Supreme Court of India
K. Gopinathan Nair & Etc vs State Of Kerala on 21 March, 1997
Author: S Majmudar
Bench: Cji, S. B. Majmudar

PETITIONER:
K. GOPINATHAN NAIR & ETC.

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT: 21/03/1997

BENCH:
CJI, S. B. MAJMUDAR

ACT:

HEADNOTE:

JUDGMENT:

W I T H [Civil Appeal No. 1167-71/92: 1546/93: and 3647-52/86] J U D G M E N T S.B. Majmudar, J.

According to our esteemed colleague Sujata v. Manohar, J., these appeals are required to be allowed. With orofound respect, it is not possible for us to agree with her findings and the conclusions in so far as it is held bu 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.

In Civil Appeal Nos. 4953-77 of 1991 a 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 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 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 had imported these raw cashewnuts and made them available to the assessees. Consequently these transactions would be styled as purchases by the assessees in the course of import and were outside the sweep of the Act. This contention of the assessees was rejected by the Kerala sales Tax Appellate Tribunal, Addl. 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.

In Civil Appeal 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 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 bu Karnataka Appellate Tribunal, Bangalore. The appellant's Revision before the High court came to be dismissed by a Division Bench of the High Court by its order dated 3rd march 1986 and that is how the CCI is before us on special leave.

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 transaction 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 Appeal Nos. 4955-77 of 1991 and Shri Hegde, learned senior counsel appearing for the appellant CCI in Civil Appeal Nos. 3647-52 of 1986. The learned counsel appearing for the respondent-state of Kerala and state of Karnataka on the other hand have supported the decisions of these High Courts.

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 place on the power of a state to tax Sales. Articles 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 imposed, 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 & sale or purchase of good 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 it 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 title to 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 into 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, centers 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.

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 Company, Coonoor and Ors. v. Sales Tax Officer, special circle. Ernakulam and ors. [1964] 7 SCR 706 a 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 assessee-appellants to local agents of foreign buyers would earn exemption under Article 286(1) (b) 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 Tax officer assessed the appellants to pay sales tax on transaction of auction held at Fort Cochin. It was contended by the appellant-assessees that purchase by local agents of foreign buyers were for their principals abroad and the goods were in fact exported out of the territory 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 for 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 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 statue 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 dingle 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 that the said sales occasioned export and not in the course of export. Therefore the sales bu the appellants to the agents of foreign buyers do not come with the purview of Act. 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 inter-linked. On the same reasoning as in the aforesaid case, therefore, a sale in the course of import and the sale and the import must have an integrated and intertwined connection. If that is not so it would not be sale in the course of import but it would be as sale by import or because of import. In the case of K.G. Khosla & co. v. Deputy commissioner of commercial Taxes [1966] 3 SCR 352 a 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 parambur and 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 Madras General Sales Tax Act in respect of supplies at Mysore. The appellant lost before the Appellate 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 two Revision Application 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 for any other purpose. Consequently the sales took place in the course of import of goods within Section 5(2) and, therefore case indicate that the assessee was the agent of the foreign seller. The principles 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 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 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 course of import. The third constitution Bench judgment is found in the case of coffee Board, Bangalore v. Joint Commercial Tax officer. Madras and Another (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 exports 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, CJ. 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 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 there having already crossed the customs frontiers, or the sale must occasion the export. The phrase 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 is the sale which itself result 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 curse of import, (i) there must be 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 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 be found wanting. The next constitution Bench judgments rendered in the case of The state of Bihar and Another v. Tata Engineering and Locomotive co. Ltd. (1970) 3 SCC 697. In that case the constitution 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 observation in para 14 of the Report :

> "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 : (1) When goods which are in export or import stream are sold; (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 the state other than the state in which the delivery of goods takes place; and (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."

This takes us to yet another constitution Bench judgment of this court in the case of M/s Binani Bros. (P) Ltd. etc. etc. V. Union of India & Ors. (1974) 1 SCC 459. In this court in this Court specking through Mathew, J., had an occasion to once again examine the question whether the sales on that case were in the course or import of goods so as to be covered by the Article 286 (1) (b) of the Central sales Tax Act, 1956. In that case 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 form 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 which the foreign sellers. No movement of goods in the course of import took place pursuant to the contracts of sales to DGS & D were distinct and separate from his purchase from foreign sellers. To put it differently the sales by the petitioner to the DGS & D did not occasion the import. On the contrary purchases 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 sellers did not enter into any contract by themselves or through the agency of the petitioner with the DGS & D and movement of goods from the foreign countries was

not occasioned on account of the sales by the petition to DGS & D. It was further held that through under the contract DGS & D undertook to provide all facilities for that 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 petitioner to DGS & D was not in the course of import it will have to be held that the sales by CCI in the course or import. Another Constitution Bench judgment which also gets squarely attracted on the facts of the present cases is rendered in the case of MD. Serajuddin & Ors. etc. etc. V. The state of Orissa (1975) 2 SCC 47. In the aforesaid case this 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 assessee who was 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 directly with the state Trading corporation (STC) ever since export of mineral ores was canalise 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 the contract with STC not exempt from sales tax under Article 286(1) (b) of the constitution read with section 5(1) of the central sales tax Act. The majority of the constitution Bench speaking through Ray, CJ., 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 in the course of export out of the territory of India means sale taking place not only during the goods out of the country but also as part of or connected with such activities. In paragraph 18 of the Report the following pertinent observation were made:

> " A sale in the course of export predicates a connection between the sale as decisive for determining that question. Each case must depend upon its facts. But it does not mean that distinction between transaction 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 a sale for export. Where the export is the result if sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by stature, 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 further there should be a single sale or there can be two or more independent cases. 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 case 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 breads 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. The only sale which can be said to cause the export is the sale which itself result 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 for export. In this connection the following pertinent observation were made in paragraphs 25 and 26 of the Report:

> " 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 interacted 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 cannot be disregarded.
>
> The features which point with unerring accuracy to the contract between the appellants 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 of contract between the appellant and the foreign buyer. The privity of contract is between the corporation 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 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."

Sales or purchases through canalising agencies who export or import goods were also considered paragraph 28 of the Report. It was held that 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 ad prevention of abuse of foreign exchange. Counsel for Minerals and metals Trading co. which became the successor to the corporation did not contend that the successor to the corporation did not contend that the corporation is and agency. Agency is created by actual authority given by 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 principal and agent.

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 pari 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 wherein the foreign seller would be out of picture and such transactions 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's case (supra) has heavily relied upon other constitution Bench judgment in the case of Binani Bros. (Supra) which was directly concerned with the interpretation of section 5(2) of the central sales Tax Act as we have seen earlier.

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 The Deputy Commissioner of Agricultural Income Tax and sales Tax. Central Zone. Ernakulam v. M/s Kotak & co.. Bombay. etc. etc. (1974) 3 SCC

148. 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 March 20, 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 lading obtained by the foreign supplier on shipment of the goods was also obtained by the firm and the cotton was thus sent to 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. 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. (supra) . 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 will established on record and which will be adverted to by us in the latter part of this judgment.

It is time for us now to refer to two other judgment 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 Deputy Commissioner of Agricultural Income Tax and sales Tax. Eranakulam v. Indian Explosive Ltd. (1985) 4 SCC 119 this court dealt with the question whether the respondent- assessee was concerned with sale transaction in the course of import of chemicals, dyes etc. The modus operandi assessee in that case was to the effect that local purchasers used to place orders 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 Authority issued by chief controller of Import the goods, to open letters of credit and make remittent of foreign exchange against the said license to the extent of value specified therein. The impost licence expressly contained two conditioned, (i) that the goods imports 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 a 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. In the light of these facts the decision of the Kerala High court that 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 purchase and the actual import of the goods from the foreign supplier. The movement of goods from 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 paragraph 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 there must be integral connection or inextricable link between the first sale following the import actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be snapped.

The aforesaid decision obviously was rendered in the light or the peculiar facts of the case before the court. In that case that case the respondent-assessee was acting on behalf of the local importers and was almost as good as their agents 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 custom 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 cause that there was an integral connection or inextricable link between the first sale following the 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 salient features emerging on the record of these cases. On the contrary the decisions of the constitution Benches of this court in Serajuddin's case (supra) and in the case of Binani Bros. (supra) get squarely attracted. The other decision on 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. and Anr. etc. V. Coffee Board. Bangalore etc. etc. (1980) 3 SCR 625 which is called the second coffee Board case. In that case Tulzapurkar, J. speaking for the Bench had to consider the constitution 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, Bangalore (supra). 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 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 (b) 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 sub- section(1) 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 course of" found both in section 5(1) and section 5(2) this decision by three learned Judges' Bench could not have laid down anything contrary to what the constitution Benches in Serajuddin's case (supra) and in the case of Binani Bros. (supra) had laid down on the true construction of the provision of section 5(1) and 5(2) while interpreting the words 'in the course of export' or ' in the course of import' as found in these provisions.

Reliance placed by our esteemed colleague Sujata V. Manohar, J. on the judgments of this court in the cases of Indian Explosives Ltd. and M/s. Kotak & co. (supra) for taking the view that ratio of the constitution Bench judgment in Md. Serajuddin case (supra) 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 and M/s. Kotak & Co.'s case (supra ) 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 MM. Serajuddin's case (supra) and M/s. Binani Bros.'s case (supra) squarely get attracted. Even that apart, with great respect to our esteemed colleague Sujata V. Manohar, J., it could not 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 or this court by inserting s 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 '.

In the light of the aforesaid settled legal position emerging from the constitution Bench decisions of this court the following propositions clearly get projected fro 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 concerned goods must be effected as a direct of the concerned sale or purchase transaction. (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 through there may appear to be two sale transactions they are so integrally enter-connected 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 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 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 a as mere name lender through whom it is the local importer-cum-local user who masquerades.

If the aforesaid conditions are satisfied then obviously the transaction of sale or purchase would be in the realm or 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 user in India get transmitted through an independent canalising- import agency which enters into back to back contracts and there is no direct linkage or caudal 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 be disrupted and would be substituted by two independent transactions. one between 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 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.

On the facts of these cases and in the light of the propositions enumerated above it is impossible to accept the contention of 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.

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 crossed the customs frontiers of India and resultantly the latter part of section 5(2) is not attracted on the facts of these aspects any further.

Now is these 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.

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 kernels to other countries. By a Notification issued under bearing No.3-1970 dated 31st of August 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 assessee 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 this 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 there concerned private local users 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 imparting cashew on wholesale basis from the foreign exporters by entering into independent contracts with the foreign exporters by entering into independent contracts with the foreign exporters. The following salient features of the transaction 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 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 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 undisputable made out in the name of the CCI and the CCI therefore had 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 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.

In this connection it will so be profitable to keep in view the findings recorded by the Kerala Appellate Tribunal based on relevant evidence on record. At page 88 of the paper books is found a letter dated 4.11.1970 addressed by CCI to one similarly situated local users Bakul Cashew Co., Quilon. The said letter calls upon the local users 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 favor 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 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 user's 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 page 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 foreign exporter and the Indian importer is between the CCI as importer and the foreign exporter at the other end which would clearly pre-suppose 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 theses prior agreements with the local users. But that would make it a wholesale importer acting upon the requirements of the local users who would remain local purchasers through the wholesale seller-cum- importer CCI. At page 95 of the paper Book is also found CCI's invoice in turn issues for a users quantity of .p161 imported material in favour the sub-licence in issued. At page 96 is found a copy of the Bill of Lading which also shows that the foreign exporter has exported the goods in favour of the CCI, Cochin through the concerned ship. It is also found established on record that the goods could be cleared through customs by the locals users after making full payment of the goods to the CCI. Thus ownership of the goods remains with the CCI till the concerned documents are cleared through the bankers of the local users a copy of which is found as Annexure 'I' at page 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 license t the time of clearance through the customs. It was submitted by the learned senior counsel for the appellants 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 users 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 paragraph 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 of the corporation to the allottes would go to show undoubtedly that the goods remain the property of the corporation with specific right to re-allot or re-sell 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 users 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 the canalising agency like CCI to place orders for import of the concerned quantities. But CCI by the foreign exporter on its own and gets bulk imports of cashewnuts. It is the sale to the CCI buy 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 properly in the concerned imported goods would pass from CCI to the local users. Thus there are two clear transactions. One transaction is import of raw cashew by CCI from foreign exporters The second transaction which is back 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 local users 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 privity 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 learned senior counsel for the appellants. On the facts of these cases, therefore, the decisions of the constitution Benches of this Court in Serajuddin's case (supra) and in the case of Binani Bros. (supra) 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 conclusion to which the Kerala and Karnataka High court reached, therefore, cannot be faulted.

The alternative contention canvassed on behalf of the appellant by learned senior counsel Shri Poti based on section 2(ab) of the central sales Tax Act which defines 'crossing the customs frontiers of India' as crossing the limits of the area of a custom 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 fore 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 provision is of a remedial nature and it cannot be said to be a procedural amendment which could have any retrospective effect. On the contrary this substantive prevision 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 (Dead) by LRs. & Ors. V. Padmini Chandrasekharan (Dead) by LRs (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 earlier decision of this court in the case of Garikapai Veeraya V. N. Subbiah Choudhry Air 1957 SC 540 wherein chief Justice S.R. Das speaking for this court had made following pertinent observations:

> " The golden rule of construction is that 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 Act was passed."

Consequently it cannot be said that the enactment of a new definition regarding crossing the customs frontiers of India a said 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 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 grate 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 transaction 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.