(2017) 10 BOM CK 0016

BOMBAY HIGH COURT

Case No: 02 of 2004

The Commissioner of Sales Tax, Maharashtra State, Bombay		APPELLANT
	Vs	
M/s.Ravi Trading Company, Akola		RESPONDENT

Date of Decision: Oct. 10, 2017

Acts Referred:

- Contract Act, 1872, Section 148 - "Bailment", "bailor" and "bailee" defined
- Sale of Goods Act, 1930, Section 19 - Property passes when intended to pass

Hon'ble Judges: R. K. Deshpande, Manish Pitale

Bench: DIVISON BENCH

Advocate: S.M.Ukey

Judgement

1. The Maharashtra Sales Tax Tribunal at Mumbai has by its order dated 04.09.1998 referred the following questions for the decision of this Court under Section 61(1) of the Bombay Sales Tax Act, 1959.

(i) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of clause (29) of section 2 of the Bombay Sales Tax Act, 1959 and clause (h) of Section 2 of the Central Sales Tax Act, 1956, the Tribunal was justified in law in holding that the insurance charges and carrying charges do not form part of the sale price?

(ii) Whether on the facts and in the circumstances of the case and on a true and correct interpretation of clause (c) of subsection (2) of section 36 read with Explanation (I) to the Bombay Sales Tax Act, 1959, the Tribunal was

justified in law in deleting the penalty by placing reliance on the ratio of the decision of the Bombay High Court in case of Indoswe Engineers (P) Ltd. Vrs. State of Maharashtra (101 STC 177) ?

2. If the question at Sr.No.1 is answered in affirmative, then it may not be necessary for us to decide the question of law at Sr.No.2. But, if we decide the first question in negative, then second question will have to be decided on its own merits.

3. Before considering the question No.1, the decision of the Apex Court in the case of Hindustan Sugar Mills vrs. State of Rajasthan and others, reported in (1978) 4 SCC 271 will have to be considered being the landmark judgment throwing light on the controversy involved and considered by the Tribunal also. In the said decision, the Apex Court considered the question as to whether in sales of cement effected under the Cement Control Order, 1967, the amount of "freight" forms part of the sale price so as to be exigible to sales tax under the provisions of the Rajasthan Sales Tax Act, 1954 and the Central Sales Tax Act, 1956. The Apex Court considered the provisions of Section 3 of the Rajasthan Sales Tax Act which provided that every dealer whose turnover in the previous year exceeds a certain limit shall be liable to pay tax on his taxable turnover, subject to the provisions of that Act. It considers the definition of "Taxable turnover" under Section 2(s) to mean that part of the "turnover", which remains after deducting the aggregate amount of proceeds of certain categories of sales and "turnover" according to Section 2(t), mean "the aggregate of the amount of sale prices received or receivable by a dealer in respect of the sale or supply of goods.....".

4. The Court considers the definition of "sale price" given in Section 2(p). The relevant portion of it is reproduced below;

> "..... the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such costs is separately charged."

The Apex Court considers that the aforesaid definition is in two parts. The first part says that ''sale price'' means the amount payable to a dealer as consideration for the sale of any goods. It holds that the only relevant question to ask is, what is the amount payable by the purchaser to the dealer as consideration for the sale and not

as to what is the net consideration retainable by the dealer.

5. The Court in para 8, takes into consideration a case where a dealer transports goods from his factory to his place of business and sells them at a price which is arrived at after taking into account ''freight and handling charges'' incurred by him in transporting the goods. The Court holds that the amount of ''freight and handling charges'' included in the price would obviously be the part of the ''sale price'', because it would be payable by the purchaser to the dealer as part of the consideration for the sale of the goods. The reasoning behind it stated is that, since ''freight and handling charges'' represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price charged to the purchaser, which would form a part of ''sale price'' within the meaning of first part of the definition.

6. The Court thereafter considers another example based upon the contract of sale entered into between the parties, where the dealer instead of transporting the goods from his factory or his place of business and selling them there, enter into a contract of sale freight on rail (F.O.R.) destination railway station. Where such a contract is made, the seller undertakes an obligation to put the goods on rail and arrange to have them carried to the destination railway station at his expense. The delivery of the goods to the purchaser in such a case is complete at the destination railway station and till then the risk continues to remain with the dealer. The Court holds that agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to the amount of freight, even if there is any fluctuation. The Court holds that when the purchasers pay the amount of freight in such a case, it would be as part of the agreed price and not as freight vis-a-vis the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of "sale price" and fall within the first part of the definition.

7. In para 10 of the said decision, the Court, however, deals with a distinctive case where the contract of sale may not be F.O.R. destination railway station, but the price alone may be so. The Court holds that the contract does not have all the incidents of a F.O.R. destination railway station contract, but merely the price is stipulated on that basis. The terms of such a contract may provide that the delivery shall be complete when the goods are put on rail and thereafter it shall be at the risk of the purchaser. Such a stipulation would make the railway agent of the purchaser for taking delivery of the goods. The freight in such a case would be payable by the purchaser though the price agreed upon is F.O.R. destination railway station. The Court holds that the amount representing freight would not be payable as part of the consideration for the sale of the goods but by way of reimbursement

of the freight which was payable by the purchaser, but, in fact, disbursed by the dealer and hence it would not form part of the ''sale price''.

8. In paragraph 16, the Apex Court considers the latter part of the definition of ''sale price'' containing the exclusion of the amount of freight from ''sale price''. It considers that second part enacts an inclusive clause and it says that ''sale price'' includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". The Court considers that there is an exception carved out of this inclusion and not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. It holds that the exclusion clause does not operate as an exception to the first part of the definition and it merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. It holds that obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of ''sale price''. It further holds that if the State is able to show that particular amount falls within the first part of the definition and is, therefore, part of the ''sale price'', the exclusion clause cannot avail the assessee to take the amount in question out of the definition of ''sale price''.

9. In the present case, the assessee is the dealer in cotton bales and is registered under the Bombay Sales Tax Act, 1959 (in short "the BST Act") as well as the Central Sales Tax Act, 1956 (in short "the CST Act"), as dealer. In the return filed by the assessee for the period from 25.10.1984 to 12.11.1985 and 13.11.1985 to 02.11.1986 under the provisions of BST and CST Acts, the deduction of amount of insurance of Rs.51,373/and freight/carrying charges of Rs.11,00,523/was claimed on the ground that the same do not constitute ''sale price'' as defined under Section 2(29) of the BST Act and Section 2(h) of the CST Act. Though the authorities below have held that the said amount was taxable, the Maharashtra Sales Tax Tribunal has held that the said charges cannot constitute part of a ''sale price'' under the provisions of BST and CST Act.

10. The Tribunal has in the prsent case recorded the finding that it is the case of spot delivery and the burden of the buyer is to collect the goods and convey them to whichever destination he chooses and if, in order to facilitate this, the assessee renders the services to the buyer, the charges in respect of insurance and carrying are the post sale charges which canot be legally included in the sale price. The Tribunal, therefore, takes the view that the charges of insurance and freight/carrying charges in the present case levied by the assessee after delivery of the goods do not form part of the sale price and should, therefore, be exempted from the sale.

11. In the order of reference, the Tribunal considers the decision of the Apex Court in the case of Hindustan Sugar Mills Limited, cited supra, and holds that the insurance charges paid by the assessee may form part of sale price as they are not excluded from the definition of sale price under the Central Act. After considering the decision of the Apex Court in Central Wines vrs. Special Commercial Tax Officer, reported in 65 STC 48 delivered by the Apex Court, it holds that it is possible to take a view that the insurance charges and the carrying charges paid by the assessee in respect of the goods sold are included in the sale price because the assessee retains physical possession of the goods, even if, sale was on the spot delivery.

12. The question to be considered in this case is whether the Tribunal was justified in the facts and circumstances of this case in holding that the insurance charges and carrying charges do not form part of the sale price? Though we are concerned in this reference with the assessment made under the provisions of BST and CST Acts, it would be sufficient if we refer only to the provisions of BST Act, since the material provisions of both the Acts are identical.

13. Section 3 of the BST Act deals with the incidents of tax and it provides that every dealer whose turnover either of sales or of all purchases has exceeded or exceeds the relevant limit specified in subsection (4) shall until such liability ceases under subsection (3), be liable to pay tax under this Act on his turnover of sales and on his turnover of purchases made on or after the notified day. The "turnover of sales" is defined under Section 2(36) of the BST Act means the aggregate of the amounts of sale price received or receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of sale price, if any, refunded by the dealer to purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period.

14. Section 2(29) of the BST Act defines "sale price".

The relevant portion of the definition is reproduced below;

> " ''Sale price'' means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of goods at the time of or before delivery thereof, other than [the cost of insurance for transit or of installation] when such cost is separately charged".

The aforesaid definition of "sale price" is capable of same interpretation of the expression "sale price" considered by the Apex Court in the judgment in Hindustan

Sugar Mill''s case, cited supra. The first part says that ''sale price'' means the amount of valuable consideration paid or payable to a dealer for any sale made and the only relevant question to be asked in respect of it is, what is the amount payable by the purchaser to the dealer as consideration for sale and not as to what is the net consideration retainable by the dealer. The latter part of the definition of ''sale price'' in the present case also contains a clause of exclusion of the amount of the cost of insurance for transit or of installation when such cost is separately charged. It will, therefore, have to be held that the exclusion clause does not operate as an exception to the first part of the definition and it merely enact an exclusion out of the inclusion clause and takes out some thing which would otherwise be within the inclusive clause. It has to be held that the exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purposes of bringing the particular amount within the definition of "sale price".

15. In the order of reference, the Tribunal has held that it is possible to take a view that the insurance and carrying charges incurred by the buyer after sale of goods constitute a sale price because the seller has retained the possession even in case of spot delivery. This is also the contention raised by Shri Ukey, the learned Additional Government Pleader. It is not possible to endorse such a view. It is not the case here that the insurance and carrying charges of cotton bales are the components of the sale consideration which passes from buyer to the seller. The case is, therefore, not covered by the first part of the definition of ''sale price'' under Section 2(29) of the BST Act. In order to cover the case under the latter part of the said definition, what is required to be shown is that the buyer has incurred such charges in respect of the goods at the time of or before the delivery thereof. The finding in this case by theTribunal is that the charges in respect of insurance and carrying are the postsale charges, which cannot be included in the sale price, and we agree with it.

16. Shri Ukey, the learned Additional Government Pleader has urged that the insurance and carrying charges would constitute a sale price of the goods in question. He has relied upon the decision of the Apex Court in Hindustan Sugar Mills case, cited supra. It is not possible to accept this contention for the reason that, to attract the first part of the definition of "sale price" under Section 2(29) of the BST Act, the real test laid down in the decision cited supra is that such charges are the components of the sale consideration. The said decision further holds that such charges borne by the seller should be shown to have been for making the goods available to the buyer at the place of sale. Such is also not the finding by the Tribunal in the present case.

17. In the decision of M/s. India Meters Limited vrs. State of Tamil Nadu, delivered by the Apex Court in Civil Appeal No. 1032-33 of 2003, decided on 07.09.2010, relied upon by Shri Ukey, the learned Additional Government Pleader, it was the obligation

to pay freight as the goods were to be delivered to the premises of buyer which was incurred by the seller and therefore, the Apex Court has held that the amount of freight was included in the definition of "sale price". In para 15 of the said decision, the Apex Court clearly holds as under :

> "15. The transfer of title to the goods as provided in clause 10 read with clause 6 of the agreement was to be at the place of delivery in the premises of the buyer. Though the contract mentioned the price of the electric meters as exfactory price, the delivery was not at the factory gate. The specification of what the price would be at the factory gate, therefore, does not in the context of the term subject to which the sale was agreed to be effected, render it the point or the location at which the sale can be said to have been completed. Had the sale been completed at the factory gate, the expenses incurred thereafter by way of freight charges would then be capable of being regarded as expenditure which was in the nature of a postsale expenditure and, if paid by the seller, regarded as an amount paid by such seller on behalf of the buyer".

In view of above, it is clear that if the sale was completed in the present case at the point of spot delivery, the expenses incurred thereafter by way of freight or carrying charges are capable of being regarded as expenditure which was in the nature of postsale expenditure and even if paid by the seller, it is regarded as an amount paid by such seller on behalf of the buyer, which cannot constitute the component of sale price.

18. Section 19 of the Sale of Goods Act, 1930, dealing with the property passes when intended to pass, being relevant is reproduced below :

> "19. Property passes when intended to pass.
>
> (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

The passing of the property in goods depends upon the intention of the parties, as is evident from the terms of the contract, the conduct of the parties, and the circumstances of the case. Under subsection (3) of Section 19, unless a different intention appears, the rules contained in Sections 20 to 24 are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. It is thus, the transfer of right to use the goods is deemed to be sale of goods, attracting the incidence of tax.

19. In the present case, the Tribunal has recorded in para 12 of its judgment dated 07.06.1996 delivered in Second Appeal Nos.1337, 1338 and 1339 of 1991 that the perusal of the documents will show the following facts :

(a) Delivery is a spot delivery;

(b) Insurance charges are as per the desire of the buyer;

(c) Carrying charges are in the shape of the compensation for stacking, destacking carriage of goods;

(d) In certain cases, no insurance is taken by the assessee; and

(e) There are no carrying charges if the goods are collected within the specified period.

In para 13, the Tribunal holds that the goods are specific and in deliverable stage, without requiring the assessee to do anything to them for making them deliverable. It further holds that since it is a spot delivery, the burden of the buyer is to collect the goods and convey them to whichever destination he chooses. However, in order to facilitate this, the assessee may render the services to the buyer. The Tribunal further holds that these factors will clearly show that the delivery of the goods is complete no sooner the bales of cotton are earmarked as specified goods and identified and stocked at a particular place. In clear terms, the Tribunal holds that the charges in respect of insurance and carrying are, therefore, postsale charges

and cannot, therefore, be legally included in the sale price of the goods.

20. In the present case, passing of the property in goods to the buyer is at the place and time of spot delivery. After the sale is complete, even if the assesseesellor retains the possession of the goods sold and incurs the expenditure of insurance and carrying the goods at the destination of the buyer, he performs these functions in his capacity as a ''bailee'', as contemplated by Section 148 of the Indian Contract Act, 1872, who shall be entitled to reimbursement of such expenses from the ''bailor'', as specified under Section 158 therein. Such charges of insurance and carrying incurred by the assesseesellor cannot, therefore, constitute a ''sale price'' within the meaning of Section 2(29) of the BST Act.

21. In view of above, we hold that in the facts and circumstances of this case, the Tribunal was justified in holding that the insurance charges and carrying charges do not form part of the sale price for the reason that the sale was completed at the point of spot delivery and the insurance and carrying charges were incurred thereafter. We, therefore, answer Question No.1 in the affirmative.

22. In view of our answer to Question No.1 in the affirmative, Question No.2 does not at all arise for consideration. The reference stands disposed of accordingly.