

A**BENGAL TIMBER TRADING CO. LTD.**

v.

COMMISSIONER OF SALES TAX, MADHYA PRADESH**B***February 1, 1967*[K. SUBBA RAO, C.J., J. C., SHAH, J. M. SHELAT.,
V. BHARGAVA AND G. K. MITTER, JJ.]**C**

Constitution of India, 1950, Art. 286(1)(a) Explanation, prior to amendment by the Constitution (Sixth Amendment Act) 1956—Sale of railway sleepers—“Actually delivered” meaning of—Question to be considered for decision whether delivery within the State—“F.O.R.” used in connection with price and not place—Effect of—Liability to sales-tax under C.P. and Berar Sales Tax Act (21 of 1947).

D

The appellant entered into a contract with the President of India for the supply of railway sleepers. The consignees, to whom the sleepers were to be despatched according to the instructions given to the appellant under cl. 11(a) of the conditions of contract, were outside the State of Madhya Pradesh. The sleepers were booked by rail to the consignees from Dhamtari railway station in Madhya Pradesh. In the third column in the Schedule to the contract, Dhamtari was shown as the place of delivery. On the question whether the sales came under the Explanation to Art. 286(1) (a) of the Constitution prior to its amendment by the Constitution (Sixth Amendment) Act, 1956 and were therefore exempt from sales-tax under the C.P. and Berar Sales Tax Act, 1947, the High Court held: (1) that the property in the goods passed to the purchaser at Dhamtari, (2) that the sleepers were actually delivered to the purchasers at that place, and (3) that the sales were completed at Dhamtari and were therefore liable to tax.

E

In appeal to this Court,

F

HELD: The sales were covered by the Explanation and as such were not taxable by the State of Madhya Pradesh. [557 A-B]

G

(1) The question is not when and where, under the general law, the title to the goods passed under the contract, but whether actual delivery of the goods took place, for consumption outside the State of Madhya Pradesh so as to be within the deeming provision of the Explanation. [556 B-C]

H

(2) In the fifth column in the Schedule to the contract, relating to rate, the expression “F.O.R.” was used only in connection with the price of the goods. Therefore, it only meant that the rate was to be inclusive of all charges of putting the goods on rail and had nothing to do with the place of delivery. Further, the expression “actually delivered” in the Explanation means physical delivery of the goods or such other action as puts the goods in the possession of the purchaser but does not include symbolical or notional delivery such as entrustment to the railway as a common carrier [550 C; 553 F-G; 555 D]

Singareni Collieries Co. Ltd. v. State of Andhra Pradesh & Ors. [1966] 2 S.C.R. 190 followed.

(3) All the clauses of the contract have to be read as a whole to find out the intention of the parties as to where the actual delivery was to take place. So read, cls. 3, 11, 12 and 14 of the contract are not merely conditions super-imposed after the actual delivery of the goods. They show that, while the major part of the operations of the appellant with regard to delivery were to be performed at Dhamtari, he was not relieved of all liability as to delivery until the goods were finally accepted at the destination by the consignee, and that actual physical delivery was not to be taken as complete before the goods were accepted by the consignee at the destination. Clause 3(a) links delivery with final acceptance, which, according to cl. 11(g), could only be after the goods had reached the destination and were acknowledged as accepted by the consignee. Clause 11(g) also shows that notwithstanding the fact that the goods had been passed by the Sleeper Passing Officer at Dhamtari, they had been put on rail within the period of contract at the said station, the Sleeper Passing Officer had given the appellant a passing certificate in terms of cl. 10 and the Station Master at Dhamtari had issued a tally receipt for the number of sleepers loaded the consignee still had the right to inspect the goods at the destination and reject any which were not in terms of the contract; and such rejected goods were to be treated as non-delivered. The place of actual delivery, in the light of all the circumstances, could only be the destination and the goods could only be said to be fully delivered and finally accepted after they were acknowledged at the destination, and since consumption took place only in the State to which the goods were despatched, the sales came within the purview of the explanation [554 H; 555 A—D; 556 B—D]

Birendranath Guha & Co. v. State of Bihar, 5 S.T.C. 273 and *D. N. Dutta v. Commissioner of Sales Tax, Orissa*, I.L.R. [1961] Cuttack 622 overruled.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 398 to 400 of 1966.

Appeals by special leave from the judgments and orders dated March 6, 1964 of the Madhya Pradesh High Court in M.C.C. Nos. 90, 91 and 110 of 1963 respectively.

M. C. Setalvad, *Shankar Ghosh* and *D. N. Gupta*, for the appellant (in all the appeals).

B. Sen and *I. N. Shroff*, for the respondent (in all the appeals).

The Judgment of the Court was delivered by

Mitter, J. These are three appeals by leave granted by this Court from orders of reference under section 44(1) of the Madhya Pradesh General Sales Tax Act, 1958 at the instance of the Commissioner of Sales Tax, Madhya Pradesh to the High Court in that State. The question in each of the references was, whether, in the facts and circumstances of the case, the sales of sleepers (for railways) made by the non-applicant (Bengal Timber Trading Co. Ltd.) under the agreement with the President of India came under Art. 286 (1) (a) of the Constitution read with the Explanation thereto and therefore were exempt from the imposition of tax under the C.P. and Berar Sales Tax Act, 1947 ?

A Except for the amounts which varied from year to year involved in the sales, the facts and circumstances were common in all the three cases. The periods for which tax was sought to be imposed were; from 1st July 1950 to 30th June 1951, from 1st July 1951 to 30th June 1952 and from 1st July 1952 to 30th June 1953. It will be noted that all the three periods are prior to the amendment of Art. 286 of the Constitution by the Constitution (Sixth Amendment) Act, 1956. The relevant portion of Art. 286 as it stood during the years in question read as follows :—

B “286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

C (a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

D Explanation.—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

E

 The true meaning of the said Article and Explanation came up for consideration in a number of decisions of this Court. Its real purpose was to prevent “imposition of an unduly heavy burden upon the consumers by multiple taxation upon a single transaction of sale” *Bajarang Jute Mills Ltd. v. State of Andhra Pradesh*⁽¹⁾. In effect the Explanation to the Article created a fiction and fixed the State “in which the actual delivery of the goods took place for the purpose of consumption there” as the only place where sales tax could be levied as was pointed out in *Bengal Immunity Company Ltd. v. The State of Bihar and Ors.*⁽²⁾. There it was said that “the shifting of the *situs* of a sale or purchase from its actual *situs* under the general law to a fictional *situs* under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the *situs* is fictionally fixed”. The earlier decisions of this Court were noted in *Bajarang Jute Mills’ case*⁽¹⁾ and it was there observed :

H “It is now well-settled that by Art. 286(1) [as it stood before it was amended by the Constitution (Sixth Amendment) Act, 1956] sales as a direct result of which goods

(1) 15 S.T.C. 430 at 433.

(2) [1955] 2 S.C.R. 603, 651.

were delivered in a State for consumption in such State *i.e.*, the sales falling within the Explanation to Art. 286(1) were fictionally to be regarded as inside that State for the purpose of cl. (1) (a) and so within the taxing power of the State in which such delivery took place and being outside all other States exempt from sales tax by those other States."

The last mentioned case was considered by this Court in *Singareni Collieries Co. Ltd. v. State of Andhra Pradesh and others*(¹) and it was held :

".....the expression 'actually delivered' in the context in which it occurs can only mean physical delivery of the goods, or such other action as puts the goods in the possession of the purchaser. The expression 'actually delivered' does not include mere symbolical or notional delivery *e.g.* by entrusting the goods to a common carrier, or even by delivery of documents of title like railway receipts. It was said that the rule contained in s. 39 (1) of the Indian Sale of Goods Act, 1930 has no application in dealing with a constitutional provision which while imposing a restriction upon the legislative power of the States entrusts exclusive power to levy sales tax to the State in which the goods have been actually delivered for the purpose of consumption".

The fiction of the sale or purchase being deemed to have taken place in the State in which the goods had been actually delivered as a direct result of sale or purchase for the purpose of consumption in that State, was resorted to in order to put the matter beyond all controversy on the question as to where the property in the goods passed or as to any inquiry about the place where the goods may be said to have been delivered.

The contract in this case was entered into between the President of India and the appellant before us and contained terms and conditions to be noted immediately. The recital to the agreement shows that "the contractor has agreed to supply and deliver to the State wooden sleepers to the number and of the description and quality at the price or prices and at the times and places and in the manner detailed in the Schedule, specification and conditions of contract hereinafter appearing all of which form part and parcel of this agreement". The relevant conditions of contract are as follows :

Cl. (1). Time of delivery of the sleepers shall be of the essence of the contract and the contractor shall deliver the sleepers on or before the date or dates mentioned in the

(1) [1966] 2 S.C.R. 190, 200.

A Schedule or within such extended time or times as may be allowed under cl. (2).....

Clause 2 provides that if the contractor shall be delayed in the supply of the materials so as to necessitate an extension of the time provided in the Schedule, he shall apply in writing to the Sleeper Control Officer, Eastern Group, who, if reasonable grounds are shown to his satisfaction, shall grant such extension in writing as in his absolute discretion he may think fit.

B

Cl. 3 (a). "The prices named in the Schedule shall cover everything required to be done by the contractor in terms of the specification and conditions of contract including all loading and handling charges connected with the inspection and delivering of the sleepers on rail and taxes and impositions in respect of the sleepers till they are delivered and finally accepted under the terms of this contract."

C

Cl. 3(b) provides that in the event of wagons not being available within a month after passing, the contractor shall stack and earth the passed sleepers. Pending despatch, the sleepers were to remain in the contractor's custody.

D

Cl. 4. "The person or persons authorised to inspect, pass and brand sleepers for the State under these conditions of contract . . . will be appointed or nominated by the President, Eastern Group Sleeper Control and/or the Sleeper Control Officer, Eastern Group"

E

Cl. 5(a). "The sleepers shall be offered for examination and passing within the boundaries of the railway stations mentioned in the Schedule unless permission is given in writing by the Sleeper Control Officer, Eastern Group, to the contractor to offer them for inspection at other stations or sites."

F

Cl. 5 (g). "The contractor shall make all arrangements with the railway concerned for the lease of an adequate plot or plots of land at stations where he desires to offer sleepers for inspection and bear the charges thereof."

G

Cl. 9 provides for testing of the sleepers by the Sleeper Passing Officer and any sleepers which were rejected by him were to be removed from the railway premises at the charge and cost of the contractor. Under cl. 10 the Sleeper Control Officer was to give the contractor a passing certificate of the number passed and rejected at such station. Under cl 11(a) "After passing, the contractor shall apply to and obtain from the Sleeper Control Officer,

H

Eastern Group, his orders as to the despatch of the passed sleepers which would then be disposed of by the contractor either by handing them over to the consignee or by loading into railway wagons and booking them under the risk note 'B' by rail to the consignee to whom the sleepers were allotted". Cl. 11(f) provides that on arrival at destination, the consignee shall check the number of sleepers and report on any shortage or the receipt of defective sleepers. In all cases, the Sleeper Control Officer was to be the final authority as to whether such sleepers were in good order and conformed to the specification or not. Cls. 11(g), 11(i) and 12 ran as follows:

Cl. 11(g). "In the case of passed sleepers booked by rail the contractor shall immediately after loading apply for and obtain from the despatching station master a tally receipt for the number loaded. Such sleepers as are acknowledged by the consignee as possessing the passing mark of the Sleeper Passing Officer and the private mark of the contractor will be deemed fully delivered, subject, however, to the right of the consignee to have such sleepers re-inspected by the Sleeper Control Officer, or his representative, and all sleepers rejected by the Sleeper Control Officer shall be deemed to be non-delivered and all sleepers are to be at the risk of the contractor until fully delivered and finally accepted at the destination."

Cl. 11(i). "If there is any shortage in the number of sleepers received by the consignee in any particular consignment *i.e.* covered by a single railway receipt, the contractor shall be paid for all sleepers shown on the tally receipt provided all sleepers received by the consignee are passed sleepers and have not been rejected by the Sleeper Control Officer but if any part of such consignment consists of unpassed sleepers they shall be rejected and included in the shortage and the contractor shall be held responsible for the total shortage in that consignment and shall not receive any payment for such shortage."

Cl. 12. "The sleepers shall be of the best description and in strict accordance with the specification and the contractor shall receive payment for such sleepers only as are approved, branded and passed by the Sleeper Passing Officer and duly delivered to the consignee in terms of the contract."

Cl. 13 provides for payment of 90% on bills submitted in triplicate supported by the passing certificate, tally receipt and by an acknowledgment from the consignee to the Sleeper Control

A

B

C

D

E

F

G

H

- A** Officer certifying that the sleepers have been received by him and have been checked and found in order. The payment of the remaining 10% shall be made on bills submitted in triplicate as soon as the sleepers have been delivered as provided in cl. 11(g).

Clause 14 reads :

- B** "It must be expressly understood that all on account or advance payments are in no way to be considered as relieving the contractor in any way from the liabilities he may incur under the terms of the contract. This has express reference to cl. 11(g) above."

- C** The schedule to the contract was in tabular form containing six columns. The 3rd column was headed "places at which to be delivered" and below it was mentioned "Dhamtari, Eastern Railway." The 5th column was headed "rate at which the sleepers to be supplied at each place inclusive of all demands, F.O.R." In this column were given the rates for different kinds of sleepers *i.e.* of different dimensions. The 6th column was headed "month of completion" and in this column (to quote from the document at page 112 of the paper book) was given the date 15-10-1952. The third note at the foot of the schedule provided that "the date of completion of the contract shall be the last date of inspection at the supplier's stations during the month in which the contract is due to be completed."

- E** The High Court of Madhya Pradesh took the view that the sales were completed in Dhamtari, that the property in the goods passed to the purchaser at that place and the sleepers were actually delivered to the purchaser at that place. It was further stated in the judgment of the High Court that the place of delivery was specifically stated to be F.O.R. Dhamtari. The last observation does not seem to be correct because, as noted already, the place of delivery as given in the Schedule was Dhamtari, Eastern Railway and it was only in connection with the price of the goods that the expression 'F.O.R.' occurred. It is well known that the expression 'F.O.R.' when used in connection with the place of delivery means that the delivery *prima facie* takes place when the goods are put on rail and when the expression is used in connection with the price, it means that the rate is to be inclusive of all charges of putting the goods on rail.

- H** In order to find out whether the Explanation to Art. 286(1) (a) was applicable, we need not consider where the property in the goods passed nor are we to guide ourselves by s. 39(1) of the Indian Sale of Goods Act which only raises a *prima facie* inference as to delivery. In this case the consignee of the goods was always to be outside Madhya Pradesh according to the instructions given to the contractor with regard to the despatch of the goods. Counsel

on behalf of the State of Madhya Pradesh contended that actual delivery of the goods took place at Dhamtari in that State. In aid of his contention, he relied on the following factors : (a) The Schedule which was a part of the contract showed that the place of delivery was Dhamtari, Eastern Railway; and (b) Cls. 1 and 2 of the conditions of contract referred both to the time and place of delivery as mentioned in the schedule. The net result of these two clauses, according to counsel, was that the time and place of delivery both pointed to Dhamtari. According to counsel, cl. 3(b) went to show that after the goods were brought to the railway yard at Dhamtari and were passed by the Sleeper Passing Officer, the contractor became the bailee in custody of the goods and the charges which he incurred in earthing up the goods during the months of April to June were to be borne by the buyer. This was sought to be reinforced by cl. 3(a) which provided that all loading and handling charges and expenses in connection with the putting of sleepers on rail and taxes and impositions were to be on the sellers's account at Dhamtari.

Counsel argued that cl. 5(g) went to show that it was to suit the convenience of the purchaser that the contractor had to take on lease a plot of land belonging to the railway for storing the sleepers. Cls. 9 and 10, according to him, went to show that the rejected sleepers had to be taken out of the railway yard leading to the inference that only such goods as had been passed by the Sleeper Passing Officer were to be considered as the property of the railway. Great reliance was placed on cl.11(a) which according to counsel, clinched the matter. It was urged that if the goods were actually handed over to the consignee at Dhamtari railway station, there could be no manner of doubt that actual delivery took place there. According to counsel the position was the same if the goods were loaded into railway wagons and booked to the consignee under risk note 'B' in terms of the contract. This was sought to be fortified by reference to cl. 11(i) according to which the contractor was to be paid for all sleepers shown on the tally receipt.

Counsel urged that all the above provisions in the contract went to show that as soon as the goods were put on rail at Dhamtari after they had been brought into the railway yard and passed by the Sleeper Passing Officer, and marks had been put on them, delivery of the goods was complete and nothing remained to be done by the contractor.

In our opinion, we have got to take the whole of the contract into account and then find out the intention of the parties as to where actual delivery was to take place thereunder. While there can be no doubt that the major part of the operations of the contractor with regard to delivery were to be performed at Dhamtari he was not relieved of all liability as to delivery until the goods

- A** were finally accepted at the destination by the consignee. In this respect, we cannot overlook cls. 3(a), 11 (g), 12 and 14 of the conditions of contract when the consignee was outside Madhya Pradesh. Cl. 3 (a) speaks of delivery and final acceptance under the terms of the contract. Delivery here is linked with final acceptance which according to cl. 11 (g) can only be after the goods had reached the destination and were acknowledged as accepted by the consignee.
- B** Cl. 11 (g) makes it clear that notwithstanding the fact that the goods had been passed by the Sleeper Passing Officer at Dhamtari and that they had been put on rail within the period of the contract at the said station and the Sleeper Passing Officer had given the contractor a passing certificate in terms of cl. 10 and the station master at Dhamtari had issued a tally receipt for the number of sleepers loaded, the consignee still had the right to inspect the goods at the destination and reject any which were not in terms of the contract and such rejected goods were to be treated as non-delivered.
- C** All this, in our opinion, puts the matter beyond doubt that the actual physical delivery was not taken as complete before the goods were accepted by the consignee at the destination. In all such cases,
- D** the consumption took place in the State to which the goods were despatched with the result that the sales came within the purview of the Explanation to Art. 286 (1) (a) as it stood before the Sixth Amendment of the Constitution.

- Our attention was drawn to a judgment of the Patna High Court in *Birendranath Guha and Co. v. State of Bihar*⁽¹⁾ where the assessee had taken lease of a timber forest in Nepal and had built godowns and offices in Nepal territory close to Jogbani railway station in the State of Bihar. The assessee supplied to the railways and despatched to different destinations various quantities of sleepers from Jogbani railway station after obtaining instructions from the Sleeper Control Office. The assessee contended that no sale took place in Bihar since the sleepers had been manufactured in Nepal and despatched from Jogbani railway station to places outside Bihar. The full terms of the contract in that case are not to be found in the report but it appears that it was worded very similarly to the contract before us. The Patna High Court held that on a consideration of all the provisions of the contract, it was manifest that the goods in question had been unconditionally appropriated to be contract at Jogbani railway station. Alternatively, the High Court held that there was appropriation of the goods within the meaning of s. 23(2) of the Sale of Goods Act at Jogbani railway station and accordingly it was held that there was delivery to the carrier at Jogbani railway station coupled with an unconditional appropriation of the goods within the meaning of s. 23 (2) of the Sale of Goods Act. With regard to cls. 11(g), 11 (j) and 13(a) the High Court said that these were merely additional stipulations

(1) 5 S. T. C. 273.

superimposed on the contractor who agreed to act as insurer of the goods till the stage of final destination and also agreed to the other conditions, but these additional conditions had no bearing on the question as to where and when the title to the sleepers passed to the buyer. A

We find ourselves unable to agree with the above expression of opinion as we have already pointed out that the question is not when the title to the goods passed under the contract, but to ascertain whether actual delivery of the goods took place outside the State of Madhya Pradesh for the purpose of consumption there so as to be within the deeming provision of the Explanation to Art. 286 (1). The contract has to be considered in the setting of the facts and circumstances of the case as a whole and cls. 11(g), 11(i), 12, 13 and 14 cannot be read as conditions superimposed after the actual delivery of the goods. The place of actual delivery in the light of all the circumstances of the case can only be the destination of the goods and the goods can only be said to be fully delivered and finally accepted after they are acknowledged at the destination by the Sleeper Control Officer. B
C
D

A similar contract came up for consideration before the Assam High Court in *Birendranath Guha v. Commissioner of Taxes*⁽¹⁾ and the High Court took a view different from that of the Patna High Court mentioned above.

In *D. N. Dutta v. Commissioner of Sales Tax, Orissa*⁽²⁾ two questions were referred to the High Court, one of them being, whether there was a completed sale in Orissa so as to confer jurisdiction on the State of Orissa to tax the impugned transactions and secondly, whether even if there was a completed sale in Orissa, the State Government was prohibited from taxing those transactions in view of the ban imposed by cl. (1) and cl. (2) of Art. 286 of the Constitution. The contract, according to the judgment of the High Court, was identical with the one which came for consideration in the Patna case in *Birendranath Guha and Co. v. State of Bihar*⁽³⁾ The Orissa High Court held that in respect of the impugned transaction, none of the sleepers had been subject to reinspection by the Sleeper Control Officer or rejected by him at the destination; all the sleepers were fully delivered when the passing mark was given by the Sleeper Passing Officer at the place of despatch and the seller had loaded them in the wagon at the despatching station and obtained the tally receipt from the station master concerned. It is not necessary to examine the case in detail but it is sufficient to say that even if there was no rejection at the place of destination, actual delivery would not be completed until they were finally accepted E
F
G
H

(1) 10 S. T. C. 327.

(2) I. L. R. [1961] Cuttack 622.

(3) 5 S.T.C. 273.

A at destination and to that extent we find ourselves unable to agree with the decision of the Orissa High Court.

In the result, it must be held that the sales in these cases were covered by the Explanation to Art. 286 (1) and as such not taxable by the State of Madhya Pradesh. The appeals are therefore allowed with costs. One set of hearing fee.

B

V.P.S.

Appeal allowed.