PETITIONER:
FERRO ALLOYS CORPORATION LTD.

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 14/12/1998

BENCH:
S.P.BHARACHA, S.RAJENDRA BABU

ACT:

HEADNOTE:

JUDGMENT:
JUDGMENT
BHARUCHA.J.

These appeals by special leave questions the correctness of the judgment and order of a Division Bench of the High Court of Orissa dismissing writ petitions filed by the appellants. Until the Assessment year 199--91, one respondents accepted the position that the states made by the appellants were sales in the course of export and, therefore, exempt from the levy of sales tax. For the Assessment Years 1990-91 and 1991-92 the respondents found that these sales were intra-State sales subject to the levy of tax under the Orissa Sales Tax Act. The writ petitions filed by the appellants thereagainst were dismissed.

The appellants are an export oriented unit set up pursuant to the resolution of the Government of India dated 31st Dec. 1980. That resolution decided to give 100% export oriented units certain concessions to enable them to meet the rigors of foreign demands in terms of pricing, quality, precision, etc. According to the resolution, "(a) 100% export oriented unit would imply an industrial unit offering for exports its entire production, excluding permitted levels of rejects". A unit approved by the Board set up under the resolution was required to undertake to manufacture in bond and export its entire production for a period of 10 years and the finished products were exempt from excise and other central levies. Only rejects, upto 5% or such other percentage as the Board might fix, were allowed to be sold in the domestic tariff area. The application of the appellants that its charge chrome project be approved as a 100% export oriented unit was granted by the Government of India on 24th Oct. 1991.

On 15th Sept., 1981 the appellants entered into an agreement, called the Off-Take Agreement, with M/s. Marc Rich & Co., AG, (now called "Richco"), a corporation having its registered office at Zug, Switzerland. The agreement recited that the appellants intended to construct and were in the course of constructing a new charge chrome plant in the State of Orissa, utilising chrome ore from mines in that State, as a 100% export oriented unit offering for export its entire production. Richco was an international

marketing organisation that was specialised and experienced in the distribution and handling of ferry alloys, ferrous and non-ferrous ores and concentrate and steel related commodities wouldwide with associated companies and or offices in over 30 countries, including associated representative offices in New Delhi, Calcutta and Bombay, with personnel experienced in the marketing of charge chrome. Richco had been a major exporter of Indian ferry alloys and maintained well-extablished connections with major consumers of charge chrome throughout the would and was well placed and highly experienced in the marketing and transportation of charge chrome and it sought additional material "for the purpose of re-sale to its major consumers". The recitals added that the appellant "destres to appoint Richco as its exclusive purchaser worldwide for the re-sale of charge chrome produced by the new Orissa plant and Richco desires to accept such appointment". The Off-Take Agreement defined for its purposes, the term "the Agreed Rate" to mean "5% on F.O.B.S.T. Indian Port price" relished by the appellants. (S.T.stands for "stored and trimmed"). Clause 2 of the agreement stated that the appellants appointed "Richco as the sole and exclusive purchaser worldwide for all the charge chrome produced at the plant during the run-up and throughout the contract period and Richco shall be entitled to re-sell the same for its own account". The appellants undertook with Richco that in each year the aggregate quantity of charge chrome available for sale to Richco would not be less than the export minimum. Richco in turned undertook "with Factor (the appellants) to purchase at regular intervals in each year the charge chrome ..... equal to the export minimum at the prices agreed from time to time (as market conditions may require) by the parties hereto ..... ". It was acknowledged that the market for which the charge chrome was earmarked was primarily Japan and any balance would be earmarked for consumers in the rest of the world. For long term contracts with major consumers the appellants would have the right to participate in negotiations so as to enable them to plan their production programma and delivery schedule. Clause 3 stated, "The price for charge chrome to be sold and purchased hereunder shall be that agreed between Factor and Richco from time to time based on prevailing international prices as established by the major producer exporters of charge chrome (taking into account the quality of the charge Chrome) for those areas to which the charge chrome shall be destined ..... ". It also stated, "The prices to be established shall be no a F.O.B.S.T. Indian Port basis C+F or CIF Discharge Port basis as required by Richco from time to time and shall be expressed in dollars or if the parties so agree in any other currency". The appellants were required to pay to Richco a discount at the agreed rate on all charge chrome purchased by Richco. It was to be allowed by the appellants on each shipment and be paid in dollars to the account of Richco "within thirty days from receipt of the final sale proceeds for the charge chrome in question provided that if the final sale proceeds for any charge chrome shall be withheld for quality and/or quantity reasons then Factor shall pay the discount on the provisional payment within ninety days of the date of arrival of the vessel at Richco’s nominated. port and the balance of such discount shall be paid when the final payment is settled". Clause 4 of the agreement, dealing with payments, stated, "Payment of the price by Richco in respect of each consignment shall be made by letters of credit for the full value providing for 90% provisional

payment against shipping documents and the balance upon receipt of final certificates of assay and weight at load port/discharge port". The appellants warranted that they would "be the sole and absolute owner (free from any adverse interests) of all charge chrome exported to Richco hereunder". Title and risk to each consignment of the charge chrome would pass to Richco as agreed from time to time. Clause 5 required the charge chrome to be sold thereunder to be shipped in bulk. Clause 13 recorded, "This Agreement ..... have been entered into pursuant to the approval granted by the Govt. of India..... ".

Pursuant to the Off-Take Agreement Charge Chrome Agreements were entered into from time to time. A sample of such agreements placed on the record states that, in terms of the Off-Take Agreement, the appellants, described as the "sellers", had agreed to sell charge chrome to Richco, described as the "buyers", on the terms and conditions therein stated. The quantity stated, specifications and price were stated, the last being so many U.S. cents per pound "of chrome content FOBST Paradeep, India in bulk payable 30 days from Bill of Lading date". The shipping date was stated and the destination, being Japan for supply to Messrs. Nippon Steel Corporation, Tokyo. The agreement signed on behalf of the buyers and sellers. Standard terms and conditions were annexed to the agreement. Thereunder Richco was required to arrange for the issuance of a certificate pertaining to the discharge of the charge chrome at the discharging port. The standard terms stated that the "final settlement will be based on weight determined at port of discharge or ultimate buyers' works and analysis mentioned in the certificate". The payment would be made by confirmed irrevocable letter of credit in favour of appellants as therein set out. Clause 4 of the standard terms stated :

> "aShould any consignments shipped under this contract fall below the contractual specifications, the buyers reserve the right to reject and revert the material to the sellers or to accept such consignment or consignments at reduced price as may be mutually agreed to between the buyers and sellers.
>
> b.The buyers shall pay all customs duties as well as any other duties and taxes payable in Japan at the time of or by reason of the importation".

Risk in respect of goods was stated to pass to Richco "from the time when the goods shall have effectively passed the ship's rail at the port of shipment". Title in respect of the charge chrome would pass to Richco from the appellants "when the sellers have received the proceeds of the goods from the negotiating bank without recourse to the sellers".

Documents are placed on record which show how the Off Take and Charge Chrome Agreements were worked. All that need be referred to is the shipping bill, which shows that it was the appellants who were the exporters because no export licence was required under "Clause 15(j) of Export Trade Control 1988-91".

Learned counsel for the appellants submitted that the sales effected by the appellants to Richco were sales in the course of export to Richco. The agreements, particularly, the Charge Chrome Agreements, left no doubt in this behalf. Learned counsel for the respondents submitted that the sale to Richco was under the Off-Take agreement and that the Charge Chrome Agreements were only delivery orders thereunder. The export had been occasioned, in his

submission, by reason of the agreements that were entered into between Richco and the ultimate buyers, which agreements, clearly, preceded the Charge Chrome Agreements.

Section 5 of the Central Sales Tax Act, 1956, so far as it is relevant, reads thus :

> "5.When is a sale or purchase of goods said to take place in the course of import or export. (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.
>
> 3.Notwithstanding anything contained in sub-sention (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with the agreement or order for or in relation to such export".

To analyses these provisions to the extent relevant here, the sale of goods is deemed to take place in the course of their export out of the territory of India only if (1) the sale occasions the export, (2) the sale is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India; and (3) the last sale of goods preceding the sale occasioning the export of the goods is deemed to be in the course of such export if it has taken place after and for the purpose of complying with the agreement or order relating to such export.

The appellants have based their case on all the aforesaid three limbs of Section 5. We shall deal with the argument on the first of the aforesaid three limbs first.

Before we do so, we should make reference to the judgment of this Court upon which both sides have relied, namely, the Constitution Bench judgment in Md. Serajuddin and Ors. Vs The State of Orissa, (1975) 2 S.C.C. 47. This was the judgment that occasioned the amendment of Section 5 so as to introduce sub-section (3) therein. Analysing earlier decisions of this Court, various principles were laid down in Serajuddin' case to ascertain which was the sale which occasioned the import. It was said that the sale which was to be regarded as exempt was the sale which caused the export to take place or was the immediate cause of the export. To establish an export, a person exporting and a person importing were necessary elements and the course of export was between them. The introduction of a third party dealing independently with the seller on the one hand and with the importer on the other broke the link between the two for then there were two sales, one to the intermediary and the other to the importer. The first sale was not in the course of export because the export commenced with the intermediary. The expression "sale" in Section 5 of the Central sales Tax Act had the same meaning as in the sale of Goods Act. The expression "in the course" implied not only a period of time during which the movement was in progress but postdated a connected relation. Sale in the course of export out of the territory of India meant a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. Directions given to

place the goods on board a ship pursuant to the contract of sale were not in the course of export because, in the given case, the export sale was an independent one with a foreign buyer. In such cases, the taking of goods from the appellant's place to the ship was completely separate from the transit pursuant to the export sale.

In our view, the first question to answer is :

which is the contract of sale of the charge chrome to Richco? Is it, as is contended by learned counsel for the respondents the Off-Take Agreement? Or is it, as is contended by learned counsel for the appellants that the Off-Take Agreement is only the agreement of sale to Richco and the contracts of sale are the Charge Chrome Agreements?

> Section 4 of the Sale of Goods Act, 1930 states :
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> "4.Sale and agreement to sell (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of a contract of sale between one part-owner and another.
>
> 3.Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell."

While on the Sale of Goods Act reference may also be made to Section 9, which states that the price in a contract of sale may be fixed by the contract or may be left to be fixed in the manner thereby agreed or it may be determined by the course of dealing between the parties. Where the price is not determined as aforestated, the buyer must pay the seller a reasonable price.

The Off-Take Agreement was executed when the appellants were still in the course of constructing the charge chrome plant, that is to say, well before the production of any of the charge chrome that was to be sold thereunder. The agreement was to operate in respect of the charge chrome that was produced at the plant during the run-up and throughout the contract period. Richco undertook to purchase the same at regular intervals in each year, equal to the export minimum. The price was to be that which was agreed between the appellants and Richco from time to time "based on prevailing international prices as established by the major exporter producers of charge chrome (taking into account the quality of charge chrome) for those areas to which the charge chrome shall be destined." The agreement, therefore, did not relate to a specified quantity of charge chrome nor was the price agreed to thereunder. The agreement did not even state with any precision how the price of the charge chrome was to be determined. The agreement, therefore, was no more than an agreement to sell. Even so, there are clear indications in the Off-Take Agreement that the sales that were to be effected pursuant thereto were sales to Richco abroad. Richco was to be the exclusive purchaser of the charge chrome "world-wide". The entire quantity of charge chrome that the appellants were required to export by reason of their obligations as an 100% export oriented unit was covered by the agreement. The price thereof was to be paid in dolla's. The agreement spoke of "charge chrome exported to Richco".

The Charge Chrome Agreements were entered into between the appellants as "sellers" and Richco as "buyers" and were signed on their behalf. The quantity of charge

chrome sold thereunder, its specifications and the price therefor was specified. The price was counted in US cents. The destination mentioned therein was a foreign port. Under the Standard Terms and Conditions annexed to the Charge Chrome Agreements Richco was required to arrange for a certificate pertaining to the discharge of the charge chrome at the discharging port. The final settlement of the price was to be based on the weight of the charge chrome determined either at the port of discharge or at the works of the ultimate buyer and the analysis mentioned in the certificate. Richco was entitled to reflect charge chrome which fell below the contractual specifications. Whether the charge chrome fell below the contractual specifications could only be determined by the assay carried out at the port of discharge. The title to the charge chrome passed to Richco from the appellants when the appellants received full consideration for the charge chrome "from the negotiating bank, without recourse to the sellers", that is to say, only when the charge chrome was found to have met the contractual specifications, which was abroad. These provisions in the Charge Chrome Agreements indicate not only that they were the contracts of sale of the charge chrome but also that the sale of charge chrome thereunder was a sale to Richco abroad and therefore, that the export of the charge chrome was occasioned by the Charge Chrome Agreements.

Richco was not an intermediary in the sense that it was not the contract of sale of the charge chrome by Richco to the ultimate buyer which occasioned the export. The charge chrome having been exported by the appellants to Richco abroad, Richco resold it to the ultimate buyers. Decisions relating to situations where there were intermediaries who purchased goods from Indian sellers in India and then exported them to foreign buyers are, therefore, not relevant to the present case.

We, therefore, hold that the High Court and the authorities below were in error in concluding that the sales made by the appellants were not sales in the course of export and, therefore not exempt from the levy of sales tax.

We may now having decided the issue on merits, take notice of an affidavit filed in this Court on behalf of the Union of India. The affidavit supports the stand of the appellants. It annexes letters written by the Union of India on 6th November, 1995 and 29th April, 1998 to the respondents. The letters state that since the appellants charge chrome plant was Customs bonded it was not possible for the appellants to make any domestic sale thereof without the approval of the competent authority and the Customs and Central Excise authorities had certified that the appellants had not sold any quantity of charge chrome in India. In view thereof, and keeping in view the fact that all export sales were exempt from the payment of State and Central Sale Tax, the respondents were requested to ensure that the production and export programme of the appellants' plant was not adversely affected. The respondents did not reply to the said two letters, nor to the affidavit on behalf of the Union of India.

The appeals are allowed. The judgment and order under appeal is set aside. The writ petitions filed by the appellants are allowed and the assessment orders impugned thereby quashed.

The respondents shall pay to the appellants the costs of the appeals.