
(1991) 11 KL CK 0039

In the High Court Of Kerala

Case No : TRC 23 to 35, 40, 41, 44, 45, 64, 65, 69 to 83, 114 and 115 of 1988
and 192 to 197 of 1989

Sujir Vasudev Nayak

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-11-1991

Acts Referred:

Central Sales Tax (Amendment) Act, 1976 — Section 2
Central Sales Tax Act, 1956 — Section 2, 3, 5, 5(1), 5(3)
Sea Customs Act, 1878 — Section 3A

Citation : (1991) 11 KL CK 0039

Hon'ble Judges : T.V. Ramakrishnan, J;K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : S. Padmanabhan, T.D. Rajalakshmi, Arikkat Vijayan Menon, N.D.
Premachandran and G. Krishnakumari, for the Appellant; T. Karunakaram
Nambiar, Special Govt. Pleader, Taxes, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Radhakrishna Menon, J.—These Tax Revision Gases raise the question whether the purchases of African raw cashew nuts made by the Assesseees 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.

2. The argument of counsel for the Assesseees Sri Padmanabhan is that the procedure adopted by the parties namely CCI and the Assesseees resulting in the allotment of the imported raw cashewnuts to the Assesseees reflects a transaction inextricably bound up with the import by the CCI in terms of the import licence granted to them by the Government and therefore the purchases made pursuant to the transaction are immune from liability to tax. Dilating on this point it was further argued by the counsel that the CCI has been interposed only as a conduit connecting the Assesseees with the foreign sellers. This procedure was necessitated on account of the import and export order whereunder only the CCI can import raw cashewnuts from foreign countries. The inextricable link spoken

above is not broken by the introduction of the CCI. That it is not possible by the introduction to brake the link is further clear from the fact that the raw cashew nuts imported, cannot be diverted to any other purchasers than the Assesseees from whom orders for supply of imported raw cashewnuts have been taken. The above position is further established by the fact that the contract between the foreign seller and the CCI is on FOB/CIF basis and as such the property in the goods would pass on shipment. Lastly it was argued that even assuming that the Assesseees did not have any direct contract with the foreign seller for the purchase of the raw cashewnuts, the privity of contract between them and the foreign seller must be presumed because the canalising agent i.e. the CCI is the agent of the Assesseees. In support of the above contentions the counsel relied on some of the terms in the contract between the Assesseees and the CCI and the CCI and the foreign seller. He also relied on the clauses in the import licence issued in favour of the CCI. The learned Special Government Pleader for Taxes Sri T. Karunakaran Nambiar on behalf of the Revenue refuted the above arguments. According to the counsel none of the documents would establish that the transactions under which the Assesseees were to get the imported raw cashewnuts, could be said to be inextricably bound up with the import. Expanding this point he argued thus: The CCI imports the raw cashewnuts from East African countries on the strength of the import licences issued to it by the Controller of Imports and Exports. The raw cashew nuts thus imported would thereafter be purchased by the Assesseees. One of the circumstance relevant is that CCI should remain as owner of the imported raw cashewnuts upto the time of actual purchase by the Assesseees from the port where at the ship as per the Bill of Lading was to discharge the goods. It is true that separate bills of entry were drawn before the letters of authority enabling the Assesseees to take delivery of the imported cashew earmarked to them from the port were given. These letters of authority were sent through banks and the Assesseees received them after making payments. The Customs duty no doubt is paid by the Assesseees. The said payment under the circumstances must be deemed to be payment on behalf of the CCI.

3. The Appellate Tribunal accepted the above contentions of the Revenue and found that the transaction under which the Assesseees could get delivery of the allotted raw cashewnuts is not immune from liability to tax under the K.G.S.T. Act and consequently upheld the assessments.

4. Before we go into the merits of the above competing contentions it has become necessary to consider the scope of the preliminary argument of the learned Counsel for the Assesseees and it is this. The propositions of law laid down by this Court in *Gopinathan Nair and Co. Vs. State of Kerala*, remanding the appeals to the Appellate Tribunal for a *denovo* trial, support the case set up by the Assesseees. Going by the decision, it should be held that the transaction under which the Assesseees took delivery of the imported raw cashewnuts shall be treated as inextricably bound up with the import and as such the alleged sales by the CCI of the imported cashewnuts to the Assesseees are not exigible to tax

under the K.G.S.T. Act. The question as to whether this argument can be taken cognisance of requires to be considered in the light of the order of the Supreme Court rejecting the special leave application, the Revenue had filed against the said judgment. The Supreme Court has stated that it was not necessary to consider the merits of the case at that stage. This observation was made, presumably for the reason, that, since the appeals have been remanded to the Tribunal for a fresh consideration, the so called propositions of law cannot be said to conclude the questions one way or the other, raised by the parties. On going through the judgment one can opine without fear of contradiction that this Court was of the view that the issues involved in the case have not been dealt with by the Tribunal in the right perspective i.e. in the light of the principles enunciated by the apex court and the various High Courts and accordingly the common order of the Appellate Tribunal was set aside and the appeals were remanded to the Tribunal for fresh disposal. We therefore are of the view that the said judgment cannot be said to conclude the matters. We accordingly would go into the merits of the competing contentions of the parties stated supra.

5. Regarding the merits of the contentions: It is essential to find out why the Government of India introduced the canalisation system. The main reason, as observed by the Supreme Court, is control of foreign exchange and prevention of abuse of foreign exchange. Having understood the position thus let us first see what would be the impact of this system of canalisation on the relationship between the C.C.I. and the Assesseees. Does this system bring about the relationship of principal and agent between the Assesseees and the C.C.I. The answer depends upon the construction of the various conditions incorporated in the licence issued in favour of the C.C.I. by the Export and Import Authority. Under the licence the C.C.I. was to place orders with the foreign suppliers for the sale of the raw cashewnuts, after ascertaining the requirements of the Assesseees and after taking letters of acceptance from them, and therefore the C.C.I. functions only as an agent of the Assesseees, is the argument of the counsel for the Assesseees. On the other hand the counsel for the Revenue contends that the terms of the contract, the Assesseees have entered into with the C.C.I. and also the conditions contained in the licences would indicate the contra. As rightly pointed out by the Government Pleader none of the statements in the various documents referred to by the counsel for the Assesseees in support of the argument that the C.C.I. must be treated as an agent, would establish that an agency is created by actual authority given by the Assesseees to the C.C.I. It should in this connection be remembered that an agency can be created only by actual authority given by the principal to the agent or "principales" ratification of contract entered into by the agent on his behalf but without the authority. We therefore are of the view that the relationship between the Assesseees and the C.C.I. cannot be said to be the relationship between the principal and agent. On the other hand the relationship between them is that of two principals. It therefore follows that C.C.I. acts on its own and not as an agent of the allottees. We are fortified in this view by the decision of the Supreme Court in *Serajuddin*

and Others Vs. The State of Orissa, .

6. The above position notwithstanding the counsel Sri Padmanabhan for the Assesseees raised the following contentions. The import of the raw cashewnuts was occasioned by a single transaction and the parties to that transaction were the Assesseees, the C.C.I. and the foreign seller. The intervention of the statutory intermediary the C.C.I., with the only right to import and allot the raw cashewnuts to the Assesseees, would not affect the real nature of the transaction, based on which the Assesseees were to import the raw cashewnuts directly from the foreign seller. That it is so can be seen from the facts namely, that the allottees are the Assesseees, that the invoices and the bill of lading contained the specific marking disclosing the identity of the Assesseees, that the import is for the benefit of the Assesseees only, that the Assesseees shall not divert the imported goods for any other purpose and that the entire processed imported nuts, the Assessee shall export to foreign countries. The existence of these facts is not disputed because they are all borne out by records to which the Assesseees and C.C.I. were parties. May be that the allotment of the quota to each of the Assesseees on the arrival of the raw nuts is on the basis of contract between the Assesseees and C.C.I. These contracts for the allotment of the raw nuts were necessitated on account of the Import and Export Order, 1955. Whatever that be, both the contracts, i.e., the contract the C.C.I, entered into with the foreign seller and the contracts the Assesseees entered into with the C.C.I., are part of one integrated transaction which resulted in the import of the raw nuts. The interconnection is so intimate that the one cannot stand without the other. There is nothing in the law to rule out two sales qualifying for exemption u/s 5 of the C.S.T. Act. The contract, the C.C.I, entered into with the foreign seller is C.I.F./ F.O.B. and therefore it must be declared that the property in the raw nuts has passed to the Assesseees on the shipment of the same.

7. The Government Pleader Sri Nambiar on the other hand argued that in order to attract Article 286(1)(b) or Section 5 C.S.T. Act what requires to be established is that the purchase and the resultant import shall form part of a single transaction, in the sense that the two activities, the purchase and the import, and not the two purchases as suggested by the counsel for the Assesseees, discernible from the contentions stated above, shall form part of the transaction which occasioned the import. Why it is said so is that such a purchase cannot be dissociated from the import without which it cannot be effectuated, and the purchase and the import on account of the said purchase form parts of a single transaction. The purchase by the Assesseees of the raw nuts after importation from the port premises, under the circumstances, Sri Nambiar submits, is an entirely different transaction not only not integrated inextricably but unconnected with the transaction which occasioned the import. The case set up by the Assesseees namely immunity from tax, therefore must fail.

8. In support of their respective arguments both the counsel relied virtually on the same rulings of the apex court, declaring the law on the subject.

9. We shall now endeavour to state the law, which according to us, stands well settled by the judicial pronouncements of the apex court construing Article 286(1) (b) and Sections 3 and 5 of the C.S.T. Act. The integrated activities which form parts of the transaction which occasions the import, are the purchase and the resultant import. The purchase by import does involve series of integrated activities commencing from the agreement of purchase with the foreign seller and ending with the delivery of the goods to a common carrier for transport into the country by land or sea. Such a purchase cannot be dissociated from the import and therefore the said purchase and the resultant import alone would form part of the transaction occasioning the import. It cannot therefore be said that a purchase of the goods, after the importation of the same into the country has been completed, is inextricably connected with the transaction which occasioned the import. Affirming this view, discernible from *State of T.C. v. Bombay Co. Ltd.* 3 S.T.C. 435 and *State of T.C. v. S.V.C. Factory* 4 S.T.C. 205 the Supreme Court in *Mukammed Sirajudeen's case* 36 S.T.C. 136 has further stated thus:

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 crucial words in the section are that a sale or purchase of goods shall be deemed to take place in the course of export of the goods only if the sale or purchase occasions such export. The various decisions to which reference has been made illustrate the ascertainment of the pre-eminent question as to which is the sale or purchase which occasions the export. *The Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, as well as the case of *Binani Bros (1974)* 33 S.T.C. 254 clearly indicates that the distinction between sales for export and sales in the course of export is never to be lost sight of. 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 within the ruling in the *Coffee Board case* and the *Binani Bros case* are these. The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There was no privity 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.

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. The Corporation in regard to its contract with the foreign buyer entered into a contract with the Appellant to procure the goods. Such contracts for procurement of goods for export are described in commercial parlance as back to back contracts. In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption. The Appellant was under no contractual obligation to the foreign buyer either directly or indirectly. The rights of the Appellant were against the Corporation. Similarly the obligations of the Appellant were to the Corporation. The foreign buyer could not claim any right against the Appellant nor did the Appellant have any obligation to the foreign buyer. All acts done by the Appellant were in performance of the Appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer.

The various contentions raised by the counsel for the Assessee, which contentions are virtually identical with the contentions dealt with by the Supreme Court in the above excerpt therefore have lost their validity and relevance. A catena of decisions including *Khosala and Co. (P) Ltd. v. Deputy Commissioner of Commercial Tax* (1966) 17 S.T.C. 473, *Coffee Board v. Joint Commercial Tax Officer* (1970) 25 S.T.C. 528, *Ben Gorm Nilgiri Plantations Co. v. Sales Tax Officer* (1964) 15 S.T.C. 753, *Binani Bros. (P) Ltd. v. Union of India* (1974) 33 S.T.C. 254 and *Deputy Commissioner of Agricultural I.T. and S.T., Ernakulam v. Indian Explosives Ltd.* (1985) 60 S.T.C. 310 having a bearing on the question, was examined elaborately in that case. Those decisions of the Supreme Court namely *Muralilal Sarawagi v. State of A.P.* (1977) 39 S.T.C. 294, *Member, Board of Revenue v. Swaika Oil Mills* (1977) 40 S.T.C. 367 and *Deputy Commissioner of Agricultural I.T. and S.T. v. Indian Explosives Ltd.* (1985) 60 S.T.C. 310 delivered after *Sirajudeen* 36 S.T.C. 136, in our view, have only reiterated the law on the subject stated in the two Travancore Cases and *Sirajudeen* 36 S.T.C. 136. That the ratio discernible from *Sirajudeen's* case 36 S.T.C. 136 has been accepted by the Parliament is clear from the statement of Objects and Reasons for the amendment to the Central Sales Tax Act in 1976 inserting Sub-section (3) of Section 5. By the amended provision the Parliament set at naught the effect of the ratio in *Sirajudeen's* case 36 S.T.C. 136 in so far as the same related to the purchase or sale preceding the sale or transaction occasioning the export. We shall reproduce the statement of Objects and Reasons for easy reference:

According to Section 5(1) of the Central Sales Tax Act, a sale or purchase of goods can qualify as a sale in the course of export of the goods out of the territory of India only if the sale or purchase has either occasioned such export

or is by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. The Supreme Court has held *Mohammed Serajudeen v. State of Orissa* 36 S.T.C. 136 that the sale by an Indian exporter from India to the foreign importer alone qualifies as a sale which has occasioned the export of the goods. According to the Export Control Orders, exports of certain goods can be made only by specified agencies such as the State Trading Corporation. In other cases also, manufacturers of goods, particularly in the small-scale and medium-sectors, have to depend upon some experienced export house for exporting the goods because special expertise is needed for carrying on export trade. A sale of goods made to an export canalising agency such as the State Trading Corporation or to an export house to enable such agency or export house to export those goods in compliance with an existing contract or order is inextricably connected with the export of the goods. Further, if such sales do not qualify as sales in the course of export, they would be liable to State Sales Tax and there would be a corresponding increase in the price of the goods. This would make our exports uncompetitive in the fiercely competitive international markets. It is, therefore, proposed to amend, with effect from the beginning of the current financial year, Section 5 of the Central Sales Tax Act to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning 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.

From the discussion above it can be inferred without fear of contradiction that even today *Sirajudeen* 36 S.T.C. 136 holds the field in so far as the same relates to sale/purchase which occasions import into the country. Applying the ratio of *Sirajudeen's* case 36 S.T.C. 136 to the facts of the case on hand, we are of the opinion that the purchases made by the Assessee from CCI cannot be said to be purchases in the course of import. Our reasons to say so are these:

- (a) There was a direct, distinct and independent contract of purchase between the CCI on one hand and the foreign sellers in Africa.
- (b) The transactions under which the CCI sold the imported raw cashewnut to the Assessee 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 Assessee and the foreign sellers.
- (d) The Assessee remained undisclosed to the foreign sellers.
- (e) The foreign sellers knew nothing of the understanding between CCI and the Assessee, 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 Assesseees 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 CIF 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. (See Clause 66 of The Red Book).

(j) The very fact that CCI as per the licences and sub-licences has been authorised to purchase the raw cashewnuts in bulk shows that the transaction which occasioned the import of the goods is distinct and different from the agreement to sell the imported cashewnuts to the assessess on their paying the price therefor.

(k) The fact that the Assesseees paid the customs duty and similar charges does not mean that the goods were imported by the Assesseees or that the sale of the said raw cashewnuts to them by the CCI occasioned the import.

(l) The licence and sub-licence to import raw cashewnuts stood in the name of the CCI. See Swaika Oil Mill's case (1977) 40 S.T.C. 367.

10. We therefore are of the view that the purchases in respect of which the Assesseees claim exemption are not purchases in the course of import and they therefore are exigible to tax under the K.G.S.T. Act. A similar view is expressed by the Karnataka High Court see The Cashew Corporation of India Ltd. Vs. The State of Karnataka, . With respect we agree with the ratio discernible from this decision. It is relevant in the context to note that this decision was rendered after considering identical contentions raised by the parties. The transactions involved in that case were identical.

11. Finding it difficult to grapple with the situation brought about by the principles declared by the Supreme Court, discernible from Sirajudeen's case 36 S.T.C. 136, the counsel for the Assesseees argued that in all these cases the purchases by the Assesseees from the CCI had been effected by transfer of documents of title to the goods, to the Assesseees before the ship crossed the customs frontiers of India and hence the purchases are immune from tax under the K.G.S.T. Act. What is meant by crossing the customs frontiers of India, the learned Counsel argued, is only 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. The counsel in this connection made reference to Section 2(ab) of the Central Sales Tax Act, 1956. This definition was inserted in the CST Act in the year 1976 as is seen from Section 2 of Act 103 of 1976.

The counsel nonetheless submitted that this definition, inasmuch as the same is declaratory/clarificatory in nature, must be held to be retrospective in operation and if that be so, the purchases by the Assesseees from the CCI by transfer of the letters of authorisation authorising the Assesseees to take delivery of the property from the port, resulted in the purchase of the goods in the course of import. This argument at the first blush is attractive; but, if we go deep into the same we can see that this definition cannot be said to be declaratory in nature. To appreciate this aspect we have to focus our attention on the law which governed the field prior to the introduction of the above definition. It is true that there was no definition of the expression "customs frontiers of India" in the CST Act prior to the year 1976. The question therefore is what does the expression "customs frontiers of India" in Section 5 of the CST Act mean. The answer to the question depends upon the construction of the proclamations made by the President of India and Notification issued by the Central Government u/s 3A of the Sea Customs Act, 1878. The President of India has issued a proclamation dated 22nd March 1956 and going by that proclamation the territorial waters of India extent into the sea to the distance of 6 nautical miles measured from the appropriate base line. (See S.R.O. 669, dated 22nd March 1956). This proclamation was subsequently superseded by Anr. proclamation dated 30th September, 1967 and as per that proclamation the territorial waters of India have been extended into the sea to a distance of 12 nautical miles measured from the appropriate base line. Here in this case we are concerned only with the second Notification. It is relevant in this context to make specific reference to a Notification issued by the Central Government. This Notification S.R.O. 1683 is dated 6th August, 1955. As per this Notification the Central Government have defined the customs frontiers of India as the boundaries of India including territorial waters of India. It therefore follows that the expression "customs frontiers of India" in Section 5 of the CST Act at the relevant time must be construed in accordance with the Notification aforesaid read with the proclamation of the President of India, dated 30th September, 1967. So applying the definition of customs frontiers of India, it is clear that in the case on hand since the purchases by the Assesseees by transfer of documents of title, assuming letters of authority constitute the documents of title, were made only long after the raw cashewnuts had reached the Port, the same must be held to be after the goods crossed the customs frontiers of India. If so, the argument of the counsel that the question as to what does the expression "customs frontiers of India" in Section 5 of the CST Act mean, requires to be decided in the light of the definition contained in Section 2(ab) of the CST Act introduced in 1976, is liable to be rejected. The claim of the Assesseees that the sales in question were sales in the course of import therefore is not sustainable in law. We are fortified in this view by a decision of the Supreme Court in *The State of Madras Vs. Davar and Co. etc.,* .

The Tax Revision Cases accordingly are dismissed but in the circumstances no order as to costs.