal visa-vis its customers.

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In Halsbury's Laws of England, Fourth Edition, Volume 1, para 712 it is stated:

"A mercantile agent is one having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money

on the security of goods. An agent may be a mercantile agent although he has no general occupation as an agent, or has only one customer, or although his general occupation is that of an independent dealer in the commodity entrusted to him, provided that he acts in the transaction in his capacity as mercantile agent; but he must not be a mere servant or shopman."

In para 713 is stated:

"A del credere agent is one who, usually for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts."

In the judgment under appeal the High Court repelled the stand of the appellant relying upon the decision of a full Bench of the Madras High Court in *Kandula Radhakrishna Rao and others v. The Province of Madras* represented by the Collector of West Godavari, Eluru and another(1). Referring to the identical definition of the 'dealer' in the Madras Act Rajamannar, C.J. delivering the judgment on behalf of the Bench has stated at page 723 column 2:

"In the case of a commission agent, the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, undoubtedly when a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would in my opinion, fall within the definition of dealer in the Sales Tax Act. Neither the definition of dealer nor of sale contemplates as a necessary condition, that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another."

We agree with the above view of the learned Chief Justice.

Mr. D. V. Patel, learned counsel for the appellant heavily relied on the definition of the expression "place of business" given in clause (dd) of section 2 of the Central Act which includes "(i) in any case where a
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dealer carries on business through an agent (by whatever name called), the place of business of such agent;" Counsel submitted that the above inclusive definition would show that it was the Corporation which was carrying on the business through the appellant company as its agent and for the purpose of the Central Act the place where the business was carried on by the company as the Corporation's agent would be the place of the business of the Corporation. On the other hand, learned Additional Solicitor General II pointed out that if the appellant was the dealer within the meaning of section 2(b) then it was not the Corporation which was carrying on the business through it as an agent to attract the definition given in clause (dd). In our judgment it was the appellant company which carried on the business of selling cement although it was acting as selling agents of the Corporation. The Corporation was not the dealer which effected the sales but it was the company which did so.

For the reasons stated above, we find no substance in this appeal. It is accordingly dismissed with costs.

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Appeal dismissed.

JUDIS