K. Gopinathan Nair and Others

Vs

State of Kerala

Civil Appeals Nos. 4955-77 of 1991

(CJI A. M. Ahmadi, Sujata V. Manohar, S. B. Majmudar JJ)

21.03.1997

JUDGMENT

S. B. MAJMUDAR, J. –

1. According to our esteemed colleague Sujata V. Manohar, J., these appeals are required to be allowed. With profound respect, it is not possible for us to agree with her findings and the conclusions insofar as it is held by her that Section 5 sub-section (2) of the Central Sales Tax Act, 1956 will cover the transactions in question. We, however, agree with her so far as it is held that Section 2(ab) of the Central Sales Tax Act has no retrospective effect and that there is no evidence on record to attract the second part of Section 5(2) which deals with sale on high seas. We, therefore, record our separate reasons for confirming the decisions impugned in these appeals.

2. In Civil Appeals Nos. 4955-77 of 1991 common question falls for consideration. It is to the following effect :

> "Whether the purchases of African raw cashewnuts made by the assessees from the Cashew Corporation of India (for short 'CCI') are in the course of import and, therefore immune from liability to tax under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as 'the Act')."

Appellants in these cases are engaged in the purchase of raw cashewnuts and export of cashew kernels after processing. The assessments relate to the years 1970-71 to 1973-74. It is the case of the appellants that they had placed orders for import of raw cashewnuts from African countries through the CCI which was canalising agency and pursuant to the said orders the CCI had imported these raw cashewnuts and had made them available to the assessees. Consequently these transactions would be styled as purchases by This contention of the assessees was rejected by the Kerala Sales Tax the assessees in the course of import and were outside the sweep of the Act. Appellate Tribunal, Additional Bench, Ernakulam. Their tax revision cases were also dismissed by a Division Bench of the Kerala High Court and that is how the appellants have preferred these appeals by obtaining special leave to appeal from this Court.

3. In Civil Appeals Nos. 3647-52 (NT) of 1986 CCI is the assessee. The sale of imported raw cashewnuts from African countries to the local purchasers by the CCI have been brought to tax under the provisions of the Karnataka Sales Tax Act, 1957. The appellant is a private company registered under the Companies Act and is said to be a subsidiary of the State Trading Corporation wholly owned by the Government of India. The appellant Company, the registered office of which is at Cochin in Kerala, imports raw cashew from East African countries under licences issued by the

Controller of Imports and Exports, and allots such cashew to the actual users for being processed and for export of a certain percentage of the raw cashew allotted. In this process the appellant Company sells cashew to the actual users. The appellant had not got itself registered as a dealer in the Karnataka State nor had it filed returns for the years 1970-71 to 1975-76. The contention of the appellant Company before the Taxing Authority was to the effect that the transaction of sale by the Company to the actual users was in the course of import and, therefore, the State Sales Tax Act could not encompass such a transaction. The Taxing Authority in Karnataka on the other hand sought to levy sales tax on the appellant on the basis that it was a non-resident dealer. The 'contention of the CCI was negatived by the Karnataka Appellate Tribunal, Bangalore. The appellant's revision before the High Court came to be dismissed by Division Bench of the High Court by its order dated 3-3-1986 and that is how the CCI is before us on special leave.

4. It becomes, therefore, clear that a common question arises for our determination as to whether the import of raw cashewnuts by the CCI from African exporters and its purchase by actual users in India could be said to be a transaction in the course of import and, therefore, eligible for exemption under Section 5(2) of the Central Sales Tax Act, 1956. Both the Kerala High Court as well as the Karnataka High Court have taken the view that these transactions are not saved by Section 5(2) of the Central Sales Tax Act, 1956 and they are exigible to local sales tax. It is this view that has been seriously brought in challenge by Shri Poti, learned Senior Counsel appearing for the appellants in Civil Appeals Nos. 4955-77 of 1991 and Shri Hegde, learned Senior Counsel appearing for the appellant CCI in Civil Appeals Nos. 3647-52 of 1986. The learned counsel appearing for the respondents, State of Kerala and State of Karnataka on the other hand have supported the decisions of these High Courts.

5. In order to resolve this controversy it is necessary at the outset to look at the relevant constitutional and statutory provisions. Under Article 286 of the Constitution of India restrictions have been placed on the power of a State to tax sales. Article 286(1) and 286(2) lay down as under :

> "286. Restrictions as to imposition of tax on the sale or purchase of goods. - (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 -
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> (a) outside the State; or
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> (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.
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> (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)."

Parliament in exercise of its powers under Article 286 sub-article (2) enacted Central Sales Tax Act, 1956. As laid down by Section 3 thereof, 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. Under Section 5(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. Under sub-section (2), a sale or purchase of goods shall be deemed to take place in the course of the import of the goods

into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of the goods before the goods have crossed the customs frontiers of India. It, therefore, becomes a moot question as to whether the sale of raw cashewnuts imported by CCI from African countries, to local users in State of Karnataka or Kerala, as the case may be, can be said to be said to be sale in the course of import of these raw cashewnuts into the territory of India. For deciding this question the provision of sub-section (2) of Section 5 will have to be kept in view. As per the said provision the sale of imported raw cashewnuts shall be deemed to take place in course of import only if such sales by CCI to the local actual users or conversely the purchases of such imported raw cashew by the local users from the CCI have occasioned such import of raw cashew. The second part of sub-section (2) of Section 5 is not attracted on the facts of the present cases as factually it is not found in these cases that such sales were effected by transfer of documents of title to goods, namely, the raw cashewnuts before they crossed the customs frontiers of India. The entire controversy, therefore, centres round the short question, namely, whether the sales of these imported cashewnuts by CCI to local users were in the course of import of these cashewnuts and whether such sales had occasioned the import.

6. There are various decisions of the Constitution Benches of this Court which have laid down clear parameters for answering this question. In the case of Ben Gorm Nilgiri Plantations Co. v. STO ((1964) 7 SCR 706 : AIR 1964 SC 1752 : (1964) 51 ITR 345 : (1964) 15 STC 353) majority of the Constitution Bench of this Court speaking through Shah, J., had an occasion to consider the question whether sale of tea by the assessees appellants to local agents of foreign buyers would earn exemption under Article 286(l) (b) a of the Constitution of India by being treated as sale in the course of exports. It is trite to observe that the phraseology "sale or purchase in the course of export" as employed by Section 5(1) of the Central Sales Tax Act is in pari materia with the phraseology employed by Section 5 sub-section (2) dealing with "sale or purchase in the course of import". In the aforesaid case the appellants were carrying on business of growing and manufacturing tea in their estates. They sold tea to the local agents of foreign buyers. The sales were effected by public auction at Fort Cochin. These auctions were conducted by brokers of tea. The Sales Tax Officer assessed the appellants to pay sales tax on transactions of auction held at Fort Cochin. It was contended by the appellants assessees that purchases by local agents of foreign buyers were for their principals abroad and the goods were in fact exported out of India and, therefore, the sales by appellants were in the course of export out of the territory of India and were thus exempt from tax under Article 286(1) (b) of the Constitution. The aforesaid contention of the appellants was negatived by all the authorities under the Sales Tax Act. They thereafter also failed before the High Court. The majority of the Constitution Bench also dismissed their appeal. Shah, J., speaking for the majority held that the transaction of sale which is preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. Etymologically the expression "in the course of export" contemplates an integral relation or bond between the sale and the export. In general where a sale is effected by the seller, and the seller is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of the sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by statute or contract of mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export. It was further laid down as under :

> "A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In the present case there was between the sale and

> the export no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The appellants were not concerned with the actual exportation of the goods and the sales were intended to be complete without the export, and as such it cannot be said that the said sales occasioned export. The sales were therefore for export and not in the course of export. Therefore the sales by the appellant to the agents of foreign buyers do not come within the purview of Article 286(i) (b) of the Constitution."

As per the aforesaid decision of the Constitution Bench before a sale can be said to have taken place in the course of export the export must have a direct nexus with the sale and the activity of sale and export must be completely a interlinked. On the same reasoning as in the aforesaid case, therefore, a sale in the course of import must necessarily require the sale concerned to occasion the import and the sale and the import must have an integrated and intertwined connection. If that is not so it would not be a sale in the course of import but it would be a sale by import or because of import. In the case of K. G. Khosla and Co. v. Dy. Commr. of Commercial Taxes ((1966) 3 SCC 352 : AIR 1966 SC 1216 : (1966) 17 STC 473) the latter Constitution Bench of this Court had to deal with the question whether sales in that case were in the course of import. Section 5 sub-section (2) directly fell for consideration of the Constitution Bench. In that case the appellant assessee had entered into a contract with the Director General of Supplies, New Delhi for supply of axle bodies manufactured by its principals in Belgium The goods were inspected on behalf of the buyers in Belgium but under the contract they were liable to rejection after further inspection in India. In pursuance of the contract the appellant supplied axle bodies to the Southern Railway at Perambur & Mysore. It was the contention of the appellant that the sales effected by them in favour of Director General of Supplies, New Delhi were in the course of import. That contention was rejected by the joint Commercial Tax Officer, Madras who held that these were intra-state sales because the seller was the consignee of the goods and the buyer had reserved the right to reject the goods even after their arrival in India. Accordingly assessment was made under the Madras General Sales Tax Act in respect of supplies at Perambur and another assessment was made under the Central Sales Tax Act in respect of supplies at Mysore. The appellant lost before the Appellant Assistant Commissioner but partially succeeded before the Tribunal which held that part of the goods were sold in the course of import. Both the parties filed to revision applications in the High Court. The High Court allowed the revision application of the State and rejected that of the assessee. The appellant thereafter approached this Court by special leave. Allowing the appeal of the assessee it was held by the Constitution Bench of this Court speaking through Sikri, J., that section 5 sub-section (2) of the Central Sales Tax Act does not lay down any condition that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import. That it was quite clear on the facts that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there, and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director General of Supplies. There was no possibility of those goods being diverted by the assessee for any other purpose. Consequently the sales took place in the course of import of goods within Section 5(2) and, therefore, were exempt from taxation. The facts of the aforesaid case indicate that the assessee was the agent of the foreign seller. The principals were in Belgium. They exported the goods through the agency of the appellant and sold them to the Director General of Civil Supplies, New Delhi who was the consignee. Thus the entire transaction was an integrated transaction by which a foreign seller through its Indian agent, namely, the assessee sold the goods to the Indian purchaser, namely, the Director General of Civil Supplies. Consequently it

was treated as one integrated transaction of sale by a foreign exporter of goods to an Indian importer, namely, the Director General of Civil Supplies, New Delhi through the agency of its local agent, namely, the assessee and, therefore, the transaction was treated by the Constitution Bench as representing sale in the course of import. The third Constitution Bench judgment is found in the case of Coffee Board v. Jt. CTO ((1969) 3 SCC 349). In that case the Coffee Board had sold coffee at the export auctions with a view that the coffee may get exported through these auction-purchasers to outside countries. It was the contention of the Coffee Board that these sales were in the course of export of coffee out of the territory of India since the sales themselves occasioned the export of coffee and coffee so sold was not intended for use in India or for sale in Indian markets. This contention canvassed in the writ petition under Article 32 of the Constitution by the Coffee Board was rejected by the majority of the Constitution Bench speaking through Hidayatullah, C.J. It was held that the petitioners cannot claim exemption from tax. The phrase "sale in the course of export" comprises in itself three essentials : (i) that there must be a sale; (ii) that goods must actually be exported and (iii) that the sale must be a part and parcel of the export. Therefore either the sale must take place when the goods are already in the process of being exported which is established by their having already crossed the customs frontiers, or the sale must occasion the export. The phrase expanded with this meaning reads "in the progress or process of export" "or during export". Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held. The tests are that there must be a single sale which itself causes the export or is in progress or process of export. There is no room for two or more sales in the course of export. The only sale which can be said to cause the export is the sale which itself results in the movement of the goods from the exporter to the importer. Sale must be an integral part of the precise export before it can be said to have occasioned that particular export. Applying the aforesaid test laid down by majority in that decision to "sales in the course of import" three essentials would obviously be required to be met before the sale can be said to be in the course of import, (i) there must be a sale; (ii) the goods must actually be imported; and (iii) the sale must be part and parcel of the import. Consequently it must be shown by the appellants that the sale by CCI to the local users of imported raw cashewnuts had occasioned the import and such a sale was a part and parcel of the import. If there are two independent sales, one by a foreign exporter to CCI and a second sale by CCI to the local users, the link between the import of raw cashewnuts and their actual delivery to their actual users would be broken. The integrated course of import would then he found wanting. The next Constitution Bench judgment is rendered in the case of State of Bihar v. TELCO ((1970) 3 SCC 697). In that case the Constitution Bench of a this Court had to examine pari materia provision found in Article 286(2) of the Constitution dealing with sales in the course of inter-State trade or commerce. Hegde, J., speaking for the Constitution Bench made the following pertinent observations in para 14 of the Report : (SCC p. 702)

> "The decided cases establish that sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances :
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> (1) When goods which are in export or import stream are sold;
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> (2) When the contract of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place; and
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> (3) Where as a necessary incidence of the contract of sale goods sold are required to

be exported or imported or transported out of the State in which the delivery of goods takes place."

7. This takes us to yet another Constitution Bench judgment of this Court in the case of Binani Bros. (P) Ltd. v. Union of India ((1974) 1 SCC 459 : 1974 SCC (Tax) 183). In this case a Constitution Bench of this Court speaking through Mathew, J., had an occasion to once again examine the question whether the sales in that case were in the course of import of goods so as to be covered by Article 286(1) (b) of the Constitution read with Section 5(2) of the Central Sales Tax Act, 1956. In that case the petitioner under Article 32 before this Court was a dealer in non-ferrous metals. He was supplying the same to the Directorate General of Supplies & Disposals (DGS&D). The petitioner used to import these metals. The petitioner had sold the imported material as principal to the DGS&D. For effecting these sales it had purchased the goods from foreign sellers and these purchases from the foreign sellers occasioned the movement of goods in the course of import. It was held by the Constitution Bench that the movement of goods was occasioned by the contracts for purchase which the petitioner entered into with the foreign sellers. No movement of goods in the course of import took place pursuant to the contracts of sale made by the petitioner with the DGS & D. The petitioner's sales to DGS&D were distinct and separate from his purchase from forgin sellers. To put it differently, the sales by the petitioner to the DGS&D did not occasion the import. On the contrary purchase made by the petitioner from the foreign sellers occasioned the import of the goods. There was no privity of contract between DGS&D and the foreign sellers. The foreign seller did not enter into any contract by themselves or through the agency of the petitioner with DGS&D and the movement of goods from the forgin countries was not occasioned on account of the sales by the petitioner to DGS&D. It was further held that though under the contract DGS&D a undertook to provide all facilities for the import of the goods for fulfilling the contracts including an Import Recommendation Certificate, there was no absolute obligation on the DGS&D to procure these facilities. And it was the obligation of the petitioner to obtain the import licence. Therefore, even if the contracts envisaged the import of goods and their supply to the DGS&D from out of the goods imported, it did not follow that the movement of the goods in the course of import was occasioned by the contracts of sale by the petitioner with DGS&D. As we will presently show, the ratio of the decision of the aforesaid Constitution Bench directly gets attracted on the facts of the present cases. Substituting DGS&D for local users and the petitioners in that case by the CCI it becomes clear that on the same reasoning by which the Constitution Bench held in the aforesaid case that the sale by the petitioner to DGS&D was not in the course of import it will have to be held that the sales by CCI in the present cases to local users were also not sales in the course of import. Another Constitution Bench judgment which also gets squarely attracted on the facts of the present cases is rendered in the case of Mohd. Serajuddin v. State of Orissa ((1975) 2 SCC 47 : 1975 SCC (Tax) 269). In the aforesaid case this Court was concerned with the interpretation of the term "in the course of export" as found in Section 5(1) of the Central Sales Tax Act. However, while interpreting the said phraseology the Constitution Bench also construed identical phraseology found in Section 5(2) dealing with "in the course of import". In that case the appellant before this Court was the assessee who was a registered dealer under the Central Sales Tax Act, 1956, carrying on business of mining and exporting mineral ores to foreign countries. He had entered into four contracts for sale of chrome concentrates. Two of them were directly with foreign buyers. The other two were with the State Trading Corporation (STC) ever since export of mineral ores was canalised through it. The STC in turn entered into contracts with foreign buyers. The High Court held sales under the first two contracts directly with foreign buyers exempt from sales tax being in the course of export. But it held sales under the contract with STC not exempt from sales tax under Article 286(l) (b) of the Constitution read with Section 5(1) of the Central Sales Tax Act. The majority of the Constitution

Bench speaking through Ray, C.J., upheld the decision of the High Court against the assessee. It was held that Section 5 of the Central Sales Tax Act has given a legislative meaning to the expression "in the course of export" and "in the course of import". The expression "in the course" implies not only a period of time during which the movement is in progress but postulates a connected relation. Sale in the course of export out of the territory of India means 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. In para 18 of the Report the following pertinent observations were made : (SCC p. 57)

> "... A sale in the course of export predicates a connection between the sale and export. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But it does not a I mean that distinction between transactions which may be called sales for export and sales in the course of export is not real. Where the sale is effected by the seller and the seller is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by statute, contract, or mutual understanding between the parties arising from the nature of the transaction the sale is in the course of export."

While considering the question whether the sale is in the course of export, the Constitution Bench considered the further question whether there should be a single sale or there can be two or more independent sales. In this connection, it was observed that there must be a single sale which itself causes the export and there is no room for two or more sales in the course of export. The sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export because the export commences with the intermediary. The tests are that there must be a single sale which itself causes the export or is in the progress or process of export. There is no room for two or more sales in the course of export. The only sale which can be said to cause the export is the sale which itself results in the movement of the goods from the exporter to the importer. So the test is whether there were independent transactions or only one transaction which occasioned the movement of the goods in the course of export. Applying this principle to the facts of the case it was held that the sale by the assessee to the STC which was the canalising agency for exports had no connection with the export by STC of the purchased goods to the foreign buyers and, therefore, the sale by the assessee in favour of the canalising agency, namely, STC was held not to be a sale in the course of export but was found to be a sale for export. In this connection the following pertinent observations were made in the headnote of the report at p. 49 :

> "Hence the contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound. The pre-eminent question is as to which is the sale or purchase which occasions the export. The distinction between sales for export and sales in the course of export cannot be disregarded.
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> The features which point with unerring accuracy to the contract between the

> appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale are : There was no privity a of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods All relevant documents were in the name of the Corporation whose contract of sale was the occasion of the export. The expression 'occasions' in Section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the Corporation and the appellant.
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> The appellant sold the goods directly to the Corporation. The circumstance that the appellant did so to facilitate the performance of the contract between the Corporation and the foreign buyer on terms which were similar did not make the contract between the appellant and the Corporation the immediate cause of the export."

8. Sales or purchases through canalising agencies who export or import goods were also considered in para 28 of the Report. It was held that the system of canalisation of exports or imports through the State Trading Corporation is constitutionally valid. The broad reasons for the system of canalisation are control of foreign exchange and prevention of abuse of foreign exchange. The counsel for Minerals and Metals Trading Co. which became the successor to the Corporation did not contend that the Corporation is an agency. Agency is created by actual authority given by the principal to the agent or principal's ratification of contract entered into by the agent on his behalf but without his authority. Agency arises by an ostensible authority conferred by the principal on the agent or by an implication of law in cases of necessity. The contention on behalf of the appellant that STC was an agent of necessity because the STC was a special agency to carry out certain public policies was turned down. It was held that the sale by the assessee to the canalising agency which exported the goods was a sale transaction between two principals and there was no aspect whatsoever of principal and agent.

9. Applying the ratio of the aforesaid Constitution Bench decision to sale or purchase in the course of import as envisaged by Section 5(2) which is a pan materia provision and is almost a mirror image of the provision of Section 5(1) dealing with converse type of cases it has, therefore, to be held that any purchase of goods imported by canalising agency like CCI which is the importer of such goods and which sells them to the actual users would also partake the character of a sale between principal and principal wherein the foreign seller would be out of picture and such transactions cannot be termed as a well-knit integrated transaction between all the three of them so as to make the transaction one of sale or purchase in the course of import. But it may as well be a transaction because of or by import carried out by the canalising agency like CCI. It is also pertinent to note that the Constitution Bench in Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) had heavily relied upon another Constitution a Bench judgment in the case of Binani Bros. ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) which was directly concerned with the interpretation of Section 5(2) of the Central Sales Tax Act as we have seen earlier.

10. The learned Senior Counsel for the appellants invited our attention to a decision of a Bench of two learned Judges of this Court in the case of Dy. Commr of Agricultural Income Tax and Sales

Tax v. Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) The said decision was rendered in the light of the peculiar facts of the case which came up for consideration of this Court. The Bench speaking through Hegde, J., noted the fact that the assessee firm before them had imported cotton against actual user's import licence granted to the mills concerned and was selling the cotton to them. That the assessee was also precluded from selling to anybody other than the mills to whom the user's import licence had been granted. It was also noted that the assessee firm had entered into contract with the mills dated 20-3-1964, that the import licence issued in favour of the mills was made available to the firm for utilisation of the contract, that the letter of authority authorising the firm to import cotton was also issued. That the bill of leading obtained by the foreign supplier on shipment of the goods was also obtained by the firm and the cotton was thus sent of India. On the peculiar facts of that case, therefore, it was held that the assessee firm was acting on behalf of the Indian importer mills concerned. Consequently it must be held that the court treated the assessee as an agent of the Indian importer mills concerned. In the light of the aforesaid peculiar facts of the case, therefore, the Bench applied the ratio of the decision of this Court in the case of K. G. Khosla & Co. ((1966) 3 SCR 352 : AIR 1966 SC 1216 : (1966) 17 STC 473). It is difficult to appreciate how the said decision can be of any avail to the appellants on entirely different set of facts which have remained well established on record and which will be adverted to by us in the letter part of this judgment.

11. It is time for us now to refer to two other judgments of this Court rendered by Benches of three learned Judges and on which strong reliance was placed by the learned Senior Counsel for the appellants. In the case of Dy. Commr. of Agricultural Income Tax and Sales Tax v. Indian Explosives Ltd. ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) this Court dealt with the question whether the respondent assessee was concerned with sale transactions in the course of import of chemicals, dyes etc. The modus operandi of the assessee in that case was to the effect that local purchasers used to place orders with the respondent quoting their Import Licence Numbers in accordance with their pre-existing contracts with the respondent. The respondent then placed orders with the foreign supplier for the supply of the goods and in such orders the name of the local purchaser who required the goods as also its licence numbers were specified; the actual import was done on the strength of two documents like (a) the Actual User's Import Licence and (b) Letter of Authority issued by the Chief Controller of Imports and Exports whereunder the local purchaser was authorised to permit the respondent assessee on his behalf to import the goods, to open letters of credit and make remittance of foreign exchange against the said licence to the extent of the value specified therein. The import licence expressly contained two conditions, (i) that the goods imported will be the property of the licence-holder at the time of clearance through the Customs and (ii) that the goods will be utilised only for consumption as raw material or accessories in the licence-holder's factory and that no portion thereof will be sold to or be permitted to be utilised by any other party. In the light of these facts the decision of the Kerala High Court that the respondent assessee had effected sales in the course of import was upheld by this Court. Tulzapurkar, J., speaking for this Court observed that there was an integral connection between the sale to the local purchaser and the actual import of the goods from the foreign supplier. The movement of goods from a foreign country like United States to India was in pursuance of the conditions of the pre-existing contract of sale between the respondent assessee and the local purchaser. The import of the goods by the respondent assessee was for and on behalf of the local purchaser and the respondent assessee could not, without committing a breach of the contract, divert the goods so imported for any other purpose. In para 4 of the Report it was further observed in the light of various decisions of this Court to which we have made a reference earlier, that in order that the sale should be one in the course of import it must occasion the import and to occasion the import there must be integral

connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the 1' transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be snapped.

12. The aforesaid decision obviously was rendered in the light of the peculiar facts of the case before the Court. In that case the respondent assessee was acting on behalf of the local importers and was almost as good as their agent for importing the goods on their behalf from foreign countries. The goods imported had to be the property of the licence-holder at the time of clearance from the customs and it was on the basis of the actual user's licence that the goods were imported by the respondent assessee and, therefore, it was held on the facts of that case that there was an integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from contract or mutual understanding or nature of the transaction which linked the sale to import which could not, without committing a breach of contract or mutual understanding be diverted elsewhere. As we will presently see no such conclusion is possible on the facts of these appeals and in the light of the salient features emerging on the record of these cases. On the contrary the decisions of the Constitution Benches of this Court in Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) and in the case of Binani Bros. ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) get squarely attracted. The other decision on a which strong reliance was placed by the learned Senior Counsel for the appellants was rendered by a Bench of three learned Judges in the case of Consolidated Coffee Ltd. v. Coffee Board ((1980) 3 SCC 358 : 1980 SCC (Tax) 279 : (1980) 3 SCR 625) which is called second Coffee Board case. In that case Tulzapurkar, J. speaking for the Bench had to consider the constitutional validity of Section 5 sub-section (3) of the Central Sales Tax Act which was brought on the Statute-Book in the light of the earlier Coffee Board case judgment of the Constitution Bench in Coffee Board ((1969) 3 SCC 349) and the decision in Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269). By the said amendment to Section 5(3) the legislature thought it fit to grant exemption also to the penultimate sales prior to the sales in the course of export by the canalising agency. That was with a view to boost up foreign exchange earnings. While upholding the said amendment it was held that Section 5(3) of the Central Sales Tax Act has been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported and (h) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export. The aforesaid decision, therefore, is confined to the validity of the amended provision which itself postulates that but for such amendment the penultimate sale would have remained outside the sweep of Section 5 subsection (I) of the Central Sales Tax Act and such penultimate sale could not have been treated as sale in the course of export. Even that apart for interpreting the identical phraseology "in the cours of" found both in Section 5(1) and Section 5(2) this decision by three learned Judges' Bench could naturally not be of any assistance to the appellants as obviously the three learned Judges' Bench could not have laid down anything country to what the Constitution Benches in Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) and in the case of Binani Bros ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) had laid down on the true construction of the Sections 5(1) and 5(2) while interpreting the words "in the course of export" or "in the cours of import" as found in these provision.

13. Reliance placed by our esteemed colleague Sujata V. Manohar, J. on the judgments of this Court in the case of Indian Explosives Ltd. ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) and Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) for taking the view that ratio of the Constitution Bench

judgment in Mohd. Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) would not be applicable as the legislature had amended the relevant provisions of Section 5, in our view, is not apposite. In the first place, as noted earlier, the decisions of smaller Benches of learned Judges of this Court that decided Indian Explosives ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) and Kotak & Co. case ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) a cannot be pressed in service by the appellants when on facts of the present cases the contrary ratio of the decisions of the Constitution Benches which decided Mohd. Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) and Binani Bros. case ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) squarely get attracted. Even that apart, with great respect to our esteemed colleague Sujata V. Manohar, J., it could not be assumed that the legislature by inserting sub-section (3) of Section 5 had in any way departed from the ratio of the aforesaid Constitution Bench decisions on the statutory scheme as was then existing. It is trite to observe that the legislature is competent to remove the substratum of the earlier judgment of this Court by inserting a new provision. It is necessary to visualise that but for sub-section (3) of Section 5 as introduced by the latter amendment, the penultimate transactions would have remained outside the sweep of the phrase "sale in the course of export". It is only because of the latter amendment that by a legislative fiction even the penultimate sales were sought to be covered by the said phrase. It is pertinent to observe in this connection that there is no such amendment introduced by the legislature for extending the sweep of the phrase "sale in the course of import".

14. In the light of the aforesaid settled legal position emerging from the Constitution Bench decisions of this Court the following propositions clearly get projected for deciding whether the concerned sale or purchase of goods can be deemed to take place in the course of import as laid down by Section 5(2) of the Central Sales Tax Act :

(1) The sale or the purchase, as the case may be, must actually take place.

(2) Such sale or purchase in India must itself occasion such import, and not vice versa i.e. import should not occasion such sale.

(3) The goods must have entered the import stream when they are subjected to sale or purchase.

(4) The import of the goods concerned must be effected as a direct result of the sale or purchase transaction concerned.

(5) The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.

(6) There must be either a single sale which itself causes the import or is in the progress or process of import or though there may appear to be two sale transactions they are so integrally interconnected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well a integrated transaction consisting of two transactions dovetailing into each other.

(7) A sale or purchase can be treated to be in the course of import if there is a direct

privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of the Indian importer.

(8) The transaction in substance must be such that the canalising agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only as a mere name lender through whom it is the local importer-cum-local user who masquerades.

15. If the aforesaid conditions are satisfied then obviously the transaction of sale or purchase would be in the realm of sale or purchase in the course of import entitling it to earn exemption under Section 5(2) of the Central Sales Tax Act. But if on the contrary the transactions between the foreign exporter and the local users in India get transmitted through an independent canalising import agency which enters into back-to-back contracts and there is no direct linkage or causal connection between the export by foreign exporter and the receipt of the imported goods in India by the local users, the integrity of the entire transaction would get disrupted and would be substituted by two independent transactions, one between the canalising agency and the foreign exporter which would make the canalising agency the owner of the goods imported and the other between the import canalising agency and the local users for whose benefit the goods were imported by the wholesale importer being the canalising agency. In such a case the sale by the canalising agency to the local users would not be a sale in the course of import but would be a sale because of or by import which would not be covered by the exemption provision of Section 5 sub-section (2) of the Central Sales Tax Act.

16. On the facts of these cases and in the light of the propositions enumerated above it is impossible to accept the contention of the learned Senior Counsel for the appellants that the sales in the present cases effected by the CCI in favour of the local users were in course of import of raw cashew from African countries.

17. We may state that a clear finding of fact is reached by the Tribunal in cases arising out of revisions before the Kerala High Court and also by the Karnataka High Court in the appeals by CCI that neither the CCI nor the assessee had led any evidence to show that goods were sold by transfer of documents of title on high seas, and hence it had to be held that CCI had not sold the goods to local users on high seas and before the goods crossed the customs frontiers of India and resultantly the latter part of Section 5(2) is not attracted on the facts of these cases. Consequently it is not necessary to dilate on these aspects any further.

18. Now is the time for us to take stock of the situation and to see whether the aforesaid requirements for the applicability of Section 5(2) have been met in the present cases or not.

19. Prior to September 1970 the assessees imported raw cashewnuts from African countries under an Open General Licence. After processing these cashewnuts the assessees exported cashewnuts kernels to other countries. By a notification issued under the Import Trade (Control) Order bearing No. 3-1970 dated 31-8-1970, "cashewnuts" were deleted from the schedule of items which could be imported under an Open General Licence. Instead they were now required to be imported through a canalising agency, namely, the CCI. As a result, for the relevant Assessment Years 1970-71 to 1972-73 the assessees imported their requirement of cashewnuts from African countries through the CCI. As the CCI is acting as a canalising agency, it after collecting the information regarding the requirements of actual users in connection with the import of raw cashew is found to have acted on

its own in its dealing with the foreign exporter. Therefore, CCI cannot be said to be an agent of the local users. It has been found as a fact that CCI deals with the foreign exporter on its own though while so acting it may be keeping in view its further obligation to sell the imported cashew to the private local users concerned who have to process the same for exporting the processed cashewnuts ultimately. It is also well established on record that on account of the demands by local users and the agreement to sell the imported cashew by CCI to the local users the CCI undertakes the task of importing cashew on wholesale basis from the foreign exporters by entering into independent contracts with the foreign exporters. The following salient features of the transactions which remain well established on record and which have been enumerated by the Kerala High Court deserve to be noted at this stage :

> (a) There was a direct, distinct and independent contract of purchase between the CCI on the one hand and the foreign sellers in Africa on the other.
>
> (b) The transactions under which the CCI sold the imported raw cashewnuts to the assessees on payment of the price thereof are wholly unconnected with the contract of purchase, the CCI had entered into with the foreign sellers.
>
> (c) There is no privity of contract between the assessees and the foreign sellers.
>
> (d) The assessees remained undisclosed to the foreign sellers.
>
> (e) The foreign sellers know nothing of the understanding between CCI and the assessees, discernible from the various orders and agreements executed between them in connection with the distribution of the raw cashewnuts.
>
> (f) The bills of lading were undisputably made out in the name of the CCI and the CCI therefore has obtained a complete and indefeasible title to the goods purchased by them from foreign sellers.
>
> (g) The transaction under which the raw cashewnuts were put on board the ship did not create any real rights and obligations as between the foreign sellers and the assessees although the raw cashewnuts are supposedly imported for their benefit.
>
> (h) The circumstance that the contract between CCI and the foreign sellers was in the CIP form strengthens the position that there were two distinct, independent and unconnected purchases.
>
> (i) Sale prices for distribution of goods to actual users will be determined by the public sector agency concerned subject to the guidance and general control of the Ministry of Foreign Trade.

In this connection it will also be profitable to keep in view the findings recorded by the Kerala Appellate Tribunal based on relevant evidence on record. At p. 88 of the Paper-Book is found a letter dated 4-11-1970 addressed by CCI to one similarly situated local user Bakul Cashew Co., Quilon. The said letter calls upon the local user to furnish requisite bank guarantee for the entire value of the goods allotted to it or in the alternative open a Letter of Credit in favour of the Cashew Corporation of India, Cochin/State Trading Corporation of India, Cochin through the Cochin Branch of its bankers in Quilon. The letter further recites that clearance of respective quantity of cashewnuts would be done by executing a bond with customs with the help of the following

documents :

1. Provisional invoice to be issued by CCI in the absence of original supplier's invoice.

2. No. and date of sub-licence issued in its favour.

3. Delivery order in local users' favour issued by the steamer agent

The Tribunal also noted the further fact that the foreign exporter issues invoice of the exported commodity to India in favour of CCI Ltd. whose import licence is also mentioned at the top of the invoice. That licence is in favour of Cashew Corporation of India. A copy of such invoice is found at p. 94 of the Paper-Book. This invoice leaves no room for doubt that the privity of contract between the foreign exporter and the Indian importer is between the CCI as importer and the foreign exporter at the other end which would clearly presuppose that the goods moved in the import stream on account of the purchase by CCI, the Indian importer, which places order for import of cashew with the foreign exporter. The local users are nowhere in the picture at that stage. It may be that the CCI acting as a wholesale importer places the orders for import of cashew in the light of these prior agreements with the local users. But that would make it a wholesable importer acting upon the requirements of the local users who would remain local purchasers through the wholesale seller-cum-im porter CCI. At p. 95 of the Paper-Book is also found CCI's invoice in turn issued for a lesser quantity of p. 161 imported material in favour of the local user concerned in whose favour the sub-licence is issued. At p 96 is found a copy of the Bill of Lading which also shows that the foreign exporter has exported the goods in a favour of the CCI, Cochin through the ship concerned. It is also found established on record that the goods could be cleared through customs by the local users after making full payment of the goods to the CCI. Thus ownership of the goods remains with the CCI till the documents concerned are cleared through the bankers of the local users. The subsidiary licence issued to the local users a copy of which is found as Annexure 'I' at p. 99 of the Paper-Book shows that the goods for the import of which the licence has been granted shall be the property of the licensee at the time of clearance through the customs. It was submitted by the learned Senior Counsel for the appellants that that was a mistaken condition imposed in the subsidiary licence. Be that as it may, during the relevant period of assessment such subsidiary licence clearly showed that the main licence to import was in favour of CCI and the sub-licence was available to the local user who could become the owner of the goods imported only after making full payment of the goods to the CCI and after getting clearance of the goods through the customs. Even the Letter of Authority given by the Ministry of Foreign Trade to CCI as importer of the goods to permit the indenter to clear imported goods through the customs also reflects the same position. The Kerala Tribunal in para 21 of its judgment has found that the allottees cannot claim absolute ownership of the goods before customs clearance as it is evidenced from a letter dated 29-2-1971 sent by the Cashew Corporation of India to certain allottees, wherein it has been specifically stated that if steps are not taken by the allottee to take delivery of the goods that reached the Port immediately, the Corporation will allot those goods to any other needy customer. It is also found that the aforesaid communication of the Corporation to the allottees would go to show undoubtedly that the goods remain the property of the Corporation with specific right to reallot or resell the same to other parties until the goods are cleared through customs. So, the allottees cannot claim ownership of property in the goods before they clear the goods through customs. It was submitted that the CCI was under an obligation to allot the requisite quantity of imported cashewnuts to the local users for whose benefits the goods were imported. But that will not reflect that local user was the importer. Agreement between CCI and local user may give a contractual right to the local user to enforce its

demands against CCI and in a given case it may be enforced by specific performance against CCI. That claim, however, has nothing to do with foreign exporter who only deals with CCI as bulk importer of the goods and against whom the local user cannot have any legally enforceable right. All the aforesaid features which are well established on record leave no room for doubt that it is on account of the sale to CCI by foreign exporter that the raw cashew get imported in India and the importer is CCI and not the local user. It is the demand of the local users which prompted the canalising agency like CCI to place orders for import of the quantities concerned. But CCI deals with foreign exporter on its own and gets bulk imports of cashewnuts. It is the sale to the CCI by the foreign exporter or conversely the purchase by the CCI of the raw cashew from the foreign exporter that occasions the movement of raw cashew from African countries to India. The imported cashew remains of the ownership of the importer CCI and only on retirement of documents on payment of value of the allotted cashew by the local users and on their getting the goods cleared from customs that the property in the imported goods concerned would pass from CCI to the local users. Thus there are two clear transactions. One transaction is the import of raw cashew by CCI from foreign exporters. The second transaction which is back-to-back transaction is of sale by the canalising agency like CCI which is the wholesale importer in favour of the localusers for whom the goods are indented. That independent sale which may be based even on a prior agreement of sale by CCI to local users would remain an independent transaction between importer CCI and the local purchaser, namely, the local user. There is no privaty of contract between the local users on the one hand and the foreign exporter on the other. These two transactions cannot be said to be so integrally interconnected as to represent one composite transaction in the course of import of raw cashewnuts as tried to be submitted by the learned Senior Counsel for the appellants. On the facts of these cases, therefore, the decisions of the Constitution Benches of this court in Serajuddin case ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) and in the case of Binani Bros. ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) get squarely attracted and as a result these sales by the CCI to the local users go out of the sweep of the exemption provisions engrafted by Section 5(2) of the Central Sales Tax Act. The conclusions to which the Kerala and Karnataka High Courts reached, therefore, cannot be faulted.

20. The alternative contention canvassed on behalf of the appellants by the learned Senior Counsel Shri Poti based on Section 2(ah) of the Central Sales Tax Act which defines "crossing the customs frontiers of India" as crossing the limits of the area of a customs station in which imported goods or exported goods are ordinarily kept before clearance by customs authorities, also cannot be of any avail to the appellants for the simple reason that this amendment was brought on the statute-book much after the relevant assessment years. This amendment which sought to confer a substantial benefit to the local users cannot be said to be a procedural amendment which could have any retrospective effect. On the contrary this substantive provision is of a remedial nature and it cannot have any retrospective effect by implication. The provision is also not expressly made retrospective. As laid down by a three-member Bench of this Court in the case of R. Rajagopal Reddy v. Padmini Chandrasekharan ((1995) 2 SCC 630) wherein one of us, S. B. Majmudar, J., spoke for the Bench, that it is now well settled that where a statutory provision which is not expressly made retrospective by the legislature seeks to affect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication. In para 15 of the Report reliance was placed on an a earlier decision of this Court in the case of Garikapati Veeraya v. N. Subbiah Choudhry (AIR 1957 SC 540 : 1957 SCR 488 : (1957) 2 MLJ (SC) 1 wherein Chief Justice S. R. Das speaking for this Court had made following pertinent observations :

> "The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the

Act was passed."

Consequently it cannot be said that the enactment of a new definition regarding crossing the customs frontiers of India as laid down by Section 2(ab) of the Central Sales Tax Act for considering the liability to pay sales tax could be legitimately pressed in service for deciding the question of sales tax liability of the appellants during the assessment years when such definition was not on the Statute-Book. For all these reasons no case is made out by the appellants for our interference in these cases. With great respect to our esteemed colleague Sujata V. Manohar, J., it is not possible to agree with her conclusion that there is a direct and inseverable link between the transaction of sale and the import of goods on account of the nature of the understanding between the parties as also by reason of the canalising scheme pertaining to the import of cashewnuts. Nor it is possible for us to agree with her finding that these transactions are covered by the exemption provisions of Section 5(2) of the Central Sales Tax Act. In view of our findings that these transactions are not covered by the exemption provisions of Section 5(2) all the appeals are liable to fail and are accordingly dismissed, however, with no order as to costs.

SUJATA V. MANOHAR, J. - (minority view)

Civil Appeals Nos. 4955-77 of 1991, 1167-71 of 1992 and 1546 of 1993

21. The assessees are processors of cashewnuts in Kerala. Prior to September 1970 the assessees imported raw cashewnuts from African countries under an Open General Licence. After processing these cashewnuts the assessees exported cashewnut kernel to other countries. By a Notification issued under the Import Trade (Control) Order bearing No. 3-1970 and dated 31-8-1970, "cashewnuts" were deleted from the schedule of items which could be imported under an Open General Licence. Instead they were now required to be imported through a canalising agency, namely, the Cashew Corporation of India Ltd. As a result, for the Assessment Years 1970-71 to 1972-73 the assessees imported their requirement of cashewnuts from African countries through the Cashew Corporation of India Ltd. The assessees were called upon to pay sales tax under the Kerala General Sales Tax Act in respect of the cashewnuts purchased by them from the canalising agency. According to the assessees, the sales effected by the Cashew Corporation of India to them are not exigible to tax under the Kerala General Sales Tax Act since these are sales in the course of import and hence are exempt from the State sales tax under Section 5(2) of the Central Sales Tax Act, 1956. This contention of the assessees has been negatived by the sales tax authorities in Kerala. In a revision which was filed by the assessees a before the Kerala High Court, the Kerala High Court remanded the matters to the Sales Tax Tribunal to consider the following question, namely :

> "Whether the purchases of African nuts made by the assessees from the Cashew Corporation of India are in the course of import eligible for exemption under Section 5(2) of the Central Sales Tax Act ?"

22. The Tribunal after reconsidering the matter answered the question against the assessees. This finding of the Tribunal has been upheld by the Kerala High Court in revision. Hence these appeals have come before us. Civil Appeals Nos. 3647-52 of 1986

23. This group of appeals also deals with the import of cashewnuts, but in the State of Karnataka, by the Cashew Corporation of India Ltd. which is a canalising agency for the import of cashewnuts for sale to the processors of cashewnuts in Karnataka. The processors, after processing cashewnuts, export cashew kernel. However, while under the Kerala General Sales Tax Act, 1965, cashew was

assessable at the last point of purchase in the State, under the Karnataka Sales Tax Act, 1957 cashew is assessable at the first point of purchase in the State. Hence, in these appeals, assessment of sales tax by the State of Karnataka is sought to be made on the Cashew Corporation of India in respect of cashew imported by it at the instance of the processor and sold to the processor. The transactions which are the subject-matter of controversy in these appeals, however, are identical with the transactions which are the subject-matter of appeals in the Kerala matters.

24. Before we decide whether the import of cashewnuts by the Cashew Corporation of India and the purchase of cashewnuts by the assessees/processors from the Cashew Corporation of India is in the course of import or whether it is a local sale liable to tax under the Kerala or Karnataka General Sales Tax Act, it is necessary to set out the exact nature of the transaction in question.

25. The Import Trade (Control) Policy for April 1971-March 1972, in Part B, para 51 deals with import through Public Sector Agencies. Under the sub-heading "Canalisation of Imports", it states that import of certain items will be arranged only through Public Sector Agencies. The canalising agency in the case of cashewnuts is the Cashew Corporation of India Ltd. Under the Import Trade (Control) Handbook of Rules and Procedures, 1970 the procedure for imports through Public Sector Agencies is set out. It, inter alia, states that the canalising agency will pool the import requirements of actual users and import will be arranged in bulk through the agency concerned. It also provides that consolidated import licences/release orders will be issued in such cases to the importing agency concerned. The value of the consolidated licence/release order to be issued will be equal to the aggregate value of all the licences/release orders which could have been issued to the individual actual users had they applied separately. Such licences/release orders will be subject to the condition, inter alia, that the a imported goods shall be distributed by the licensee to the actual users whose particulars are shown in the relevant import application for use in their respective factories. Therefore, the quantity imported, the specifications of the goods imported and the place from which they are imported are all as per requirements of the local processors.

26. In the present case, letters were issued by the State Trading Corporation of which the Cashew Corporation of India was a subsidiary, informing the processors regarding canalisation of import of cashewnuts through the Cashew Corporation of India and requesting the processors to apply in pro forma for the allotment of raw cashewnuts. Based on these applications, the Cashew Corporation of India obtained from the Government of India a bulk licence for the import of raw cashewnuts. Necessary orders were placed with foreign dealers for supply of cashewnuts by the Cashew Corporation of India. The cashewnuts to be imported were marked in separate lots in respect of each allottee before shipment from the foreign port. Allotment orders in respect of each marked lot were made in favour of the processor concerned by the Cashew Corporation of India and the shipment was effected only on the basis of the acceptance of such an allotment order by the processor concerned. The Cashew Corporation of India prepared separate invoices in the name of each allottee in respect of each separate and marked shipment. A separate bill of lading was prepared in respect of goods pertaining to each allottee. The insurance premium for this lot was also charged by the Cashew Corporation of India from the allottee. For the clearance of these goods from the customs, separate documents of title pertaining to each processor were prepared and subsidiary import licences were also issued in the name of each allottee by the Cashew Corporation of India in respect of their earmarked lots. A simultaneous letter of authority was also issued by the Chief Controller of Imports and Exports in favour of the allottee in respect of the lot concerning which the allottee was given a sub-licence. On the marine insurance taken by the Cashew Corporation of India a separate endorsement was taken in the name of each allottee and the premium was included in the CIF value of the goods so despatched. The steamer agent issued a delivery order to the processors' clearing

agent and the goods were accordingly cleared by the clearing agents of the processors. The Cashew Corporation of India charged to the asses see the price which it had paid to the foreign seller and a commission for their work as a canalising agency.

27. Thus it is clear that although the canalising agency placed a bulk order for the import of cashewnuts and opened a letter of credit in favour of the foreign sellers, the bulk order so placed was a sum total of the requirements of all the processors of cashewnuts in whose favour allotment orders were issued. The Cashew Corporation of India had from the inception marked separately each lot imported by it in favour of each allottee. It had also in turn, prepared a corresponding set of documentation in favour of the allottee and the allottee was required to open a corresponding letter of credit in favour of the Cashew Corporation of India in respect of the lot being imported on its behalf. The allottees also paid the corresponding insurance a premium for the marine insurance taken out by the Cashew Corporation of India pertaining to the import of cashewnuts.

28. We have to consider whether the transaction between the Cashew Corporation of India and each of the processors can be considered as a sale by the Cashew Corporation of India to the processor in the course of import. Under Article 286 of the Constitution of India, restrictions have been placed on the power of the State to tax sales. Article 286(1) and (2) provide 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.
>
> (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)."

Article 269(l) (g) and (3) provide as follows :

> "269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely -
>
> #(a) (to) (f) * * *##
>
> (g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;
>
> (3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce."

29. Accordingly, the Central Sales Tax Act, 1956 in Sections 3 and 5 lays down principles for deciding whether a sale or purchase takes place in the course of inter-State trade or commerce or in the course of import or export :

> "3. When is a sale or purchase of goods said to take place in the course of inter-State

trade or commerce. - 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 transfer of documents of title to the goods during their movement from one State to another.

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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 a the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (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."

30. Clearly, therefore, the language of Sections 3, 5(1) and 5(2) is similar; and the requirements in each of these provisions for considering whether a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce or export or import are similarly worded. Under the first requirement so specified, in each of the three cases the sale or purchase in question should occasion the requisite movement of goods. This movement may be either from one State to another or it may be from another country to India or it may be from India to another country, as the case may be. We must, therefore, consider whether the sale or purchase which is before us, that is to say, the transaction between the Cashew Corporation of India and the assessees/processors, has occasioned the import of cashewnuts from Africa into the territory of India.

31. How does one determine whether a sale has occasioned the movement of goods either from a foreign country into India or from India to a foreign country or from one State in India to another State in India ? This Court has, in the course of several decisions that I shall refer to, laid down some basic tests to determine whether the sale in question has occasioned the requisite movement of goods. These are :

(1) There should be a direct connection between the sale and the import or export of goods or their being sent to another State.

(2) Such movement should be inextricably linked with the sale so that the bond between the sale transaction and movement cannot be severed without a breach of his obligation by the seller or the purchaser, as the case may be.

> (3) This obligation (to import, export etc.) may arise by statute, by contract or even by mutual understanding between the parties, from the very nature of the transaction. It is immaterial whether the sale has preceded such movement or succeeded such movement. So long as there is an unbreakable chain linking the sale and the movement of goods, it will be covered by Section 5 or Section 3, as the case may be. Usually such an unbreakable chain is forged by the terms of the contract of sale, or from operation of statute or even from an understanding between the local buyer and the local seller. Of course where there is only one sale - between a local buyer and a foreign seller or a local seller and a foreign buyer, the contract of import or export causes import or export. But the application of Section 5 is not confined to such contracts alone as the cases cited hereafter will show. If only a one-sale test were to be applied, these would be the only contracts qualifying for exemption. Such is not the interpretation put on Sections 3 and 5 because in several cases this Court has considered even a sale other than an import sale or an export sale as a sale in the course of import or export if there is a direct connection between the sale and the import or the export.

32. The distinction between an independent sale and a linked sale is clearly brought out by a Constitution Bench of this Court in the case of Ben Gorm Nilgiri Plantations Co. v. STO ((1964) 7 SCR 706 : AIR 1964 SC 1752 : (1964) 51 ITR 345 : (1964) 15 STC 353) (SCR at p. 711) which decided the requirements of a sale in the course of export (two Judges dissenting). In this case, the appellants carried on the business of growing and manufacturing tea. The purchasers were local agents of foreign buyers. The sales were by public auction. It was the common case of all the appellants that the purchases by the local agents of the foreign buyers were with a view to export the goods to their principal abroad and in fact the tea was exported. The appellants contended that the sales of tea to the local agents were in the course of export. Three Judges, out of the five Judges concerned, held that this was not a sale in course of export. They said that the transaction of sale which is a preliminary to export may be regarded as a sale for export but it is not necessarily to be regarded as one in the cours of export.

33. The test laid down in this case is : In order that the sale should be in the course of export, the export must be inextricably linked with the sale so that the bond cannot be severed without a breach of the obligations arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction; so that export cannot be interrupted without a breach of the contract between the local buyer and the local seller. In that case the local seller had no interest in the export of tea. Hence the sale was not in the course of export.

34. This test is reiterated in the subsequent decisions dealing with exports and imports. In the case of K. G. Khosla & Co. v. Dy. Commr of Commercial Taxes ((1966) 3 SCR 352 : AIR 1966 SC 1216 : (1966) 17 STC 473), another Constitution Bench of this Court interpreted Section 5(2) of the Central Sales Tax Act, 1956 and held that Section 5(2) does not lay down any condition that before a sale could be said to occasion the imports, it is necessary that the sale should precede the import.

35. Since this is one of the earliest cases dealing with a sale in the course of import, I refer briefly to its facts.

36. The assessee entered into a contract with the Director General of Supplies and Disposal, New Delhi for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium and the DGS&D, London or its representative, was entitled to inspect the

goods in Belgium. It was the assessee's responsibility to get the goods a manufactured in Belgium and import them into India. Accordingly the assessee supplied axle-box bodies to the Southern Railway at Perambur Works after importing them from Belgium. The question was whether this was a sale in the course of import. The Court said that the sale by the assessee to the Railways need not have preceded the import. This Court further held that the movement of goods from Belgium to India was in pursuance of the conditions of contract between the assessee and the Director General of Supplies. There was no possibility of those goods being diverted by the assessee for any other purpose. Consequently, the sales took place in the course of imports.

37. The next important case decided by this Court deals with a sale in the course of export of goods. This is the case of Coffee Board v. Jt. CTO ((1969) 3 SCC 349). It is a decision of a Constitution Bench of this Court with one Judge dissenting. In this case, the Coffee Board had sold coffee which was to be exported out of India. Such coffee for export was specially screened and selected. Auctions were held known as "Export Auctions" for sale of this coffee. The purchasers at such auctions subsequent} y exported the coffee. The question was whether the sale by the Coffee Board to the local purchaser would be considered as a sale in the course of export. The Court said that in order that the sale may occasion the export or cause the export, such a sale must be the immediate cause of export. Therefore, the introduction of a third party dealing independently with the seller on the one hand and with the foreign importer on the other hand, broke the link between the sale and the export. It, therefore, held that such a sale was not in the course of export.

38. In this case a special emphasis has been laid on the fact that there were two sales one sale to the intermediary, and the other sale to the importer. The Court observed that there must be a single sale which should cause the export. It said that there is no room for two or more sales in the course of export. The Court was clearly impressed by the fact that when the Coffee Board sold the coffee to a purchaser locally, there was no stipulation that the purchaser was bound to export the coffee. Obviously if the Coffee Board had sold the coffee to a foreign buyer, the export of coffee would have followed. This is what a one-sale test amounts to. But Section 5(1) does not say that only a sale by a local purchaser to a foreign buyer is a sale in the course of export. The language of Section 5(1) is much wider. Any sale which occasions the export is a sale in the course of export. A literal adoption of a one-sale test would result in ignoring earlier decisions of the Constitution Bench where two sales were involved and a sale subsequent to the sale between a local buyer and a foreign seller was held to be a sale in the course of import when it was established that there was a firm link between the subsequent sale and the prior import.

39. The one-sale test must be understood in the context of the facts which the court was required to consider. The sale prior to export was independent of the export. Hence in that case, the earlier sale had not a occasioned the export.

40. In fact, these observations in the Coffee Board case ((1969) 3 SCC 349) have been explained in Dy. Commr. of Agricultural Income Tax and Sales Tax v. Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) and in Dy. Commr of Agricultural Income Tax & Sales Tax v. Indian Explosives Ltd. ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) on the basis that in the Coffee Board case ((1969) 3 SCC 349) there was no inextricable link between the local sale and the export, while in the cases of Indian Explosives ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) and Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) there was such an inextricable link between the import of the goods and the local sale.

41. In the case of Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) there was the assessee

firm was engaged in the supply of foreign cotton to textile mills on the basis of actual user's import licences issued to the textile mills. The assessee firm contacted the foreign suppliers and if the offers received were found acceptable to the mills, the assessee entered into a contract with the mill concerned and on that basis, accepted the offer made by the foreign supplier. The textile mills issued a letter of authority authorising the assessee firm to import cotton. One of the terms of the letter of authority was that the person or firm in whose favour it has been issued will purely act as an agent of the licensee and the licence-holder will have to ensure that the goods on importation will be delivered to him and shall not be disposed of otherwise. This clause was read as a part of the contract entered into between the assessee and the textile mills. This Court held that from the facts as set out above it was clear that the case fell within the rule laid down by this Court in K. G. Khosla case ((1966) 3 SCR 352 : AIR 1966 SC 1216 : (1966) 17 STC 473). The sale was in the course of import although there were two sales, one entered into by the assessee with the foreign supplier and the other sale by the assessee with the textile

42. In the same year in the case of Binani Bros. (P) Ltd. v. Union of India ((1974) 1 SCC 459 : 1974 SCC (Tax) 183), a Constitution Bench of this Court considered Section 5(2) of the Central Sales Tax Act. In this case, the assessee was a registered dealer in non-ferrous metals. The assessee was also an importer of these metals. The assessee was on the approved list of registered supplier to the Directorate General of Supplies and Disposals, for whom it had imported and supplied non-ferrous metals for several years. In order to get import licences the petitioner used to get Import Recommendation Certificates issued by the DGS&D or other authorities like the State Trading Corporation. The assessee claimed that the imports had been occasioned by their contractual obligations to DGS&D. This Court, however, negatived the contention. It said that there were two sales involved, namely, the sale to the petitioner by the foreign seller and the sale by the petitioner to the DGS&D. Under the import licences granted to it, the assessee was entitled to import the goods a from any person or country and the import licences issued to it imposed no obligation on the petitioner to supply the goods only to DGS&D after the goods were imported. Hence there were two independent sales and the sale transaction between the assessee and the DGS&D cannot be considered as having occasioned the import.

43. This judgment has been explained and distinguished in the subsequent case of Indian Explosives Ltd. ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) In this case, the local purchaser used to place orders with the assessee quoting their import licence numbers. The assessee then placed orders with the foreign supplier for the supply of goods. In such orders the name of the local purchaser who required the goods as also its import licence numbers were specified. On receipt of the goods, the assessee used to invoice the local purchaser. This Court held that the sale effected by the assessee to the local purchaser was in the course of import as there was an integral connection between the sale to the local purchaser and the actual import of goods from the foreign supplier. This Court cited with approval the ratio laid down in K. G. Khosla case ((1966) 3 SCR 352 : AIR 1966 SC 1216 : (1966) 17 STC 473). It distinguished Binani Bros. case ((1974) 1 SCC 459 : 1974 SCC (Tax) 183) on two material aspects : (1) In that case the assessee itself held the import licence and the goods were imported on the strength of such an import licence; and (2) There was no term or condition prohibiting diversion of the goods after the import. However, in the case before them, the integral connection or inextricable link between the transaction of sale and the actual import were established.

44. In the case of State of Bihar v. TELCO ((1970) 3 SCC 697) a Constitution Bench of this Court considered the provisions of Section 3 of the Central Sales Tax Act, 1956, to decide what can be considered as a sale in the course of inter-State trade or commerce. Noting the similarity in language

between Sections 3 and 5, the Court relied upon the decisions of this Court dealing with Sections 5(1) and 5(2). In the case before the Court the assessee sold their trucks, buses, chassis and spare parts to the appointed dealers for the purpose of being sold in the territories outside the State assigned to these dealers under the dealership agreement. The Court held that the sales were in the course of inter-State trade or commerce. Dealing with the expression "in the course of', it observed that sales or purchases which themselves occasion the export or import or movement of goods from one State to another come within the exemption. If the sale cannot be dissociated from the export or import or movement of goods from one State to another, then the sale and the resultant export or import or movement of goods must be considered as forming part of a single transaction.

45. In the case of Mohd. Serajuddin v. State of Orissa ((1975) 2 SCC 47 : 1975 SCC (Tax) 269), however, the one-sale test appears to have been applied in isolation. The assessee entered into two contracts with the State Trading Corporation for supplying mineral a ore for export since the export of mineral ore was canalised through the State Trading Corporation. The State Trading Corporation, in turn, entered into contracts with foreign buyers. By a majority of four to one, this Court held that the sale by the assessee to the State Trading Corporation was not a sale in the course of export even though it was a canalising agency for export. This was because it felt that 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 because, now instead of one there were two sales - one to the intermediary albeit a canalising agency and the other to the importer. It was this emphasis on one sale which led the Court into not placing sufficient emphasis on the test propounded in Ben Gorm Nilgiri Plantations case ((1964) 7 SCR 706 : AIR 1964 SC 1752 : (1964) 51 ITR 345 : (1964) 15 STC 353) although this test was affirmed by it as valid.

46. This decision led to the amendment of Section 5 by Parliament by the addition of sub-section (3) which makes a sale preceding the export sale also a sale in the course of export in circumstances set out therein, thus obviating any difficulties which may arise in the case of sales in the course of export by virtue of this emphasis on a single sale in the case of Mohd. Serajuddin ((1975) 2 SCC 47 : 1975 SCC (Tax) 269).

47. To put it a little differently, when there is a local sale followed by export of the goods sold; or import of goods followed by a local sale, one must examine whether the export or the import of goods is an essential ingredient of the local sale. In some cases dealing with exports, the Court found that the local sale lacked this essential ingredient because the local seller of the goods had no interest in seeing that the goods were exported, although the local purchaser may have bought the goods for export. To the local seller, it was immaterial whether the goods were in fact exported or not. So that there was no understanding between the local seller and the local buyer that the goods must be exported.

48. This seldom happens in the case of imports whenever the local seller imports the goods as per the specifications of a specific local buyer and on the mutual understanding between the local buyer and the local seller that the goods so imported by the local seller will be purchased by the local buyer. There is in such cases, a direct link between the local sale and the import. In fact it is this mutual understanding between the local buyer and the local seller which occasions the import. That is why the cases dealing with imports have not resorted to differentiating between one sale or two sales. They have applied the test as prescribed by Section 5 : Whether the import is a result of understanding/contract between the local buyer and local seller ? If it is, the local sale falls under Section 5. If it is not - as may well happen if the importer sells his goods after they arrive to the best available offeror in the market, then the sale is not covered by Section 5. That is why there has been

no need to amend Section 5 to expressly cover a a local sale following import.

49. Now, if we apply this test of inseverable link between the local sale and import to the transaction in the present case, it is clear that the local sale which is between the assessees and the Cashew Corporation of India is inextricably linked with the import of cashewnuts by the Cashew Corporation of India. In the first place, the very scheme of canalisation in the present case envisages that the Cashew Corporation of India ascertains the exact requirements of the former importers who are now required to secure their supplies through the canalising agent. Orders of import which are placed by the Cashew Corporation of India are in exact terms of the requirements of each of the allottees and are a sum total of these requirements. There is specific allocation of each lot before it is shipped from the foreign port, in favour of each of the allottees. The local purchaser has to clear the allocated goods on their arrival. Even a subsidiary licence is issued in favour of the local purchaser. The price of imported cashewnuts is paid by the local purchaser. The Cashew Corporation of India is only paid a commission. There is thus a clear allocation of the goods being imported in favour of the local purchaser and there can be no question of the diversion of the import to anybody else. The cumulative effect of this arrangement is : It is the specific requirement of local purchaser which has led to the specific import. Whether the actual sale takes place before the import or after the import is irrelevant in this context (vide K. G. Khosla case ((1966) 3 SCR 352 : AIR 1966 SC 1216 : (1966) 17 STC 473). It is the arrangement between the local buyer and the local seller which has occasioned the import.

50. The respondents drew our attention to the fact that in the case of any default by the local purchaser, the canalising agency would be entitled to sell the goods elsewhere. This, however; in my view, does not detract from the fact that the import is as per the requirements of the local purchaser and is directly linked with it. A specific allocation is made in favour of each of the local purchasers. The orders for import are placed to comply with the specific requirements of the local purchasers. A default clause cannot alter the nature of the transaction between the local purchaser and the canalising agency. The very term "canalising agency" in the context of the canalisation scheme as set out earlier strengthens the argument that the imports were effected on behalf of and/or for the benefit of the local purchaser who had agreed to purchase these cashewnuts. The fact that only a commission is charged by the canalising agency from the local purchasers also reinforces this conclusion. In these circumstances, the fact that a bulk order is placed by the canalising agency with the foreign supplier does not snap the link between the transaction of sale by the Cashew Corporation of India to the asses sees and the import of cashewnuts by the Cashew Corporation of India. It is the local sale which has given rise to the import. It will qualify as a sale in the course of import.

51. The respondent State has placed strong reliance on the case of Mohd. Serajuddin ((1975) 2 SCC 47 : 1975 SCC (Tax) 269). It was contended that in the light of the observations made there, unless there is only one sale - the sale which results in import - the sale cannot be considered as causing the import. The real test, in my view, is of inseverable linkage. This is how observations regarding the need for one sale in the earlier Coffee Board case ((1969) 3 SCC 349) have been explained by this Court in the cases of Indian Explosives ((1985) 4 SCC 119 : 1985 SCC (Tax) 527) and Kotak & Co. ((1974) 3 SCC 148 : 1973 SCC (Tax) 512) In the case of Consolidated Coffee Ltd. v. Coffee Board ((1980) 3 SCC 358 : 1980 SCC (Tax) 279 : (1980) 3 SCR 625) also, this Court has observed that Section 5(1) was construed by this Court in the context of two sales rather very strictly in the two cases, namely, the Coffee Board ((1969) 3 SCC 349) and Mohd. Serajuddin ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) cases. Referring to the Statement of Objects and Reasons in respect of the amending Act which brought about the introduction of sub-section (3) in Section 5, this Court

observed that from the Statement of Objects and Reasons, it is clear that Mohd. Serajuddin decision ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) is specifically referred to as having necessitated the amendment. Secondly, from the Statement of Objects and Reasons, it is clear that penultimate sales made by small and medium-scale manufacturers to an export canalising agency or private export house to enable the latter to export those goods in compliance with existing contracts or orders, are regarded as inextricably connected with the export of the goods and hence earmarked for conferral of the benefit of exemption.

52. The assessees contend that in any event, the test of one sale laid down in the cases of Coffee Board ((1980) 3 SCC 358 : 1980 SCC (Tax) 279 : (1980) 3 SCR 625) and Mohd. Serajuddin ((1975) 2 SCC 47 : 1975 SCC (Tax) 269) should be confined only to export sales and should not be applied to imports. They further contend that even in the area of export the test has now been ruled out by reason of a subsequent amendment made to Section 5 of the Central Sales Tax Act as a result of which sub-section (3) has been introduced in Section 5. Hence such a test should not now be applied to imports for the first time.

53. In view of similarity of language in Sections 5(1) and 5(2), no such distinction is possible between imports and exports. Similar tests will have to be applied to both the sub-sections. There is no express amendment as far as imports are concerned which can assist the processors in the present case. It may be that such an amendment was not necessary in the case of imports because the difficulty with the penultimate sales had mainly arisen in the case of exports. However, whether it is exports or imports or inter-State sales, what needs to be emphasised is the basic requirement prescribed under Sections 3 and 5, namely, that the transaction in question must occasion either the export or the import or the movement of goods from one State to another. This clearly postulates an inseverable link between the transaction a of sale in question and the import or export or movement of goods from one State to another, as the case may be. The one-sale test referred to in some cases dealing with exports is only an aspect of this basic test. We are concerned with a sale which occasions an import. Therefore, we have to see whether there is such an inextricable and direct link between local sales which are before us and the import of cashewnuts from African countries into India by the Cashew Corporation of India. The facts already set out show that there is such an inseverable link as the import made by the Cashew Corporation of India is a necessary consequence of the specific requirements submitted by the processors and is a result of the obligations which it has undertaken under its arrangement with the local processors which has crystallised later in the form of the contract of sale. The sales in question are, therefore, in the course of import.

54. It was also argued by Mr. Poti, learned counsel appearing for the assessees, that in the present case, the sale by the Cashew Corporation of India to the assessee took place before the goods crossed the customs frontiers of India. Hence it is a sale in the course of import. He placed reliance upon Section 2(ab) of the Central Sales Tax Act, 1956, which defines "crossing the customs frontiers of India" as crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by Customs authorities. He submitted that since the goods were sold by the Cashew Corporation of India to the assessees before the goods were cleared by the Customs authorities they must be considered as having been sold in the course of import because they were sold before the goods crossed the customs frontiers of India. This definition, however, of crossing the customs frontiers of India has been introduced only by Act 103 of 1976 long after the imports in question took place. It would have no application to the present case. The contention of Mr. Poti that this definition must be applied even to goods imported prior to 1976 because it is only clarificatory in nature, cannot be accepted. Prior to the introduction of this definition in the Central Sales Tax Act of 1956, crossing the customs frontiers of India was

understood as crossing the limit of territorial waters of India. The definition, therefore, cannot be considered as merely clarificatory. Since it came to be introduced in the Central Sales Tax Act after the imports in question, it cannot be resorted to for the purposes of the present case.

55. It was next submitted by Mr. Poti that the sale in the present case was effected by a transfer of documents of title to the goods before the goods crossed the customs frontiers of India even in the sense of crossing the territorial waters of India. Hence it was a sale in the course of import. He relied upon the second part of Section 5(2) of the Central Sales Tax Act for this purpose. The Tribunal, however, has found as a fact that there is no clear evidence as to when the sale by transfer of documents took place. In the absence of any factual basis, therefore, this submission also cannot be accepted.

56. However, since there is a direct and inseverable link between the transaction of sale and the import of goods on account of the nature of the understanding between the parties as also by reason of the canalising scheme a pertaining to the import of cashewnuts, the sales in question cannot be taxed under the Kerala General Sales Tax Act or the Karnataka General Sales Tax Act, as the case may be. The appeals are accordingly allowed. There will, however, be no order as to costs.

57. After submitting this judgment, I have had the benefit of reading the judgment of my learned brother S. B. Majmudar, J. I have the highest regard for his views. I am, however, unable to agree with him for reasons which, I hope, are clear from what I have already said.