

(1986) 03 KL CK 0023

In the High Court Of Kerala

Case No : T.R.C. No's. 12, 29 and 40 of 1983, 69, 70 and 109 of 1984

State of Kerala

APPELLANT

Vs

G. Sankaran Nair and Others

RESPONDENT

Date of Decision : 11-03-1986

Acts Referred:

Central Sales Tax Act, 1956 — Section 5
Constitution of India, 1950 — Article 286

Citation : (1986) 63 STC 225

Hon'ble Judges : P.C. Balakrishna Menon, J; M. Fathima Beevi, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; T.L. Viswanatha Iyer, G. Sivarajan and Arikkat Vijayan Menon, for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrishna Menon, J.—In these tax revision cases by the State of Kerala, a common question as to whether raw cashew-nuts and cashew kernels are the same goods for the purpose of Section 5(3) of the Central Sales Tax Act, 1956, arises for decision.

2. The assesseees in all these cases are exporters of cashew kernels. The question raised relates to the exigibility to sales tax on the purchase turnover of raw cashew-nuts, purchased locally from within the State by the assesseees for the purpose of export of its kernel to foreign countries. The assessments relate to periods after the amendment of the Central Sales Tax Act, 1966, by Act 103 of 1976. As per Section 3 of the Amendment Act, 1976, Sub-section (3) was added to Section 5 with effect from 1st April, 1976.

3. The assessing authority and the first appellate authority have held that the raw cashew purchased is different from the cashew kernels exported and hence the purchases cannot be held to be in the course of export within the meaning of Section 5(3) of the Central Sales Tax Act. The Tribunal mainly relying on the decision of the Andhra Pradesh High Court in *Singh Trading Company v.*

Commercial Tax Officer, Srikakulam 1979] 44 STC 1 (SC) has held that the cashew kernels exported cannot be held to be a commodity different from the raw cashew purchased and hence the purchase has to be held to be in the course of export within the meaning of Section 5(3) of the Act. Accordingly the Tribunal directed modification of the orders of assessment in all these cases deleting the purchase turnover of raw cashew-nuts as not exigible to tax under the Kerala General Sales Tax Act.

4. As per Article 286(1) of the Constitution 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. Sub-section (3) of Section 5 of the Central Sales Tax Act (74 of 1956) inserted by Section 3 of the Central Act 103 of 1976 is extracted below:

(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.

The Tribunal has proceeded on the basis that the purchase of raw cashew-nuts in all these cases took place after agreements or orders for export of cashew kernels and that the latter part of the sub-section is satisfied.

5. To attract Sub-section (3), it must be shown that the goods exported are the same as had been purchased for the purpose of export. Unless therefore the cashew kernels exported can be said to be the same goods, as the raw cashew-nuts purchased, it cannot be said that the purchase was in the course of export within the meaning of Sub-section (3) of Section 5. Whether cashew kernels and raw cashew-nuts are the same goods with reference to Article 286(1)(b) of the Constitution came up for decision before a Constitution Bench of the Supreme Court in the decision in *State of Travancore-Cochin v. Shanmugha Vilas Cashew-nut Factory* [1953] 4 STC 205 (SC). Patanjali Sastri, C.J., on behalf of himself, Mukherjea, Vivian Bose and Ghulam Hasan, JJ., summarised the conclusion of the majority on the interpretation of Article 286(1)(b), at page 217, as follows:

Our conclusions may be summed up as follows:--

(1) Sales by export and purchases by import fall within the exemption under Article 286(1)(b). This was held in the previous decision.

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the

exemption, assuming that the State-power of taxation extends to such transactions.

It remains to consider in the light of the foregoing discussion how far the cashew-nut purchases made by the respondents are within the exemption under Article 286. It will be recalled that these purchases fell into three groups:

I. Purchases made in the local market,

II. Purchases from the neighbouring districts of the State of Madras, and

III. Imports from Africa.

As regards Group I, the High Court finds that "the purchases of raw nuts whether African or Indian are all made with the object of exporting their kernels" though there were some negligible sales in the local market of what are called "factory rejects". The High Court further finds that the bulk of the kernels were in fact exported by the respondents themselves, a small quantity being sold by the respondents to other exporters who also subsequently exported the same. Thus, on the whole, the respondents could be said to have purchased the raw nuts for the purpose of exporting the kernels and to have actually exported them. But, it will be seen, the purchases are not covered by the exemption on the construction we have placed on Clause (1)(b), even if the difference between the raw materials purchased and the manufactured goods (kernels) exported is to be ignored. It may, however, be mentioned here that the High Court has found that the raw cashew-nuts and the kernels manufactured out of them by various processes, partly mechanical and partly manual, are not commercially the same commodity. This finding, which is not seriously disputed before us, would be an additional ground for rejecting the claim to exemption in respect of these purchases, as the language of Clause (1)(b) clearly requires as a condition of the exemption that the export must be of the goods whose sale or purchase took place in the course of export.

Das, J. (as he then was), in his concurring judgment stated at page 247:

The High Court has, on remand, enquired into the process of manufacture through which the raw cashew-nuts are passed before the edible kernels are obtained. The High Court, in its judgment on remand, goes minutely into the different processes of baking or roasting, shelling, pressing, peeling, and so forth. Although most of the process is done by hand, part of it is also done mechanically by drums. Oil is extracted out of the outer shells as a result of roasting. After roasting the outer shells are broken and the nuts are obtained. The poison is eliminated by peeling off the inner skin. By this process of manufacture the respondents really consume the raw cashew and produce new commodities. The resultant products, oil and edible kernels, are well recognised commercial commodities. They are separate articles of commerce quite distinct from the raw cashew-nuts. Indeed, it is significant that the respondents place orders for "cashew-nuts" but orders are placed with them for "cashew-nut

kernels". In the circumstances, "the goods" exported are not the same as the goods purchased. The goods purchased locally are not exported. What are exported are new commodities brought into being as a result of manufacture. There is a transformation of the goods. The raw cashews are consumed by the respondents in the sense that a jute mill consumes raw jute, or a textile mill consumes cotton and yarn. The raw cashews not being actually exported the purchase of raw cashews cannot be said to have been made "in the course of export so as to be entitled to immunity under Clause (1)(b).

The above observations of Das, J., were quoted and followed in a later decision of the Supreme Court in *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others*, The question whether hides and skins in the untanned condition can be considered to be the same goods as tanned hides and skins came up for decision before the Supreme Court in *A. Hajee Abdul Shakoor and Company Vs. State of Madras*, and relying on the decision in *State of Travancore-Cochin v. Shanmugha Vilas Cashew-nut Factory* [1953] 4 STC 205 (SC) the Supreme Court observed that it was not correct to say that the process of tanning brings about no change in the raw hides and skins and that both types of hides and skins constitute the same goods.

6. A Division Bench of the Andhra Pradesh High Court in the decision in *Singh Trading Company v. Commercial Tax Officer, Srikakulam* [1979] 44 STC 1 SC has purported to distinguish the decision of the Supreme Court in the *Shanmugha Vilas Cashew-nut Factory's* case [1963] 4 STC 205 (SC) on the ground that the question whether raw cashew-nuts purchased are the same commodity as cashew kernels exported did not directly arise for decision and that the observations are based on the finding of the High Court the correctness of which was not challenged before the Supreme Court. The Andhra Pradesh High Court on a consideration of the question held that cashew kernel is not a commodity different from raw cashew-nut. The majority opinion expressed by Patanjali Sastri, C.J., in the *Shanmugha Vilas Cashew-nut Factory's* case and the reference to the said decision in *Hajee Abdul Shukoor & Co.'s* case according to the Andhra Pradesh High Court, were only incidental and that would not detract that court from considering the question and taking the view that it took. We find it difficult to accept the view expressed by the Andhra Pradesh High Court in *Singh Trading Company's* case . The decision does not refer to the observations of Das, J., in his concurring judgment quoted above. Das, J., has clearly held that the raw cashew-nuts purchased is consumed in the process of manufacture of cashew kernels and the article purchased has lost its commercial identity. The majority judgment accepts the finding of the High Court that raw cashew-nuts and kernels are not commercially the same commodity as an additional ground for rejecting the claim for exemption of the purchase as falling under Article 286(1)(b) of the Constitution. The Andhra Pradesh High Court was wrong in its view that the question did not directly arise for decision before the Supreme Court in the *Shanmugha Vilas Cashew-nut Factory's* case [1953] 4 STC 205 (SC). A Division Bench of the Madras High Court in *Dinod Cashew Corporation v.*

Deputy Commercial Tax Officer [1986] 61 STC 1 has expressly dissented from the view taken by the Andhra Pradesh High Court in *Singh Trading Company Vs. Commercial Tax Officer and Others*, , in a case relating to the claim for exemption of the purchase turnover to raw cashew-nuts purchased for the purpose of export of cashew kernel. Referring to the observations of the Andhra Pradesh High Court that the question did not directly arise in the *Shamugha Vilas Cashew-nut Factory's* case [1953] 4 STC 205 (SC). Chandurkar, C.J., on behalf of the Division Bench of the Madras High Court stated at page 14:

Undoubtedly, the Supreme Court was concerned with the construction of Article 286 of the Constitution, but the judgment of the Supreme Court shows that the finding of the High Court that cashew-nuts and kernels were not commercially the same commodity was one of the grounds on which the Supreme Court held that the factory was not entitled to exemption under Article 286, "as the language of Clause (1)(b) clearly requires as a condition of the exemption that the export must be of the goods whose sale or purchase took place in the course of export". It would not therefore be correct to say that the question whether the two articles were commercially different did not directly fall for consideration before the Supreme Court. It would be wholly improper for us to ignore the observations of the Supreme Court that cashew-nuts and kernels were commercially different articles. It also appears that the pertinent observations of Das, J., where an independent consideration was made as to whether cashew-nuts and kernels were different articles of commerce were not considered by the Division Bench of the Andhra Pradesh High Court.

Following the decisions of the Supreme Court in *Shanmugha Vilas Cashewnut Factory's* case [1953] 4 STC 205 (SC), *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others*, and *Hajee Abdul Shukoor & Co.'s* case [1964] 16 STC 719 (SC), the Madras High Court held:

We are of the considered view that the cashew kernel and cashew-nut are different articles of commerce is not now open to debate.

7. A Division Bench of the Karnataka High Court has also expressly dissented from the decision of the Andhra Pradesh High Court, in *Peirceleslie India Ltd. Vs. State of Karnataka*, and has held that cashewnuts and its kernel are commercially different commodities.

8. Sri T.L. Viswanatha Iyer, appearing for some of the assesseees, relies on the objects and reasons of Sub-section (3) of Section 5 of the Central Sales Tax Act added by amendment effected as per Section 3 of Act 103 of 1976 as for the purpose of export promotion and unless there is exemption from sales tax on the purchase turnover of raw cashew the price of cashew kernels exported will go up very high in a competitive international market and the very purpose of the amendment would be defeated if an interpretation is adopted to treat raw cashew as different from cashew kernel and its purchase as not for the purpose of export. The learned Government Pleader, Sri T. Karunakaran Nambiar, points

out that a similar argument on behalf of the exporters who purchase coffee at auctions held by the Coffee Board was negated by the Supreme Court in the decision in Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore, with the following observation at page 183:

As regards the other aspect it is clear to us that two public interests are involved; promotion of the exports of the country is one public interest while augmentation of the States' revenues through sales tax is the other and it is obvious that if the liberal construction, as suggested by the counsel for the petitioners, is accepted the former public interest will undoubtedly be served while the latter will greatly suffer and if the narrow construction is accepted the latter public interest will be served and the former will suffer. It is difficult to say that the Parliament intended to prefer one and sacrifice the other. In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions display an anxiety not to diminish the States' revenues beyond a certain limit. The section in any case gives no indication that one public interest is to be preferred to the other and,

therefore, in our view, the matter must again depend upon the proper construction of the language employed. On construction we are of the view that by implication the expression "the agreement" occurring in Section 5(3) refers to the agreement with a foreign buyer.

The argument that the power of State-taxation should be restricted in the light of the constitutional purpose and commercial background of Article 286(1)(b) was rejected by the Supreme Court in the Shanmugha Vilas Cashew-nut Factory's case [1953] 4 STC 205 (SC). It is observed at page 215:

It is true, as pointed out in the previous decision, that the export-import trade is important to our national economy, but it is no less true that the State-power of taxation is essential for carrying on its administration, and it must be as much the constitutional purpose to protect the one as not unduly to curtail the other. The question really is, how far did the constitution-makers want to go in protecting the foreign trade by restricting the power of taxing sales or purchases of goods which they conferred on the States under entry 54 of List II. The problem before them was one of balancing and reconciling the rival claims of foreign trade in the interests of Our national economy and of the State's power of taxation in the interests of the expanding social welfare needs of the people committed to its charge, and we have their solution as expressed in the terms of Clause (1)(b). It is for the court to interpret the true meaning and scope of those terms without assuming that the one constitutional purpose was regarded as more important than the other. This court has already held in the previous decision that Clause (1)(b) protects the export-import trade of this country from double taxation by prohibiting the imposition of sales tax by the State on export-sales and import-purchases, and we find no warrant in the language employed to extend the protection to cover the last purchase before export or the first sale

after import.

The learned Government Pleader has a further contention that the local purchases of raw cashew in all these cases have not been shown to have taken place "after and was for the purpose of complying with the agreement or order for or in relation to such export", as required by Sub-section (3) of Section 5 of the Act. Now that we have found that the raw cashew purchased is different from the cashew kernel exported, it is unnecessary for us to consider whether the purchases were in pursuance to agreements or orders for export.

For the aforesaid reasons, we hold that the Tribunal was wrong in holding that the purchase turnover of raw cashew is not exigible to tax under the Kerala General Sales Tax Act for the reason of the exemption admissible u/s 5(3) of the Central Sales Tax Act. We set aside the orders of the Tribunal, deleting the purchase turnover of raw cashew-nuts from the taxable turnover of the respective assessees, and direct the addition of the same as exigible to tax under the Kerala General Sales Tax Act, 1963.

The tax revision cases are allowed as indicated above. We make no order as to costs.