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Associated Strips Ltd. Vs. Commissioner of Central Excise,

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-2002

Reported in : (2002)(81)ECC404

Judge : K Usha, N T C.N.B.

Appellant : Associated Strips Ltd.

Respondent : Commissioner of Central Excise,

Judgement :

1. Since identical issues are raised in these appeals and common arguments were addressed by both sides, we propose to dispose of the appeals under a common order.Mis. Associated Strips Ltd. v. CCE, New Delhi 2. The above appeal is at the instance of the assessee challenging the Order-in-Appeal No. 267-CE/DLH/2001, dated 12-3-2001 passed by the Commissioner of Central Excise (Appeals), New Delhi. Original authority has taken the view that the property in the goods had passed in the case of the transactions involving the assessee at the buyers premises and not at the factory gate and, therefore the element of freight and transit insurance are to be included in the normal value as contemplated under Section 4 of the Central Excise Act; 1944. The demand of differential duty as per the show cause notice was confirmed by its order dated 2-2-2000. Appeal therefrom was dismissed by the Commissioner (Appeals). According to the Commissioner (Appeals), appellant's case has to be decided in the light of the ratio of the decisions of this Tribunal in CCE, Meerut v. Prabhat Zarda Factory Ltd. - 2000 (119) E.L.T. 191 and Escorts JCB Ltd. v. CCE, New Delhi - 2000 (118)

E.L.T. 650 (Tribunal) = 1999 (35) RLT 9. Aggrieved by the above the assessee has come up in appeal before this Tribunal.

3. It is contended on behalf of the appellant that the facts in this case are entirely different from what were available in the two decisions of the Tribunal, namely, Escorts JCB Ltd. and Prabhat Zarda (supra). According to the appellant, original authority as well as the appellate authority have wrongly applied the dictum laid down in the abovementioned cases to the facts of the appellant's case.

4. The appellant is engaged in the manufacture of steel tubular poles, rectangular poles and pipes etc. falling under sub-heading 7306.90 of the Central Excise Tariff Act, 1985. The poles are chargeable to duty ad valorem. Appellant is mainly supplying the goods to Electricity Boards. Government Departments, Municipal Corporations as also private companies. The transactions with which we are concerned in this appeal are those relating to supply of steel tubular poles; rectangular hollow steel poles to Electricity Boards. Tenders were floated by Electricity Boards inviting offer of supply of the abovementioned material. The appellant points out that the tenders clearly indicate that the price of the goods should be ex-works and the amount of freight and insurance is separately payable and that taxes are not payable on freight, forwarding and insurance charge. Pursuant to the acceptance of the appellant's offer purchase orders were issued by the Electricity Board.

Two separate purchase orders were issued; one for the ex-works price of the goods and another for the expenditure towards freight, insurance, handling charges etc. As per terms of the purchase orders the goods manufactured by appellants are required to be inspected by the representative of the buyer and thereafter the appellant had to mark the name of the buyer on the poles before they are handed over to the transporters. It is contended by the appellant that once the goods are approved they are appropriated to the contract.

5. On the basis of the purchase orders received the appellants raise the invoices showing therein the ex-works price of the final product and paying duty at the appropriate rate. Sales tax is also duly paid and shown separately in the invoice. The expenditure in connection with the freight, insurance, forwarding, etc. are also

reflected separately in the invoice and no excise duty or sales tax is paid on such amount.

The buyer, Electricity Board, is shown as consignee in the invoice.

Lorry receipts issued by the transporters of the goods also show the buyer as consignee.

6. It is the contention of the appellant that the facts narrated above would clearly distinguish its case from Prabhat Zarda Factory Ltd. and Escorts JCB. Highlighting the differences between the terms of the sale involved in the appellant's case and in Prabhat Zarda, the following submission is made by the appellant.

(a) In Prabhat Zarda there was no separate agreement for sale of goods and for transportation and transit insurance of the goods as in the appellant's case. There was an admitted position that there was no factory gate sale by the assessee. The ownership of the goods remained with the assessee till the goods reached the buyer's premises. Both consignor and consignee was the manufacturer. There was also a further stipulation that the transporting agency shall not part with the goods till it received instruction from the seller. This would indicate that the property in the goods had not passed on entrusting the same with the transporter. The documents relating to the goods were given by the transporter to the buyer only after getting instruction from the seller. On the other hand, in the appellant's case goods were dispatched after they were identified and approved by the buyers representative and the buyer's name affixed on the goods. It was then handed over to the transporter with the seller as consignor and buyer shown as consignee. Once the goods are with the transporter there was no further instruction required from the appellant to deliver the goods to the buyer (Electricity Board). These, according to the appellant are the distinction between the facts in its case from that of Prabhat Zarda.

(b) In Escort JCB there is no reference to a contract between the buyer and the seller under which the buyer was obliged to take insurance on the goods in transit.

7. The learned Departmental Representative contended that the impugned order is not vitiated by application of the dictum laid down by this Tribunal in Prabhat Zarda and Escort JCB. It is submitted that so long as the insurance is taken by the seller in his name it has to be assumed that the seller retained his title on the goods. The fact that there are two different contracts for the sale of the goods and another for transport, insurance and handling charges would not make any difference. Referring to a term in the purchase order of DESU regarding payment, namely, 90% payment is to be made against delivery through receipted challans and balance 10% within 30 days after the approval of the material at DESU Stores, the learned DR contended that the title passed to the buyer only after such approval at the buyers' place by applying the provisions of Section 24 of the Sale of Goods Act.

Therefore, the freight etc. are to be added to the value.

8. In reply to the above argument learned Counsel for the appellant contended that Section 24 of the Sale of Goods Act has no application in the present case. The above section deals with a situation when goods are delivered to buyer on approval or on sale or return or other similar terms. In the present case the approval of the material after its supply is only a condition subsequent. He further submits that payment of price in installment has no relevance in deciding the question when the property has passed to the buyer. Reference was made to different provisions under the Sale of Goods Act, commentary in authoritative text books and also decisions in support of his contention. We will deal with the above materials at a later stage after referring to the facts of the appeal by M/s. Mauria Udyog Ltd.Mauria Udyog Ltd. v. CCE, New Delhi 9. These appeals are directed against Order-in-Appeal No.440-443-CE/DLH/2001, dated 18-4-2001 passed by the Commissioner of Central Excise (Appeals), New Delhi. The appellants are manufacturing LPG cylinders falling under Heading 73-11 of the Schedule to the Central Excise Tariff Act, 1985- These cylinders are sold to public sector oil companies on the basis of the contracts entered into with them. The assessing authority as well as the appellate authority took the view that the sale takes place at the buyers place and relying on the decisions of this Tribunal in M/s. Escorts JCB Ltd. and Prabhat Zarda it was held that the cost of transport is to be included

in the assessable value of the goods for the purpose of payment of duty. It is this finding that is under challenge in the present set of appeals.

10. It is contended by the appellant that the appellants are clearing the cylinders for sale from the factory gate. Terms and conditions of sale between the appellant and oil companies are on principal to principal basis and are based on purchase orders and agreements entered into between the parties. Under the terms of the agreement, the Representative of the oil company would inspect the manufactured cylinders. Thereafter a test certificate is to be obtained from the Bureau of Indian Standards. The cylinders are to be marked with the name of the oil company. According to the appellant after the inspection and identification the cylinders are appropriated to contract. Sale invoices are raised by the appellant showing therein the ex-works price. Payment of excise duty on the above ex-works price is also shown in the invoice. The invoices are in the name of the buyer indicating the head office of the oil company as the purchaser and the bottling plants as the consignee. The lorry receipt/railway receipt show the seller as the consignor and the buyer, the bottling plant, as consignee. Regarding transport the contract stipulates that the cylinders shall normally be despatched in full wagon load by rail from nearest Broadgauge Rail Head on 'Freight Prepaid' basis to destinations nominated by oil company, LPG Department, from time to time. The railway freight charges will be reimbursed on production of documentary evidence. In case of non-availability of railway wagons in the normal course, cylinders may be transported by road for which notional rail freight or actual road freight, whichever is less, shall be reimbursed.

Cylinders transported are not insured by the seller but when the cylinders are transported by rail insurance is arranged by the oil companies.

11. It is contended by the appellant on the basis of the above facts that the ownership of the goods are transferred to oil companies the moment goods are ascertained and appropriated to contract. The seller has no right to alter the destination of the goods once they are handed over to transporter for delivery at the place of the consignee. On the other hand, it was open to the consignee to re-route the goods.

Therefore, it is contended, that the facts in the present case being entirely different from Prabhat Zarda and Escort JCB, there is no justification to apply the dictum therein to the case of the appellant.

12. Learned Departmental Representative submitted that what has been undertaken by the seller is to give door delivery to the oil company and therefore it has to be taken that the property in the goods passes to the buyer at the place of buyer and not at the factory gate as contended by the appellant. He also contended that the dictum in Prabhat Zarda and Escort JCB is correctly applied to the appellant's case.

13. The primary question that has to be considered is whether the facts of Escorts JCB and Prabhat Zarda are different from the appellants case as contended by the appellants or whether they are similar so that the dictum laid down therein would be directly applicable to the appellants case as contended by the Revenue. In Escorts JCB the departmental authorities proceeded to hold that the property in the goods sold did not pass to the buyer till it reached the premises of the buyer in view of the fact that insurance policies were taken out by the seller to cover the goods till it reached the buyers premises. Even though the contention of the seller, that the sale of the goods took place at the factory gate was considered in the above decision, there is no reference to the terms of the contract between the parties. It is not seen contended that as per the terms of the contract the seller was duty bound to insure the goods in transit thus retaining insurable interest in the goods even though title to the goods had already been passed to the buyer at the factory gate. In the absence of any of these contentions it is seen that the Tribunal applied the general rule that 'risk follows property'. Since the seller was found insuring against risk of loss or damage of the goods in transit, it was held that the seller continued to be the owner of the goods till it reached the buyer's premises. In Prabhat Zarda, a decision rendered by the Larger Bench, the issue referred for consideration was whether in a case where the ownership of the excisable goods remained with the manufacturer up to the place of the buyer from where the said goods were delivered to the buyer, what would be the 'place of removal' for the purpose of Clause (iii) of Section 4(4)(b) of the Central Excise Act. In Paragraph 8 of the order it is noted that it was an admitted position that there

was no factory gate sale in the concerned case. The goods were transported on account of M/s. Prabhat Zarda Factory Ltd. the manufacturer to the destination of the buyer through the transport agency. The goods were stored on behalf of the seller in the godown of the transport agency at the destination of the buyers. The goods were insured in the name and on the account of the seller for covering the risk of loss/damage during transportation of the goods to the godowns of the transport agency. If damage occurred during transit it was the loss of the manufacturer. The manufacturer was both the consignor and consignee. Goods were delivered to the buyers by the transport agency only when so instructed by the seller. Till then no documents were given to the buyer and no legal title in the goods was passed on to him. It was therefore held that the ownership of the goods remained with the seller, that the goods were actually sold at such place from where delivery was effected to the buyers which is to be treated as the place of removal.

14. We find that the facts in Prabhat Zarda have no comparison with the facts of the case of the appellant before us. In these appeals when the goods are transported the seller was shown as consignor and the buyer the consignee, whereas in Prabhat Zarda both the consignor and consignee was the seller. There is a separate agreement regarding transportation and transit insurance of the goods in the appellants case. The goods are not transported to the godown of the transport agency and seller had not retained any right to give further instruction to the transporter for giving delivery of the goods to the buyer from the godown of the transport agency. On the other hand, in the case of Mauria Udyog Ltd. it was open to the consignee to re-route the goods which were in transit.

15. Coming to the facts of Escorts JCB also we find that they are not comparable with the facts of the present appeals. There was no separate contract entered into between the parties for transportation and transit insurance of the goods as in the present case. Escorts JCB was a case the facts of which would attract the principle that risk prima facie passes with property. On the other hand, the facts in the present appeals would make it clear that the title to the goods had been passed on to the buyer at the factory gate, the seller retaining only the risk in terms of the contract. In the case of Mauria Udyog Ltd. the seller has not retained

even that insurable interest. Therefore, we find that the facts of these appeals are entirely different from the facts of Escorts JCB and Prabhat Zarda.

16. Section 4(4)(b) of the Central Excise Act, 1944 defines "place of removal" as follows : (i) a factory or any other place or premises of production or manufacture of the excisable goods; (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty; (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and, Considering sub-clause (iii), this Tribunal held in Escorts JCB Ltd. that place where excisable goods are sold can be a place of removal and that a place where the goods are sold can be a place where the property in the goods sold passes from seller to the buyer. If the property in the goods passes from seller to buyer at the factory gate, then the value of the goods at factory gate must be the basis for assessment to duty. In the light of the above dictum, it has to be examined in every case as to when the property in the goods sold passed from the seller to the buyer. In Prabhat Zarda while affirming Escorts JCB case the Larger Bench also took the view that the sale of goods is material for deciding as to which is the place of removal for the purpose of Clause (iii) of Section 4(4)(b). The terms "sale" and "purchase" are defined under Section 2(h) as follows : "(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration." After referring to the above definition, the Larger Bench held transfer of the possession of the goods is the essence of sale. Accordingly, the place of removal, for the above purpose will be the place from where the transfer of the possession of the goods is effected by the manufacturer to his buyer. It was then held that in a case where the ownership of the excisable goods remained with the manufacturer up to the place of the buyer from where the said goods were delivered to the buyer, the place of removal for the purpose of Clause (iii) of Section 4(4)(b) of the Act would be the said place of delivery. It is further noted that in cases where the possession of the goods had been transferred at place A and the buyer takes delivery of the goods at place B, the situation is covered by Section 4(2) of the Act as it stood during the relevant period.

17. Now we are to consider the facts of the present case as to find out when did the transfer of possession of the goods to the buyer occur or when did the property in the goods pass from the seller to the buyer.

Is it at the factory gate as claimed by the appellant or is it at the place of the buyer as alleged by the Revenue In this connection it is necessary to refer to certain provisions of the Sale of Goods Act, 1930. Section 19 of the Sale of Goods Act provides that 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. Intention of the parties are to be ascertained with reference to the terms of the contract, the conduct of the parties and the circumstances of the case. Unless a different intention appears; the rules contained in Sections 20 to 24 are provisions for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 23 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made. Sub-section (2) of Section 23 further provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purposes of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

18. In the case of Associated Strips Ltd. the goods manufactured are inspected by the representative of the buyer (Electricity Board) and thereafter the manufacturer had to mark the name of the buyer on the poles before they are handed over to the transporter. So also in the case of Mauria Udyog Ltd. the LPG cylinders manufactured by the appellant are inspected by the representatives of the oil companies.

After getting test certificate from the Bureau of Indian Standards cylinders are to be marked with the name of the oil companies before they are handed over to the transporter for the purpose of transmission to the buyer. In the light of the provisions contained in Section 23, it has to be taken that the goods are unconditionally appropriated to the contract when the above procedure was followed and goods handed over to the carrier thus passing on the property in the goods to the buyer.

19. We may also refer to the provisions contained under Section 39 of the Sale of Goods Act which refers to the legal effect of delivery of the goods to a carrier by the seller. It is provided that where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is prima facie deemed to be a delivery of the goods to the buyer AIR 1966 Patna 346. Admittedly, in the present cases after appropriation of the goods to the contract they were delivered to the carrier as per terms of the contract. Therefore, delivery to the carrier has to be taken as delivery to buyer. Revenue has no case that the goods are not sent to the buyer through carrier. On the other hand, as mentioned earlier, the only contention raised is that since the insurance of the goods in transit has been taken by the seller, the seller is deemed to hold the title to the goods in transit. At this juncture we may point out that in the case of Mauria Udyog Ltd. there is no insurance taken by the seller.

20. We will therefore examine the question whether the seller's taking insurance on the goods in transit in terms of the contract entered into between the parties, would make any difference in the legal position regarding transfer of title to the goods to the buyers. Unless the seller has some interest in the goods there can be no contract of insurance. If under the terms of the contract the seller is made responsible for the safe transit of the goods, that risk against damage is sufficient for the seller to have an insurable interest in the goods even when title has passed to the buyer. It is levent to quote the following passage from Benjamin's ; Sale of Goods 5th Edition para 6-012 -Page 290 :- "The question of the allocation of risk is often of importance where a claim is made on an insurance policy, since the insured must have an insurable interest in the goods at the time of the loss. It will

be sufficient that the goods are at his risk even though he has no property in them." Section 26 of the Sale of Goods Act lays down the general principle that risk prima facie passes with property unless otherwise agreed. It therefore shows that even though the general rule is that the goods remain at the seller's risk until the property therein is transferred to the buyer and when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, there can be a contract to the contrary. This was a conscious change brought in at the time of enacting the Sale of Goods Act, 1930 as is discernible from the Report of the Special Committee on this clause in the Bill: "Section 86 of the Indian Act seeks to lay down an inflexible rule of law that the risk follows the property. According to the English Common Law it is merely a prima fade rule. There is nothing in the law of England to prevent the parties from agreeing, if the please that the risk shall pass at some time or on some condition which is not necessarily simultaneous with the passing of the property; and thus the ownership may, in particular cases, be separated from the risk. Such a case would arise when the parties are at a distance. In our opinion the rule mentioned in Section 20 of the English Act which saves particular agreements and is more comprehensive, should be adopted in India. It also provides for cases where delivery is delayed and where the seller or buyer is acting as a bailee of the goods for the other party. We have adopted the provisions of Section 20 the English Act." Therefore, under the present law, the position is as explained in the following terms :- "Although, as a rule the risk attaches to the ownership of the goods the parties, may, by agreement, disclose a different intention. And it is competent to the parties to separate the risk from the title by an agreement.

The risk of loss or deterioration is natural incident of ownership; still there is nothing in law to prevent one who is not the owner from agreeing to bear the risk. He thereby becomes an insurer of goods which he does not own." Separate purchase orders have been issued in respect of expenditure towards freight, insurance and handling charges etc. As per the purchase order for transportation' the manufacturer-seller has been made liable to insure the goods for transit risk and 30 days thereafter. As per the terms of the contract the seller has to take the insurance to protect his own interest and the interest of the purchaser against all risk. If no title to the property has been transferred to the buyer at the factory gate,

there will be no interest of the purchaser to be protected by way of insurance. In this context, the following observations in the commentary on the Sale of Goods by P.S.Atiyah QC, DCL, FBA Eighth Edition, First Indian Reprint, 1985 Page 294 is relevant :- "An obligation to insure placed upon one party by the contract is also an indication that he bears the risk, and it has been said that this is an indication that he also has the property. But again, it is possible to draw a contrary inference from this fact, for why should a party who has not got the property in the goods concern himself whether they are insured or not Once again, therefore, the proper inference to be drawn must depend on all the circumstances of the case." Therefore in this present case the insistance of the buyer that the seller shall insure the goods in transit has to be taken as an indication that property in the goods has already passed to the buyer.

21. The only other point to be considered is the contention raised by the learned Departmental Representative on the basis of a term in the contract in the case of Associated Strips Ltd. that balance 10% of the sale price will be paid within thirty days after the approval of the material at DESU Stores. According to him, this clause would go to show that the goods were sent on approval or on sale or return as contemplated by Section 24 of the Sale of Goods Act and, therefore, the property in the goods would pass to the buyer only when the goods reach the stores of DESU and where the Representative approved the material.

"24. Goods sent on approval or on sale or return, - When goods are delivered to the buyer on approval or on sale or return or other similar terms. The property therein passes to the buyer - (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection; then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed; on the expiration of a reasonable time." The analogus provision in English Law is under Section 18 Clause (4) of the English Sale of Goods Act. The distinction between delivery of goods or sale or return and a condition subsequent regarding the approval of the goods by the buyer after the property in the goods has passed on to the buyer is explained by Benjamin in the following terms :- "Delivery on sale or return. - A

person to whom goods are delivered on sale or return has a true option to buy, in the sense that he is free to buy or not as he chooses. In such a transaction the goods are bailed to a prospective buyer on the understanding that he may buy them at a stated price he may elect either to buy or to return the goods, and by the terms of the agreement or in accordance with the presumed intention of the parties set oul in Section 18, Rule 4, of the Sale of Goods Act, [1930], will be deemed to have bought them in certain events if he does not give notice of rejection. Since the property remains in the bail or until there is an election to buy, and the bailee is not until such time under any obligation to buy, there is no contract of sale within the meaning of the Act.

Nevertheless, the Act does contain certain provisions concerning the passing of the property in these transactions.

It is of course competent for the parties to enter into a quite different bargain, in which it is agreed that the property shall pass on or before delivery, subject to the right of the person taking the goods to return them and revest the property in the seller should they not suit him, either within a fixed time or a reasonable time. In this case there is a sale subject to a condition subsequent, and the transaction comes within the scope of the sale of goods Act." 23. We have referred in detail in the earlier portion of the order how the goods are identified at the factory by the representative of the buyer which was followed by marking the same according to the instruction given by the buyer and thereafter appropriated to contract.

It was then delivered to the carrier as per the terms of the contract.

If that be so the sale has taken place at the factory gate and delivery also given to the buyer when the goods were delivered to the carrier in view of the provisions contained under Sections 23 and 39 of the Sale of Goods Act. The term regarding payment of balance 10% of the sale price after approval of the material at DESU Stores, can, therefore, be only a condition subsequent. This aspect has been considered in detail in the decision of the Supreme Court in Mahavir Commercial Ltd. v. CIT, West Bengal - AIR 1973 SC 430, as follows - "It is apparent that for the purposes of Sub-section (1) of Section 23 there should be an unconditional appropriation with the assent of the parties as indicated before the property in the

goods passes to the buyer. This sub-section is quite independent of Sub-section (2) and does not contemplate an unconditional appropriation in pursuance of the contract. Sub-section (2) on the other hand requires the delivery to a carrier in pursuance or a contract which operates or is deemed to operate as an unconditional appropriation. Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not for the purposes of transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract. The buyer's assent to the passing of the property in the said circumstances is implied and that when the seller despatches the goods and delivers them to the common carrier for purposes of transit to the buyer, the common carrier not only receives the goods as agent of the buyer but also assents to the appropriation made by the seller.

11. Even though the property in the goods may pass to the buyer when the goods are handed over, the buyer may yet retain the right to examine and repudiate the goods but this right generally which a buyer has in cif contract does not by itself indicate that the property in the goods has not passed to him. This supposed incongruity was sought to be explained per curiam in Kwei Tek Chao v. British Traders and Shippers - (1954) 2 KB 459, that if property passed when the documents are transferred that property is subject to the condition that the goods should re-vest in the seller it on an examination by the buyer he finds them not to be in accordance with the contract." 24. A similar issue has come for consideration before the Privy Council in Nanka-Bruce v. Commonwealth Trust Limited - 1926 Appeal Cases P. 77.

In that case the appellant arranged to consign coco to one Laing by rail. Laing was to resell the coco to merchants and to transfer to them the railway consignment notes. The merchants were to check the weights and Laing was to pay according to the weights so checked. The appellant consigned 160 bags of coco to Laing which he sold to the respondent transferring the same to the consignment note. The respondent took delivery in good faith and credited Laing with the purchase price against a large debt due to them from him. The appellant brought an action to recover damages from the respondents for conversion of the coco. It was the

contention of the appellant that sale to Laing had not taken effect and therefore, the respondent could not acquire any title to the goods from Laing. The concurrent finding of the Courts below that Laing purchased the coco from the appellant and this finding was attacked by the appellant as erroneous in law alleging that weighing up of the goods must be treated as having been a condition precedent to an operative sale. Rejecting the above contention their Lordships of the Privy Council held as follows :- "Their Lordships agree that the provisions as to the weight of the goods being tested was not a condition precedent to a sale. The goods were transferred, their price was fixed and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale or a condition precedent to it. To effect such suspension or impose such a condition would require a clear contract between vendor and vendee to that effect. In this case there was no contract whatsoever to carry into effect the weighing, which was simply a means to satisfy the purchaser that he had what he had bargained for and that the full price claimed par the contract was therefore due." 25. In the present case the terms of the contract would in no way indicate that the goods were delivered to the buyer on approval or on sale or on return. Therefore, the provision regarding payment of balance 10% of sale price after approval can only be a condition subsequent.

26. In the light of the terms and conditions of the contract between the parties in the present appeals we come to the conclusion that sale of the goods has taken place at the factory gate and therefore, even by applying the dictum in Escorts JCB and Prabhat Zarda "the place of removal" is not the premises of the buyer as contended by the Revenue.

Under these circumstances, we hold that the element of freight and transit insurance are not to be included in the normal value of the goods. We, therefore, set aside the orders impugned and allow the appeals. The appellants will be entitled to consequential reliefs.

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