

(1961) KLJ 1264

High Court Of Kerala

Case No: O. P. No"s. 164, 165, 171 and 196 of 1957

Associated Agency,
Kottayam

APPELLANT

Vs

State of Kerala and
Another

RESPONDENT

Date of Decision: March 6, 1961

Acts Referred:

Constitution of India, 1950 " Article 286(1), 286(1)(a), 286(2)#States Reorganisation Act,
1956 " Section 119

Citation: (1961) KLJ 1264

Hon'ble Judges: M.A. Ansari, C.J; M. Madhavan Nair, J

Bench: Division Bench

Advocate: K.P. Abraham, George Kurien, Thomas Vellappally and M.M. Cheriyan, for the
Appellant;

Judgement

M.A. Ansari, C. J.

1. These writ petitions been connected, because some common legal issues arise in all
the four. In addition, another issue is shared by two out of

the aforesaid petitions. The turnover in O. P. 164/57 is Rs. 2,01,459-8-11, on which Rs.
3,147-12-11 had been assessed as the sales-tax,

because the petitioner had during 1953-54, sold rubber to Messrs. Dunlops Rubber Co.,
which commodity been delivered at the purchaser"s

godown in Fort Cochin. As the Port, during the period formed part of Madras State, the
assessment against the writ petitioner had been made

under the Madras General Sales Tax Act, 1939, though the order had been made on
March 28, 1957, i. e., after the reorganization of the States.

One of the grounds taken against the assessment is that the petitioner had only sold what belonged to Glenrock Estate and Velimalai Estate, and

should not be made personally liable because the ownership or custody of the commodity sold had at no time been with the petitioner. The

averment of facts, on which the legal grounds had been raised, can be very briefly stated. The purchaser had the purchasing department at

Kottayam, which was in the erstwhile Travancore-Cochin State; and the Officer in charge was empowered to buy rubber from the local dealers.

That Officer had placed orders for the supply at the godown of Messrs. Dunlops & Co., in Fort Cochin of specified quantities and grades of

rubber at specified prices, which orders were accepted by the writ petitioner, who directed the principal to supply from the estates the rubber

directly to the Dunlop's godown, and the officer directed the godown keeper to receive the specified quantity of rubber from the Estates in

anticipation of the delivery. The next stage in the bargain was that on receipt of the goods, the godown keeper issued weighment receipts, which

were banded, along with invoices for payment by Messrs. Dunlop's officer at Kottayam. The payments were then made, and the officer issued

forms of contract in duplicate, showing the concerned seller-estate. The forms also contained a condition that the goods should not be deemed to

have been accepted unless and until they have been examined; and, if upon examination, they be found not in conformity with the contract, the

company reserved the right to reject all or any of them. On the aforesaid averments the following four legal grounds have been taken.

(1) The bargains were outside sales, inasmuch as the rubbers had been delivered for consumption in Calcutta, and therefore, exempted under

Article 286(1) (a) of the Constitution,

(2) They were inter-State sales and therefore not taxable under Article 286(2) of the Constitution,

(3) The sales being on behalf of Glenrock and Velimalai Estates of their produce and the principals being exempt from taxation, due to the sales of

their produce not forming part of the turnover, the writ petitioner as the agent could not be taxed, where the principal would not be liable,

(4) The States Reorganization Act has only saved taxes, in arrears; and, as no demand for the sales tax challenged by the petitioner been made

prior to the operation of the Act, the Kerala State has no right to assess and recover what was due for 1953-54.

Only three out of the four grounds stated above have been raised in the next two writ petitions, because there the petitioners, who are sellers, are

not agents. The writ petitioner in O. P. 165 of 1957 states that sales of rubber to Messrs. Dunlops Co., on their own and on behalf of the

Firestone Tyre and Rubber Co., had been for consumption in the factories in Calcutta and Bombay and therefore they are outside and inter-State.

The turnover in this writ petition is Rs. 1,29,108-0-2, on which the tax assessed is Rs. 2,017-5-0, and the period is the assessment year 1953-54.

The petitioner avers that the officer in charge of the purchasing department at Kottayam placed orders with the local dealers for the supply at

Dunlop's godown in Fort Cochin of specified quantities and grades of rubber at specified prices for onward dispatch, in pursuance of such oral

agreement, rubbers were dispatched and delivered at Dunlop's godown in Fort Cochin, in anticipation of the delivery, the officer advised the

godown keeper to receive the specified quantities of rubber from the concerned dealer, on the goods having been received at the godown, the

keeper issued weighment receipts, which were handed over along with the invoice to the officer at Kottayam, payments for the goods been made

then and forms of contract issued, containing conditions similar to the one already stated. The remaining ground taken in this writ petition for

vacating the assessment is that under the States Reorganization Act, the Kerala State is not authorized to recover, or to levy the tax, because such

levies would not be in arrears due to no demands having been earlier made. Similar grounds have been taken in O. P. 171 of 1957, where the writ

petitioner had sold rubber stored in the petitioner's godown at Kottayam to Messrs. Dunlop in 1953-54, both for purchaser's consumption at the

factory in Calcutta and as agent for Firestone Tyre and Rubber Co. The turnover is Rs. 1,22,356-10-2 and the tax amount is Rs. 1,911-13-2. The

averments of facts in this petition are similar to those in O. P. 165 of 1957.

2. Lastly the petitioner in O. P. 196 of 1957, claims that he was doing business as a commission agent for various estate owners in the

Travancore-Cochin State, on March 27, 1957, been assessed on turnover of Rs. 2,78,863-4-0 to pay a tax of Rs 4,357-3-10 for the assessment

year 1953-54. He claims that Rs. 47,275-3 - 0 out of the aforesaid turnover represent the value of the rubber sold on his own account to Messrs.

Dunlops Rubber Co., and Rs. 2,31,588-1-0 to be sales by him as commission agent on behalf of several estate owners. The averments of facts in

this petition about how the orders were placed, how the goods were dispatched, how the payments were made, and how formal contracts were

executed, are similar to those in the other petitions, and the grounds taken against the assessment are also identical to those taken in O. P. 164 of

1957.

3. It is, therefore, clear that three grounds of attack against the assessment are common to all the four writ petitions, whereas the fourth is peculiar

to only two, which are O. P. 164 of 1957 and 196 of 1957. Before dealing with the aforesaid grounds seriatim, it is better to extract the relevant

parts of the formal contracts, which are alleged to being executed after the deliveries of rubber were completed at Fort Cochin.

Kottayam,

Messrs

We have this day bought from you the undermentioned rubber

Terms of payment: Against bills.

Time of delivery: Goods received and accepted after inspection and grading delivered packed to our godown at Cochin.

For the Dunlop Rubber Co. (India) Ltd.,

Manager,

Rubber purchasing department.

We, as sellers confirm this contract and agree to the terms and conditions stated hereon.

(Sd) (Signature of sellers)

B. B. 1. ***

2. Goods the subject of which this contract shall not be deemed to have been accepted by the company unless and until they have been examined,

and, if upon examination, they are found not to be in conformity with the contract, the company reserves the right to reject all or any of them.

3. ***

5. Therefore on the days formal documents were executed at Kottayam, the goods were at Fort Cochin, and documents stated the goods to have

been bought on the dates the documents were executed. It follows that the sales had taken place at Fort Cochin, notwithstanding the document

being executed at Kottayam, because on those dates the goods were at Fort Cochin. This result is due to the definition of "sale" under the Madras

General Sales Tax Act, XIV of 1939, which definition is contained in Section 2(h) and reads as follows:

sale"" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the

course of trade or business for cash or for deferred payment or other valuable consideration, and includes also a transfer of property in goods

involved in the execution of a works contract, but does not include a mortgages hypothecation, charge or pledge;

Explanation (1).

Explanation (2). Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be

deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made-

(a) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or

It follows that notwithstanding the execution of the documents at Kottayam the sales would be liable to pay tax under the Madras General Sales

Tax Act due to the goods being at Fort Cochin, unless they be "outside sales" under Article 286(1) (a) and therefore exempt from the sales tax.

Now one form of their being such is that they be covered by the ""Explanation sale"" under the aforesaid article, prior to the constitutional

amendment of 1956, and on this point the recent pronouncements of the Supreme Court are against the writ petitioners. In *India Copper*

Corporation Ltd. v State of Bihar ((1961) 12 S. T. C 56 at p. 64) the question arising for decision was whether sales, under which goods been

delivered outside the State of Bihar, but not for the purpose of consumption within the State of first delivery, would be exempt from levy of sales-

tax and the appellant had claimed such sales to be exempt as well under Article 286(l)(a) as it stood before the amendment. *Rajagopala Iyengar J.*

delivering the majority view, has observed as follows:

The key to the problem is afforded by two indications in the Article itself: (1) the opening words of Article 286(1) which speak of a sale or

purchase taking place and (2) the non-obstante clause in the Explanation which refers to the general law relating to ""sale of goods under which

property in the goods has, by reason of such sale or purchase, passed in another State."" These two together indicate that it is the passing of

property within the State that is intended to be fastened on, for the purpose of determining, whether the sale in question is ""inside"" or ""outside"" the

State, and, therefore, subject to the operation of the ""Explanation"" that State in which property passes would be the only State which would have

the power to levy a tax on the sale.

It follows that unless the contract sale be Explanation sale, the State, in which the property in the goods passes can tax. As to what is Explanation

sale has been explained in *Burmah Shell Co. Ltd. v Commercial Tax Officer* (1960) 11 S. T. C. 764) where it has been held that to exclude the

power of taxation of the State of West Bengal, the appellants must be able to point out some other State where the goods could be said to have

been delivered as a direct result of the sale for the purpose of consumption in that other State and that, as the appellants had not done so, they

could not invoke the Explanation to Article 286(1)(a). Therefore, it is clear that rubber in these petitions not having been shown to have been

delivered as a direct result of the sales for the purposes of consumption in Bombay or in Calcutta, the Explanation to Article 286(1)(a) before the

amendment of 1956 would not be attracted. On the other hand the goods are shown to have moved from the erstwhile State of Travancore-

Cochin into the State of Madras, which was not the State where the goods were to be consumed, and thereby continuous journey for the purpose

of consumption in West Bengal or Bombay been broken. Therefore, the contracts are not Explanation sales, nor they are otherwise "outside sale

because the property in the goods had passed in the taxing State under Explanation 2 of Section 2(h), and we had held similar explanation in the

Travancore-Cochin General Sales Tax Act not to be constitutionally bad. Vide Deputy Commissioner of Agricultural income tax and Sales-tax,

Trivandrum v A. V. Thomas & Co., Ltd. (I. L. R. 1960 Ker 1395.) The consequence is that the ground of the sales being exempt under Article

286(1)(a) fails.

5. As regards the next objection of the sales being inter-State, that also is without substance, for the ownership in goods only passed, having

regard to contracts extracted earlier in the judgment, after the goods had come to rest in the Cochin godown of Messrs. Dunlops & Co.

Therefore, no sales have been proved in the petitions to have directly caused movement of goods from one State to another. Nor the movement of

the goods from Cochin to Bombay or Calcutta can be the direct consequences of the sales, that voyage not being continuous due to the rest at the

Cochin godowns. The words ""in course of import"" have been defined to mean where the import be the direct result of the contract; and we think

the words ""in course of inter-State sales"" cannot be construed differently. It follows that as the ownership in the goods had passed after the rubber

had come to rest in the Cochin godown, the earlier stages become part of the agreement to sell, which stages should be excluded from

consideration where only sales are being taxed. The purchaser's right to reject the goods after the ownerships had passed would also not make the

sales inter-State when the further movement to the destination been not provided by contracts.

6. The fourth ground is equally without force. It is conceded that the Madras General Sales-tax Act, 1939, was allowed to be operative in the area

under the States Reorganization Act; and if some enactment be so continued we do not think any special authorization is required to do what the

enactment permits to be done. The inevitable consequences of the enactment being continued is after acts under it are permitted in the area. It

follows that the argument of only arrears of tax being allowed under the States Reorganization Act XXXVII/56, would not exclude the Kerala

State from assessing and levying tax under the Madras General Sales Tax Act, because u/s 119 of the former Act the taxing statute is continued

and such statute permits assessment for the years for which assessments have been made in these cases.

7. The obvious result is that all the grounds for allowing O. Ps. 165 of 1957 and 171 of 1957 are decided against the writ petitioners, and,

therefore, those petitions fail. Also these grounds in the remaining two petitions are held to be without force.

8. Coming to the additional ground in O. Ps. 164 of 1957 and 196 of 1957 it is useful to recall that Section 2(a) of the Madras General Sales Tax

Act, which defines "agricultural or horticultural produce", does not exclude rubber from such a definition. It follows that rubber would be such a

produce under the statute. Further the sale by a person of agricultural or horticultural produces grown by him is excluded from the definition of

turnover" u/s 2(i) of the Act. Therefore, sales of rubber by owners of rubber plantations would be agricultural produce and not turnover for

purposes of Section 3 and not taxable under the Act. It also follows that had those owners sold the goods when the goods were in the Cochin

godown, they would not be liable to pay the tax and in granting the exemption, owners of plantations without the Madras State cannot be

discriminated against. Therefore the question arising for adjudication in these writ petitions is whether the sales of their produce through their agents

render the bargains taxable in the hands of the non-resident agents. The writ petitioners learned advocate has drawn our attention to India C. & T.

Distributing Co. v State of Madras ((1958)9 S. T. C. 769 at pp. 775, 776 & 777) where the issue arising for the determination was how far the

non-resident agent of a non-resident rubber plantation owner, was liable to tax assessment u/s 14A of the Madras General Sales Tax Act, 1939,

and the learned Judges in allowing the Letters Patent Appeal, stated the principles under which the aforesaid Section was passed in these words:

It is clear from the provisions of this Section that it is really the non-resident principal that is assessed to tax and the agent is deemed to be a dealer

in respect of his business as a convenient representative for assessment, levy and collection of the tax".

They then continue to observe:

The assessment and the levy of tax being thus on the principal it is clear on principle he should be enabled to obtain all those exemptions that he

would be entitled to obtain had he been resident in the State.

Having thus stated the learned Judges further hold:

There is nothing in Section 14A or in any other provisions of the Act to tax the exempted goods in the hands of the agent leaving it to the principal

to obtain refund.

And they finally conclude:

We, therefore, hold that the appellant would be entitled to the exemptions u/s 2(i) in regard to the sale of rubber during the period of assessment

and of tea till 1st January, 1948.

We think those petitioners' objections to being assessed for sales of produce which would be exempt should the sales be directly by their

principals has force. The learned Government Pleader has drawn our attention to Union Leather Co. v State of Madras ((1960) 11 S. T. C. 318)

where the proposition of the agent not being liable for tax where the principal cannot be taxed, was held not to be correct, and the registered agent

dealer of an unregistered outside dealer in hides was found liable. It is, however, clear that the latter decision, which is on Section 8, does not

qualify the proposition that transactions exempt from sales tax would not be taxable should they be made through agents. It is equally obvious that

Section 8 does not apply to these petitions because the principals here were not residents within the Madras State and the decision relied by the

learned Government Pleader would hardly be relevant for deciding the question, which is whether the sales not forming part of the principal's

turnover can become taxable turnover in the hands of their agents. We think sales by owners of rubber plantations of their produce to Messrs.

Dunlops & Co., being exempt, such transactions cannot become taxable even if they be concluded through agents and the taxing officer has not

satisfactorily dealt with the question of agency, though in O. P. 164 of 1957 the writ petitioner had by letter of March 15, 1957, claimed his entire

turnover to be exempt due to his being agent. We, therefore allow O. P. 164 of 1957 and direct the Sales Tax Officer to determine whether the

writ petitioner's averment about the sales sought to be taxed having been made in the capacity of an agent on behalf of the plantation owners,

who be exempt from tax on sales of rubber, is correct, and not to levy any tax should that petitioner's above averment be correct.

The petitioner in O. P. 196 of 1957 claims only part of the turnover to be on behalf of the plantation owners, and therefore the averment

concerning only such part of the turnover needs investigation. The Sales Tax Officer will therefore investigate in this petition how far Rs. 2,31,588-

1-0 of the petitioner's turnover be sales price of rubber got as commission agent on behalf of the various owners of the rubber plantations, and

should the case be found to be correct not to tax this part. The assessment in this petition on Rs. 47,275-3-0, out of the total turnover shall stand.

It follows that O. P. 164/57 is allowed with costs, and the Sales Tax Officer in making fresh assessment on the entire turnover will follow the

directions given in that petition. Also O. P. 196 of 1957 is partly allowed and the fresh assessment in this case will be only on the turnover of Rs.

2,31,588-1-0. The other O. Ps. viz. 165 of 1957, and 171 of 1957 are dismissed with costs and the judgment will govern all the writ petitions.