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under Art. 226, the High Court can examine the merits of the order passed by appellant No. 1 in such cases.

The result is, though we agree with the appellants that the order passed by the High Court was not justified, we refrain from setting it aside for the reasons just explained. There would be no order as to costs.

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August 28.

THE CEMENT MARKETING CO., OF INDIA LTD. AND ANOTHER

v.

THE STATE OF MYSORE AND ANOTHER

(S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH and RAGHUBAR DAYAL, JJ.)

Sales Tax—Sale of goods—Transactions involving movement of goods across the border from one State to another—Liability to tax—Mysore Sales Tax Act, 1948 (Mysore 46 of 1948)—Constitution of India, Art.286(2).

The second appellant was a manufacturer of cement and at the material time it had over a dozen factories in different parts of India none of which was in the State of Mysore. The first appellant was its sales manager and had its head office in Bombay with a branch office at Bangalore in the State of Mysore. Cement was a controlled article and everyone wishing to buy cement had to get an authorisation from the appropriate Government authorities in a standard form which authorised the first appellant to sell cement in quantities mentioned therein and the cement had to be supplied from the factory therein mentioned. The purchaser had to place an order with the first appellant stating the requirement, where the goods were to be sent and how they were to be sent. In the present case, all the goods were sent against the authorisations from the various factories belonging to the second appellant which were all outside the State of Mysore and were received in the State of Mysore by the various

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purchasers. The Sales Tax Officer by his order dated March 31, 1958, took the view that though the property in the goods passed to the dealers and consumers outside the State of Mysore, since the goods had actually been delivered in the State of Mysore as a direct result of such sales for purposes of consumption in the State, the sales must be deemed to have taken place in that State and, therefore, the sales effected by the first appellant as the sales manager of the second appellant, to customers in Mysore State amounted to intra-State sales and liable to tax under provisions of the Mysore Sales Tax Act, 1948. The High Court held that as the actual delivery to the purchasers was within the State of Mysore, the cement loaded outside the State and despatched to the purchaser did not convert the sales into inter-State sales but were intra-State sales.

Held, that the sales which took place in the present case in which the movement of goods was from one State to another as a result of a convenant or incident of the contract of sale, were in the course of inter-State trade or commerce and fell within Art.286(2) of the Constitution of India. Consequently, the imposition of sales tax on such sales was unconstitutional.

M/s. Mohan Lal Hargobind v. *The State of Madhya Pradesh*, [1955] 2 S.C.R. 509, followed.

Endapuri Narasimhan & son v. *The State of Orissa*, [1962] 1 S.C.R. 314, *Bengal Immunity Co. Ltd.* v. *The State of Bihar*, [1955] 2 S.C.R. 603 *M/s. Ram Narain & Sons* v. *Assistant Commissioner of Sales Tax*, [1955] 2 S.C.R. 483 and *Tata Iron and Steel Co. Ltd. Bombay* v. *S. R. Sarkar*, [1961] 1 S.C.R. 379, relied on.

Rohtas Industries Ltd. v. *The State of Bihar*, [1961] 12 S.T.C. 615, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 255 of 1961.

Appeal from the judgment and order dated March 21, 1960, of the Mysore High Court in Writ Petition No. 147 of 1958.

R. J. Kolah, J. *B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the appellants.

C. K. Daphtary, Solicitor-General of India, B. R. L. Iyengar and *P. D. Menon*, for respondents.

1962. August. 28. The Judgment of the Court was delivered by.

KAPUR, J.—This is an appeal against the judgment and order of the High Court of Mysore in Writ Petition No.147 of 1958 dismissing the appellant's petition under Arts. 226 and 227 of the Constitution for quashing the order of assessment for the period of assessment 1955-56 *i.e*, from April 1, 1955, to March 31, 1956. In this appeal because of the Validating Act (VII of 1956) the appellants did not challange their liability for the period April 1, 1955, to September 6, 1955.

The facts necessary for the decision of this appeal are these : Appellant No. 1—The Cement Marketing Co. Ltd—are the Sales Managers of the second appellant—The Associated Cement Co. Ltd. —appointed under an agreement dated April 21, 1954. The High Court has described the first appellant to be the Distributors of the second apppellant. The second appellant is a manufacturer of cement and at the material time it had over a dozen factories in different parts of India, none of which was in the State of Mysore. The head office of first appellant is at Bombay and it had then a branch office at Bangalore in the State of Mysore. The first appellant was registered as a dealer under the Mysore Sales Tax Act 1948, hereinafter called the "Mysore Act". At all material times cement was and still is a controlled article. Whether the sale was to a Government Department i.e. to the Director General of Supplies & Disposal, Government of India, New Delhi, or to a person authorised by the said Officer or to the public it was effected on authorisations given to the buyers by appropriate Government authorities and

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produced by them in the office of the first appellant. Both in regard to purchases by the public and the Government the *modus operandi* was more or less identical. It was this : Every one wishing to buy cement had to get an authorisation in a standard form which authorised the first appellant to sell cement in quantities mentioned, therein and the cement had to be supplied from the factory therein mentioned. That document was in the following form which actually ralates to a sale to a Government contractor.

"Government of India—Ministrary of Commerce & Industry.

Office of the Regional Honorary Cement Adviser 4/12 Race Course Road, Coimbatore.

Central Quota. Dated 8-10-1955.
Authorisation No. RA/CT/28/CMI/172 CQ.
(CENTELEC)

Period IV/55
Name of Suppliers : The Cement Marketing, Co. of India
P. Box No. 613, Sugar Company Bulding-
Bangalore-2.

You are authorised to sell cement in quantity mentioned below under this authorisation. The sale will be a direct deal between yourself and

the purchaser. The Government undertakes no responsibility of any nature whatsoever:—

Name and address of the person in whose favour authorisation is issued.	Name of the cement factory or company required to supply cement.	Quantity	Name of Rly. Stn. to which cement is to be booked.	Remarks
1	2	3	4	5
M/s. G. S. Duggal & Co Ltd Engineers & Contractors, Jalhalli P.O. Bangalore.	Mudhukkarai Shahabad	300 tons	Bangalore	

Ref: No. J/117/115 date 29-9-55 from the above indentors—For manufacture of the tiles for the Bharat Electronics Ltd. Supply recommended by the Commander Works Engineers(B.E.I.P.), Jalahalli.

Full details of the purpose for which and the place at which cement will actually be consumed; Priority, Defence work.

Sd. C.C. Ramanath,
Reg. Hon. Cement Advisor
(Coimbatore)

Copy to 1. The indentor.

2. The Dy. Development Officer, Govt. of India, Ministry of Commerce & Industry, Development Wing,(Chemicals I, Mineral Industries) Shahjehan Road, New Delhi.

3. The Controller of Civil Supplies in Mysore Bangalore for information".

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This authorisation was subject to the following conditions: It was to be utilised within 15 days; the cement released could be used only for the purpose for which it was given; the authorisation was not transferable; the issuing authority could, if necessary, revoke the authorisation at any time and even the orders booked under the authorisation could be cancelled. The purchaser or the indentor had then to place an order with the first appellant as Sales Managers of the second appellant stating the requirement, where the goods were to be sent and how they were to be sent. The seller entered into a contract with the first appellant. This contract is in a standared form and gives conditions of sale. Thereupon the first appellant instructed its Bombay office to despatch the cement in accordance with the instructions of the buyer and the authorisation. In this letter they had to mention the number of the authorisation and the person who had issued it and also to whom the goods were to be sent and how and certain other details which are not necessary for the purposes of this appeal were also to be given.

Each instruction indicates that it was issued for and on behalf of appellant No. 2 by appellant No. 1 as its Sales Managers. A copy of the letter of instruction was sent to the factory from where the goods were to be despatched and the particulars of the authorisation had to be mentioned therein. Thereafter the first appellant sent an advice to

the purchaser enclosing therewith the Railway Receipt for the goods and this advice also mentioned the particulars of the authorisation against which the goods were being sent. Both the contract of sale and the advice above mentioned stated that the goods were being despached at the buyer's risk from the time the delivery was made by the factory to the carriers and the railway receipt was obtained for the goods. In the present case all the goods were sent, as indeed they had to be sent, against the authorisations from the various factories belonging to the second appellant which at the relevant time were all situate outside the State of Mysore and were received in the State of Mysore by the various purchasers.

The position of the first appellant is as was accepted by the Sales tax Officer in his order dated March 31, 1958, that of Sales Managers of the second appellant but in regard to the nature of the transactions the Sales tax Officer found:—

> "Though the property in the goods pass to the dealers and consumers outside the State immediately the goods are handed over to the carriers outside the State and railway receipt is taken out since the goods have actualiy been delivered In Mysore State as a direct result of such sale for purposes of consumption in the State, sale is deemed to have taken place in Mysore State".

and again he said:—

> "Thus the sales of cement manufactured by A.C.C. Factories situated outside Mysore State effected by the dealers M/s. Cement Marketing Company of India Ltd. Bangalore, to dealers and customers in Mysore State amounts to intra-State sales and therefore liable to Mysore Sales Tax Act 48".

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In its judgment the High Court took into consideration the fact that the first appellant had a branch office at Bangalore within the State of Mysore and that the public placed their orders with the first appellant for supplies of cement against permits granted to them; that the first appellant, who after accepting the offer for the supplies of cement, collected the price from the intending purchasers and then directed one of the factories of the second appellant to supply cement to the purchasers and actual delivery to the purchaser was within the State of Mysore and therefore the contention that cement was loaded outside the State of Mysore and despatched to the purchaser did not not convert sales into inter-State sales but were intra-State sales. It appears that the true nature of the transaction was not correctly considered by the High Court.

The *modus operandi* above mentioned shows that before an intending purchaser could obtain cement he had to get what is called an authorisation from a Government authority which nominated the factory from which the intending purchaser had to get his supplies of cement. That authorisation with an order had to be given to the first appellant; and after a contract in the standard form was entered into the first appellant sent the order to the factory named in the authorisation and that factory then supplied the requisite goods to the purchaser. The factory from where the cement was to be supplied was not in the hands or at the option of the first appellant, but was entirely a matter for the Government authority to decide, so that the cement which was supplied from a particular factory was supplied not at the choice of the first appellant but pursuant to the authorisation.

It was contended that the sales which took place in the present case in which the movement of

goods was from one State to another as a result of a covenant or incident of the contract of sale fell within Art. 286(2) of the Consitution and therefore the imposition of Sales tax on such sales was unconstitutional. The Article applicable at the relevant time i.e., before its amendment was as follows:—

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.

(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.

Explanation.....

.....

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State or commerce:

Provided....."

The Article had since been repealed and another substituted in its place by the Constitution (Sixth Amendment) Act but the sales in question were prior to the amendment.

In the present case the contract itself involved the movement of goods from the factory to the purchaser i. e. across the broder from one State to another because the factories were outside the State of Mysore and therefore transactions were

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clearly transactions of sale of goods in the course of inter-State trade or commerce. Taking the nature of the transaction and preliminaries which are necessary for the sale or purchase of cement it cannot be said that the sale itself did not occasion the movement of goods from one State to another. The essential features of the contracts proved in the present case are analogous to those in *M/s. Mohan Lal Hargovind* v. *The State of Madhya Pradesh.*(1) In that case the assessees were a firm carrying on business of making and selling biris in Madhya Pradesh. In the course of their business they imported finished tobacco from dealers in Bombay State, rolled it into biris and exported the biris to various other States. Both the exporters of tobacco from Bombay State who supplied the assessees and the assessees were registered dealers under the C. P. & Berar Sales Tax Act, 1947. It was held that the assessees imported the finished tobacco into Madhya Pradesh from persons who were carrying on in the State of Bombay business of processing tobacco and selling the goods and there was, as a result of these transactions move ment of goods from the State of Bombay to the State of Madaya Pradesh and therefore the transactions involved movement of goods across the State border and they were not liable to be taxed by virtue of Art. 286 (2) of the Constitution. In *The State of Travancore Cochin & Others* v. *The Bombay Co Ltd.* (2) which was a case under Art. 286 (1) (b) i. e. sale and purchase in the course of export trade, Patanjali Sastri, C. J., observed:—

> "A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the

(1) (1955) 2 S. C. R. 502. (2) (1952) S. C. R. 1112.

country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export from parts of a single transaction".

At p. 1120 the learned Chief Justice again observed:

> "We accordingly hold that whatever else may or may not fall within article 286 (1) sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of these appeals".

Thus a sale to fall within Art. 286 (1) (b) has to be a sale which occasions the export. Again in *the State of Travancore Cochin & Others* v. *Shammugha Vilas Cashew Nut Factory & Others* (1) the words "in the course of" were interpreted to mean a sale taking place not only during the activities directed to the end of exportation of the goods out of the contury but also as a part of or connected with such activities. At p. 63 the learned Chief Justice explained the words "integrated activities" as follows:—

> "The phrase "integrated activities" was used in the previous decision to denote that "such a sale" (i. e. a sale which occasions the export) "cannot be dissociated from the export without which it canot be affectuated, and the sale and the resultant export form parts of a single transaction". It is in that sense that the two activities—the sale and the export—were said to be integrated".

In *Endupuri Narasimham & Son* v. *The State of Orissa*, (2) it was held in the case of sales covered

(1) (1954) S. C. R. 53. (2) (1962) 1 S. C. R. 314.

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by Art. 286 (1) (b) that only sale or purchase of goods which occasions the export or import of the goods out of or into the territory of India were exempt from the imposition of tax on the sale or purchase of goods and in regard to prohibition against imposition of tax on inter-State sales the test, it was said, was that in order that a sale or purchase might be inter-State it is essential that there must be transport of goods from one State to another under the contract of sale or purchase. The following observatins from the *Bengal Immunity Co. Ltd.* v. *The State of Bihar* (1) were quoted with approval in support of the proposition:—

> "A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade".

Thus the tests which have been laid down to bring a sale within inter-State sales are that the transaction must involve movement of goods across the border (*Mohanlal Hargovind's case* (2)); transactions are inter-State in which as a direct result of such sales the goods are actually delivered for consumption in another State; *M/s Ram Narain & Sons* v. *Assistant Commissioner of Sales tax* (3) a contract of sale must involve transport of goods from one State to another under the contract of sale; *Bengal Immunity Co' case* (1). In the case of sales in the course of export or import the test laid down was a series of integrated activities commencing from an agreement of sale and ending with the delivery of goods to a common

(1) (1955) 2 S. C. R. 603, 784-5. (2) (1955) 2 S.C R. 509.
(3) (1955) 2 S, C. R. 483, 504.

carrier for export by land or by sea ; *The Bombay Co. Ltd, case* (1). "In the course of" was explained to mean a sale taking place not only during the activities directed to the end of the exportation of the goods out of the country but also as part of or connected with such activies and "integrated activities" was explained in similar langauage. This Court again accepted these tests in *Endupuri Narasimham's case* (2). In s. 3 of the Central Sales Tax Act, 1956 (Act 74 of 1956), the legislature has accepted the principal governing inter-State sales as laid down in *Mohan Lal Hargovind's case* (3). The principles for determining when a sale or purchase of goods takes place in the course of inter-state sale or commerce outside the state are :

> "S.3 A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase —
>
> (a) occasions the movement of goods from one State to another ; or
>
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another".

In *Tata Iron & Steel Co. Ltd, Bombay* v. *S.R. Sarkar & Another* (4) Shah, J., in explaining what sales are covered by cl. (a) of s.3 above said :

> "Cl. (a) of s. 3 covers sales, other than those included in Cl. (b), in which the movement of goods from one State to another is the result of a convenant or incident of the contract of sale, and property in the goods passes in either State".

As stated above under the contracts of sale in the present case there was transport of goods from

(1) 1952 S.C.R. 1112. (2) (1962) 1 S.C.R. 314.
(3) (1955) 2 S.C.R. 509. (4) (1961) 1 S.C.R. 379, 391.

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outside the State of Mysore into the State of Mysore and the transactions themselves involved movement of goods across the border. Thus if the goods moved under the contract of sale, it cannot be said that they were intra-State sales. It was not the volition of the first appellant to supply to the purchaser the goods from any of the factories of the second appellant. The factories were nominated by the Government by authorisations which formed the basis of the contract between the buyer and the seller. Applying these tests to the facts of the present case we are of the opinion that the sales were in the nature of inter-State sales and were exempt from Sales tax. In these circumstances the contracts of sale in the present case have been erroneously considered to be intra-State sales.

The decision in *Rohtas Industries Ltd.* v. *The State of Bihar* (1) to which reference was made by the respondent does not apply to the facts of the present case because the agreement between the first appellant and the second appellant is different from that which existed between Rohtas Industries Ltd. and the Cement Marketing Co of India in the case above cited. On an examination of the agreement between those two companies this court held that the relationship which existed between the two was of seller and buyer and not of principal agent. In the present case the agreement is quite different. In the first clause of the agreement between the two appellants and the Patiala Cement Co. dated April 21, 1954, the first appellant was appointed the sole and exclusive Sales Manager of the second appellant and as such the first appellant was entitled to enter into contracts of sale, receive payment of the same and do all acts and things necessary for the effective management in connection with the contracts of sale entered into on behalf of the principals. The sale price and the terms and conditions of sale were to be

(1) (1961) 12 S.T.C. 615.

determined by the principals. The Sales Manager was to keep its administrative and technical staff at such places in India as was determined by the principals. All the establishment charges and other expenses of the Sales Managers were for and on behalf of the principals and were to be defrayed by the principals in proportion to their annual sales. At the end of every month the Sales Managers were to submit to the principals accounts showing sales contracts by it on behalf of each one of the principals. At the end of each financial year ending July 31, the Sales Managers had to make a proper account of all their operations during the year and after submitting them for confirmation to the principals had to pay the price of annual sales relizations to each of the principals to whom they happened to relate. Clause 10 provided that subject to instructions of the principals the Sales Managers were to make all necessary arrangements to secure speedy and economicial transport of cement. These terms are quite different from those in the case of *Rohtas Industries Ltd.* and therefore that decision has no application to the facts of the present case.

In the result, the imposition of the Sales tax on the appellant for the year of assessment except for the period April 1, 1955, to September 6, 1955, was illegal and was not leviable for that period. The appeal is therefore allowed to that extent and the petition of the appellants succeeds but it will not effect the tax paid for the period abovementioned. In view of the partial success of appellants they will be entitled to half costs of the appeal.

Appeal allowed in part.

(1) (1961) 12 S.T.C. 615.