CASE NO.:
Appeal (civil) 4158-4186 of 2001

PETITIONER:
State of Orissa and Anr

RESPONDENT:
M/s K.B. Saha and Sons Industries Pvt. Ltd. & Ors. etc

DATE OF JUDGMENT: 27/04/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

(With Civil Appeal Nos. 5341-5344 of 2001 and
I.A.No.3 in SLP (C) No.15308/2002)

Dr. ARIJIT PASAYAT, J.

Appellants-State of Orissa and the Orissa Forest Department Corporation Ltd. (in short the 'Corporation') in these appeals call in question legality of the judgment rendered by a Division Bench of the Orissa High Court allowing the writ petitions filed under Article 226 of the Constitution of India, 1950 (in short the 'Constitution').

Writ petitions were filed by the respondents on the plea that the transactions between them and the Corporation were in course of inter-State trade and, therefore, only sales tax under the Central Sales Tax Act, 1956 (in short the 'Central Act') and not the Orissa Sales Tax Act, 1947 (in short the 'State Act') was leviable. Accordingly, prayer was made for a declaration that levy and collection of tax under the State Act was unauthorized, without jurisdiction and the excess amount collected from them under the guise of State sales tax should be refunded.

Background facts as presented by the appellants are as follows:

The respondents have their registered office outside the State of Orissa. They carry on business in tobacco and kendu leaves. They prepare bidi at factories situated in the State of West Bengal. The Corporation is a Government of Orissa Undertaking. Trade in Kendu leaves in the State of Orissa is a State monopoly and, therefore, is being transacted by the Corporation which sells processed and Phal kendu leaves by way of tender and auction every year. The writ petitioners had registered both under the West Bengal Sales Tax Act, 1994 (in short the 'West Bengal Act') and the Central Act.

As usual, the Corporation issued tender notice for sale of processed and Phal kendu leaves for the year 2000-2001 and invited sealed tenders from purchasers duly registered with it. All the writ petitioners were registered purchasers with the Corporation and they submitted tenders which were duly

accepted. They also entered into agreements with the Corporation. After the sale of kendu leaves and payment of the sale value, lifting orders were issued by the Corporation to its respective Divisional Managers permitting the purchasers to lift the goods. Thereafter, the concerned Divisional Forest Officer issued transport permit in the prescribed form on the basis of which the writ petitioners transported the kendu leaves to their places of business in the State of West Bengal. According to the writ petitioners the sale and purchase of kendu leaves are deemed to have taken place in course of inter-State trade because the sale/purchase had occasioned the movement of kendu leaves from the State of Orissa to the State of West Bengal and as such it is exigible to central sales tax under the Central Act and not local Act i.e. State Act. The plea was resisted by the State. According to it the levy of sales tax under the State Act was justified. To similar effect was the stand of the Corporation.

The High Court referred to various provisions of the Orissa Kendu Leaves (Control of Trade) Act, 1961 (in short the 'Kendu Leaves Act') under which the State of Orissa has assumed monopoly of trading kendu leaves. Rules framed thereunder are known as Orissa Kendu Leaves (Control of Trade) Rules, 1962 (in short 'Central Rules'). It was noted by the High Court that Section 3(2)(b) of Kendu Leaves Act lays down that notwithstanding anything contained in sub-section (1), leaves purchased from government or any officer or agent specified in the said sub-section by any person for manufacture of bidis within the State or by any person for sale outside the State may be transported by such person outside the unit under a permit to be issued in that behalf by such authority as may be prescribed and the permits so issued shall be subject to such conditions as may be prescribed. The High Court also referred to Rule 5-B which deals with disposal of kendu leaves. Particular reference was made to sub-rule (10) and sub-rule (11) of the said Rule. Under sub-rule (11) the purchaser is required to execute an agreement in the prescribed form 'H' within 15 days from the date of receipt of an order relating to his selection as purchaser failing which the said order of selection shall be liable to be cancelled. Sub-rule (13) provides that purchaser shall take delivery of kendu leaves from such depots or stores as indicated by the Divisional Forest Officer during the agreement. Rule 6 deals with grant of transport permit. The High Court relied upon the said Rule for its conclusion that the transactions were in the nature of inter-State trade. Reference was made to sub-rule (1) of Rule 6 which lays down that an application for issue of permit under Section 3(2)(b) of the State Act in the prescribed form 'C' has to be made to the Divisional Forest Officer. The High Court found that the writ petitioners were purchasers duly registered with the Corporation. They have submitted their tenders pursuant to the tender of notice. Their bids were accepted pursuant to which in each case agreement was executed. As an instance regarding the nature of the transaction, reference was made to the factual position in OJC 9724/2000 filed by Ashok Bidi and Anr. In that case it was noted that the Divisional Manager of the Corporation, Balangir Division in his letter dated 13.11.2000 wrote to the Sub Divisional Manager, Padampur Sub Division, requesting him to give delivery of the stock to writ petitioner No.1 on receipt of the transport permit from the Divisional Forest Officer, Kendu Leaf, Padampur. In the copy which was forwarded to the Divisional Forest Officer, Kendu Leaf, Padampur Division, the Divisional Manager requested him to issue necessary transport permit in favour of the writ petitioner. The challan

indicates that the goods were to travel from Mithapali in Orissa to Aurangabad in West Bengal. The transport permit also noted the destination. It was, therefore, concluded by the High Court that kendu leaves can only be delivered after submission of necessary transport permit and the sale can only be completed after delivery of the goods, that is to say, after the goods have been directed to move to the definite place as mentioned in the transport permit. Such permits clearly indicate the destination and also checking and examination at check gates in between the point of despatch and destination so as to avoid diversion of the goods. It was, therefore, concluded that the pre conditions essential for a sale in course of inter-State trade were satisfied and the transactions have to be held as inter-State sale within the meaning of Section 3(a) of the Central Act. The writ petitions were accordingly allowed.

In support of the appeals, learned counsel for the appellants submitted that unnecessary stress has been laid by the High Court on the transport permit. They submitted that even in case of intra-State trade, the transport permits were required. There was in each case an agreement with the Corporation and nowhere it stipulates that the goods could only be taken outside the State. After the sale was completed in the State of Orissa, the purchaser was free to take it to any destination.

The nature of the transaction has to be concluded on the basis of the common intention of the parties. The seller had no knowledge as to what is the ultimate destination. Mere knowledge to the seller is not sufficient. Something more is necessary. There was no material to show that the seller's intention was of inter-State trade. The permit issued for outside the units is only for the convenience of the purchasers, where the goods pass is immaterial.

Learned counsel for the Corporation submitted that the permit was issued to facilitate transport and there was no binding obligation and compulsion to take them outside the State.

Learned counsel for the Corporation further stated that though a casual reading of Clause 3.13 gives an impression that there was no definite point of sale spelt out in the agreement, yet a complete reading of the agreement in its entirety goes to prove that sale was intended to be intra-State sale. So far as the permit is concerned it was submitted, as noted above, that it is only to facilitate the movement of goods. Nobody can move the articles without the permits, but that does not restrict loading. Knowledge of about the State of destination is not determinative. There is no embargo on delivery and the embargo is only on transportation.

One of the appeals filed related to certain interim orders passed after the disposal of the writ petitions. Learned counsel for the Corporation stated that such a practice is unknown in law. After the writ petition is disposed of, the Court becomes functus officio and could not have passed any order of either interim or final nature.

Learned counsel for the respondents on the other hand supported the judgment of the High Court.

The nature of a transaction i.e. whether it is an inter-State or intra-State would depend upon the factual scenario of the case under examination. The Corporation only accepts

tenders from purchasers who are duly registered with it. The registration is renewed from time to time. One of the Clauses on which the High Court has placed great reliance is Clause 3.7. The same reads as follows:

"The tenderer shall be bound by all Forest Department rules and regulations in connection with the purchase and transit of the forest produce."

It has been pointed out by learned counsel for the respondents that in the tender document there was clear indication that the principal place of business and additional place of business of the respondents were all outside the State of Orissa. The details of the registrations under the West Bengal Act and the Central Act were indicated. The way bill of transport and consignment of goods despatched from outside the State of West Bengal to any place in West Bengal was also brought on record.

Reference was also made to the certificate issued by the Joint Commissioner, Income Tax, West Bengal under Section 206C of the Income Tax Act, 1961 (in short the 'Income tax Act') to the Corporation to the effect that the respondents would be utilizing the kendu leaves for the purpose of manufacture and not for trade purpose and, therefore, authorized the Corporation not to collect tax at source in terms of Section 206C of the Income Tax Act.

Though mere knowledge about the ultimate destination cannot be sufficient, yet cumulative effect of the factual scenario has to be considered.

At this juncture, it is relevant to take note of a few decisions on the question of inter-State sale.

Strong reliance was placed by learned counsel for the State on a decision of this Court in Balabhagas Hulaschand v. State of Orissa (1976 (2) SCC 44), more particularly, the position highlighted at page 52 which reads as follows:

"12. Furthermore, we can hardly conceive of any case where a sale would take place before the movement of goods. Normally what happens is that there is a contract between the two parties in pursuance of which the goods move and when they are accepted and the price is paid the sale takes place. There would, therefore, hardly be any case where a sale would take place even before the movement of the goods. We would illustrate our point of view by giving some concrete instances:

Case No. I\027A is a dealer in goods in State X and enters into an agreement to sell his goods to B in State Y. In pursuance of the agreement A sends the goods from State X to State Y by booking the goods in the name of B. In such a case it is obvious that the sale is preceded by the movement of the goods and the movement of goods being in pursuance of a contract which eventually merges into a

sale the movement must be deemed to be occasioned by the sale. The present case clearly falls within this category.

Case No. Il\027A who is a dealer in State X agrees to sell goods to B her he books the goods from State X to State Y in his own name and his agent in State Y receives the goods on behalf of A. Thereafter the goods are delivered to B in State Y and if B accepts them a sale takes place. It will be seen that in this case the movement of goods is neither in pursuance of the agreement to sell nor is the movement occasioned by the sale. The seller himself takes the goods to State Y and sells the goods there. This is, therefore, purely an internal sale which takes place in State Y and falls beyond the purview of Section 3(a) of the Central Sales Tax Act not being an inter-State sale.

Case No. III\027-B a purchaser in State Y comes to State X and purchases the goods and pays the price thereof. After having purchased the goods he then books the goods from State X to State Y in his own name. This is also a case where the sale is purely an internal sale having taken place in State X and the movement of goods is not occasioned by the sale but takes place after the property is purchased by B and becomes his property".

It is to be noted that the position in law as stated in the same paragraph was specifically dissented from in Commissioner of Sales Tax, U.P. and Ors. v. M/s Bakhtawar Lal Kailash Chand Arhti and Ors. (1992 (3) SCC 750). In para 15 it was noted as follows:

"15. Shri Sehgal relies particularly upon "Case No. III" contained in the first extract and clause (iii) mentioned in the second extract. Relying upon these statements, the learned counsel contends that a concluded sale must necessarily take place in the other State and not in the State from which the goods emanate. According to him, a concluded or a completed sale must follow the movement of goods and should not precede. If a purchase or sale is complete in the State from which the goods emanate, he says, it can never be an inter-State purchase or sale. We cannot accede to this understanding of the learned counsel. The said observations, no doubt rather widely worded, must be understood in the context of the question that arose for consideration in that case viz., whether an agreement of sale is included within the definition of 'sale' as defined in the Central Sales Tax. Be that as it may, the true position has since been explained in the later decision in Khosla and

Co. It is immaterial whether a completed sale precedes the movement of goods or follows the movement of goods, or for that matter, takes place while the goods are in transit. What is important is that the movement of goods and the sale must be inseparably connected. The ratio of Balabhagas is this: if the goods move from one State to another in pursuance of an agreement of sale and the sale is completed in the other State, it is an inter-State sale. The observations relied upon by Shri Sehgal do not constitute the ratio of the decision and cannot come to the rescue of the appellant-State. Indeed, if one looks to the language employed in clause (a) of Section 3 it seems to suggest that the movement of goods follows upon and is the necessary consequence of the sale or purchase as the case may be and not the other way round."

In the said judgment the view expressed by this Court in Union of India and Anr. v. M/s K.G. Khosla & Co. Ltd. and Ors. (1979 (2) SCC 242) was adopted. In paragraphs 15 and 17 of the judgment in Khosla's case the position was stated as follows:

"15. It is true that in the instant case the contracts of sales did not require or provide that goods should be moved from Faridabad to Delhi. But it is not true to say that for the purposes of Section 3(a) of the Act it is necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. The true position in law is as stated in Tata Iron and Steel Co. Ltd., Bombay v. S.R. Sarkar (1961 (1) SCR 379) wherein Shah, J. speaking for the majority observed that clauses (a) and (b) of Section 3 of the Act are mutually exclusive and that Section 3(a) covers sales in which the movement of goods from one State to another "is the result of a covenant or incident, of the contract of sale, and property in the goods passes in either State" (page 391). Sarkar, J speaking for himself on behalf of Das Gupta, J agreed with the majority that clauses (a) and (b) of Section 3 are mutually exclusive but differed from it and held that "a sale can occasion the movement of the goods sold only when the terms of the sale provide that the goods would be moved; in other words, a sale occasions a movement of goods when the contract of sale so provides" (page 407). The view of the majority was approved by this Court in Cement Marketing Co. of India v. State of Mysore (1963 (3) SCR 777); State Trading Corporation of India v. State of Mysore (1963 (3) SCR 792) and Singareni Collieries Co. v. State of Andhra Pradesh (1966 (2) SCR 190). In K.G. Khosla & Co. v. Deputy Commissioner of Commercial Taxes, counsel for the Revenue invited the court to reconsider the question but the Court declined to do so.

In a recent decision of this court in Oil India Ltd. v. The Superintendent of Taxes (1975 (3) SCR 797) it was observed by Mathew, J., who spoke for the Court, that: (1) a sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in the goods passes; (2) it is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement; and (3) it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale (page 801 SCC p.737, para 9). The learned Judge added that it was held in a number of cases by the Supreme Court that if the movement of goods from one State to another is the result of a covenant or an incident of the contract of sale, then the sale is an inter-State sale.

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17. This decision may be usefully contrasted with another decision between the same parties, which is reported in State of Bihar v. Tata Engineering & Locomotive Co. Ltd. (1971 (2) SCR 849). In that case the turnover in dispute related to the sales made by the company to its dealers of trucks for being sold in the territories assigned to them under the dealership agreements. Each dealer was assigned an exclusive territory and under the agreement between the dealers and the company, they had to place their indents, pay the price of the goods to be purchased and obtain delivery orders from the Bombay office of the company. In pursuance of such delivery orders trucks used to be delivered in the State of Bihar to be taken over to the territories assigned to the dealers. Since under the terms of the contracts of sale the purchasers were required to remove the goods from the State of Bihar to other States, no question arose in the case whether it was or was not necessary for a sale to be regarded as an inter-State sale that the contract must itself provide for the movement of goods from one State to another. If a contract of sale contains a stipulation for such movement, the sale would, of course, be an inter-State sale. But it can also be an inter-State sale even if, the contract of sale does not itself provide for the movement of goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract."

In Oil India Ltd. v. The Superintendent of Taxes and Ors. (1975 (1) SCC 733) the position was stated as follows:

"This Court has held in a number of

cases that if the movement of goods from one State to another is the result of a covenant or an incident of the contract of sale, then the sale is an inter-State sale. (See Tata Iron & Steel Co. Ltd. v. S.R. Sarkar (1961 (1) SCR 379) and State of J & K v. Caltex (India) Ltd. (1966 (17) STC 612). Here, the crude oil was carried from Assam through the pipelines specially constructed by the petitioner to the refinery at Barauni in Bihar and there the oil was pumped and delivered to the Indian Oil Corporation. Clause 12 of the agreement dated January 14, 1958 provides that the petitioner shall arrange for the construction of pipeline or such other related facilities as the company shall consider necessary for the transport of crude oil to be produced by it to the refinery at Barauni. This would indicate that the construction of pipeline was undertaken by the petitioner in pursuance of the agreement and that that was for the specific purpose of transporting crude oil to Barauni from Assam. This can only point to the conclusion that the parties contemplated that there should be movement of goods from the State of Assam to the State of Bihar in pursuance to the contract of sale."

In order to decide whether sale is inter-State it is sufficient that movement of goods should have been occasioned by sale or should be incidental thereto. What is important is that the movement of goods and the sale must be inseparably connected. It is not necessary that there should be an existence of contract of sale incorporating the express or implied provision regarding inter-State movement of goods. Even if hypothetically it is stated that such a requirement is necessary in the facts of the present case such implied stipulation does exist. This is referable to Clause 3.7 of the agreement.

At this juncture it is also relevant to take note of Clause 3.13 which reads as follows.

"The successful tenderer shall pay security deposit @ 25% of the full purchase price of the lot(s) within 15 days of issue of ratification order provided that where the tenderer makes purchase for purpose of Export outside India, he may, if he so elects and on furnishing the requisite papers in support thereof, tender the security deposit in the form of Bank Guarantee (BG) to the extent of 20% of the full sale value of the stock purchased in the prescribed form valid for a period of not less than one year and the said BG shall be released after finalization of the export deal."

Though, learned counsel for the Corporation submitted that this was only for the purpose of financial transactions, yet it is really not so. The clause clearly recognizes the possibility of a tenderer making purchase for the purpose of export outside India. If sale was completed intra-State, as contended by the State and the Corporation, the question of affecting the purchase for the purpose of export does not arise.

A specific query was made as to which is the specific provision in the agreement relates to completion of sale, an evasive reply was given that a complete reading of the clause makes the position clear. It may be noted that in the appeal the State has made a statement to the effect that Clause 3.6 of the tender notice refers to finalization of sale and according to it the sale is completed in the State of Orissa. A bare reading of Clause 3.6 amply proves that there is no substance in such a plea. Clause 3.6 reads as follows:

"Sale once finalized in favour of a tenderer cannot be transferred subsequently to any other person".

A sale once finalized in favour of a tenderer cannot be transferred subsequently to any other person. It does not remotely even refer to situs of such sale.

The letter of the Divisional Manager of the Corporation, Balangir Division dated 13.11.2000 is also of some relevance. The relevant portion is as follows:

"OFFICE OF THE DIVISIONAL MANAGER, ORISSA
FOREST DEVELOPMENT CORPORATION LTD.
BALANGIR KENDU LEAF DIVISION

No.8827 4202 Date 13.11.00
To
Sub-Divisional Manager
Padampur Sub-Division

Sub: Delivery of stock of Kendu leaves lot No.214/BPR/9965 Division lot, B-301/1, B-302/1 and B-303/1 of Unit No. 47(B) to the purchaser vide delivery receipt No.20710, 20711 & 20712 dt. 10.9.2000

Dear Sir,

We \005\005\005\005..Therefore, you are requested to give delivery of the stock to the concerned purchaser on receipt of the transport permit from the Divisional Forest Officer (KL) Padampur as per the following quality specification. \005\005

xx xx xx

Yours faithfully,

Sd/-
Divisional Manager
Balangir Kendu Leaf Division

Memo No\005\005\005\005\005Date\005\005.

Copy to the Divisional Forest Officer Padampur Kendu Leaf Division for his information. He is requested to please issue the necessary transport permits in favour of the above named purchaser on receipt of the form "C" duly endorsed by the undersigned/our sub-Divisional Manager

concerned.

Divisional Manager
Balangir Kendu Leaf Division"

As noted above, specific averments have been made in the writ petitions about the certificate issued by the Income tax authorities and there is no denial to this position.

Above being the position, the inevitable conclusion is that the High Court was justified in its view. On the fact situation established no interference is, therefore, called for. The appeals are dismissed with no order as to costs.

In view of dismissal of the present appeals, no order is required to be passed in I.A.No.3 in SLP (C) No.15308/2002.