STATE OF TRAVANCORE-COCHIN AND OTHERS

v.

SHANMUGHA VILAS CASHEW NUT FACTORY AND OTHERS.

1953

May 8.

[PATANJALI SASTRI C. J., MUKHERJEA, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN JJ.]

Constitution of India, 1950, art. 286 (1) (a), (1) (b) and (2)—Tax on sale or purchase of goods—Sales "outside the State"—Sales "in the course of" import or export—Sales "in the course of inter-State trade or commerce"—Nature and incidents of—State's power to tax—Scope of constitutional limitations.

Held, by (PATANJALI SASTRI C.J., MUKHERJEA, VIVIAN BOSE and GHULAM HASAN JJ.)—(i) Sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of, or into, the territory of India come within art. 286 (1) (b) and are exempt from State taxation. (ii) 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 barrier are not within the exemption. (iii) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier are within the exemption, assuming that the State power of taxation extends to such transactions.

The word "course" etymologically denotes movement from one point to another and the expression "in the course of" in art. 286 (1) (b) not only implies a period of time during which the movement is in progress but postulates also a connected relation. Consequently, a sale in the course of export out of the country

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should be understood in the context of art. 286 (1) (b) as meaning a sale taking place not only *during* the activities directed to the end of exportation of the goods out of the country, but also *as part of* or connected with such activities. But a purchase of goods for the purpose of export is only an act preparatory to their export and not an act done in the course of the export of the goods.

The respondents purchased raw cashew nuts within the State of Travancore-Cochin, from the neighbouring States and also imported such nuts from Africa, for the purpose of refining them and exporting them to America. Imports from Africa were made in the following ways: (a) purchases were made through intermediaries doing business as commission agents at Bombay who acted as agents for the respondents charging commission; (b) the commission agents at Bombay indented the goods on their own account and they sold the goods as principals to the respondents. In either case the goods were shipped direct from Africa to a port in the Travancore-Cochin State. It was found as a fact that the process of the factory was such that the goods were not the same goods commercially after refinement:

Held, (i) as regards purchases made in the local markets of the State they were not exempted under art. 286 (1) (b); (ii) as regards purchases made in the neighbouring States, if the purchases were effected and delivery was taken by the respondents' servants outside the Travancore-Cochin State, they would be exempt under art. 286, cl. (i) (a), and if the purchases were effected by employing firms doing commission business outside the State and deliveries were made through normal commercial channels the transactions would be of an inter-State character and would fall under cl. (2) but they would be taxable under the Sales Tax Continuance Order (No. 7 of 1950) issued by the President under cl. (2) as such tax was being levied before the Constitution. (iii) As regards imports from Africa, where the Bombay merchants merely acted as agents, the transactions would be purchases which occasioned the import and would be exempt under art. 286 (1) (b), but where the Bombay merchants did not act as agents for the respondents, purchases from them would be on the same footing as local purchases and would not be exempt.

Per S.R. DAS J.—The Explanation to art. 286 (1) (a) is not an exception or a proviso but only explains cl. (1) (a). It does not confer taxing power on any State but only takes away the power of taxation of a State in respect of sales and purchases in which delivery does not take place within the State by enacting that such sales shall be deemed to have taken place outside that State within cl. (1) (a). Consequently, if a sale or purchase takes place outside a State, either under the general law or by virtue of the fiction created by the Explanation, then that State cannot, under (1) (a), tax such sale or purchase. If a sale or purchase takes place within a State, either under the general law or by reason of the Explanation, then, if such a sale or purchase takes place

"in the course of" inter-State trade and commerce, no State, not even the State where the sale or purchase takes place as aforesaid can tax it by reason of (2), unless and until Parliament by law provides otherwise. A sale or purchase "in the course of" import or export within the meaning of (1) (b) includes (i) a sale or purchase which itself occasions the import or export as already held by this court, (ii) a sale or purchase which takes place while the goods are on the high seas on their import or export journey, and (iii) the last purchase by the exporter with a view to export and the first sale by the importer to a dealer after the arrival of the imported goods. If a sale or purchase takes place within a State, either under the general law or by reason of the Explanation, then, if it takes place in the course of import or export as explained above, no State, not even the State within which such sale or purchase takes place can tax it by reason of (1) (b).

As regards local purchases, as those purchases took place within the State they were not entitled to the protection of art. 286 (1) (a), since on the findings of the High Court, the goods purchased were so altered that they cannot be deemed to be the same as the goods which were exported, and the purchases cannot be said to have been made "in the course" of export so as to be entitled to immunity from taxation under art. 286 (1) (b). *As regards purchases from the neighbouring States*, if the goods were taken delivery of by the agents of the respondents outside the State, such purchases must, under the Explanation, be regarded as having taken place outside the State and accordingly would be exempt from taxation under art. 286 (1) (a). If however, the goods were directly delivered to the respondents in the Travancore-Cochin State the Explanation to art. 286 (1) (a) will apply in view of the finding of the High Court which implies that the goods are also consumed in the State, and the neighbouring States will not be entitled to tax these sales or purchases, but the purchases are "in the course of" inter-State trade and as such will be protected by (2); but as the majority of the Court have taken a different view and as such view must prevail, such purchases will become, as a result of the Explanation to (1) (a), an intra-State purchase and will lose the protection of (2). Even if such purchases fall within (2), they would be liable to be taxed under the President's Order of 1950. They are not protected by (1) (b) as the goods exported are different goods.

As regards purchases from Africa (i) where the Bombay merchants act as agents of the respondents and pay the price and take delivery of the shipping documents in Bombay the purchases fall within (1) (a) and also (1) (b) and are not liable to tax as they take place outside the State within (1) (a) and also "in the course of import" within (1) (b); (ii) where the African sellers ship the goods on their own initiation or on that of their agents and while the goods are on the high seas they are

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purchased by the respondents' Bombay agents, the sale or purchase would be exempt under (1) (a) and under (1) (b); (iii) where the respondents place separate orders with the same commission agent at Bombay and the latter places a consolidated order with the African seller on his own responsibility and the Bombay agent after paying for the entire lot, prepares a separate invoice for each of their constituents and the latter receive the delivery orders from a Travancore bank against payment and take delivery from a Travancore warehouse the sale takes place in the Travancore-Cochin State and the goods cannot claim exemption under (1) (a), (1) (b) or (2) of art. 286.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 26, 27 and 30 to 36 of 1952.

These were appeals under article 132 (1) of the Constitution from the Judgment and Order dated 10th January, 1952, of the Travancore, Cochin High Court in Original Petitions Nos. 5, 19, 34, 35, 71, 83, 88, 89 and 90 of 1951, quashing the assessments severally made on the respondents in each appeal under the Travancore-Cochin General Sales Tax Act, 1124 M. E. The respondents who were assessed under the Travancore General Sales Tax Act which came into force in March, 1949, claimed exemption from sales tax in respect of the purchases made by them after the Constitution of 1950 came into force till the end of the accounting year 1950 on the ground that under article 286 (1) (b) the State had no power to levy tax on such purchases. The sales tax authorities having rejected the claim the respondents applied to the High Court under article 226 and the High Court quashed the assessments so far as they related to the said period. The State preferred the present appeals. These appeals were heard in part with certain other appeals in September and October, 1952, but as it was found that the material facts had not been clearly ascertained by the High Court the cases were remitted to the High Court for further enquiry and findings. The connected appeals were disposed of on the 16th of October, 1952, and the judgment is reported as the *State of Travancore-Cochin* v. *The Bombay Co. Ltd.* ([1952] S.C.R. 1112). The hearing of these appeals was continued after the High Court had returned the record with its findings.

T. N. Subrahmanya Iyer, Advocate-General of Travancore-Cochin State (*T. R. Balakrishna Iyer*, with him) for the appellants.

M. K. Nambiyar (*N. Palpu*, with him) for the respondents in Civil Appeals Nos. 26, 27 and 30 to 36.

M. C. Setalvad, Attorney-General for India and *C. K. Daphtary, Solicitor-General for India* (*Porus A. Mehta*, with them) for the Union of India.

V. K. T. Chari, Advocate-General of Madras (*V. V. Raghavan*, with him) for the State of Madras.

V. Rajaram Iyer, Advocate-General of Hyderabad (*B. N. Sastri*, with him) for the State of Hyderabad.

S. M. Sikri, Advocate-General of Punjab (*M. L. Sethi*, with him) for the State of Punjab.

A. R. Somanatha Iyer, Advocate-General of Mysore (*R. Ganapathy Iyer*, with him) for the State of Mysore.

K. B. Asthana for the State of Uttar Pradesh.

(States of Bombay and Orissa were not represented.)

1953. May 8. The judgment of the Chief Justice and Mukherjea, Vivian Bose and Ghulam Hasan JJ. was delivered by the Chief Justice. S. R. Das J. delivered a separate judgment.

PATANJALI SASTRI C. J.—These are appeals from an order of the High Court of Travancore-Cochin quashing the assessments severally made on the respondents in each appeal under the Travancore-Cochin General Sales Tax Act, 1124 M. E. (Act No. XVIII of 1124 M. E.) (hereinafter referred to as the Act).

The Act provided by section 3 for the levy of a tax on the total turnover of every dealer for each year. "Turnover" is the aggregate amount for which goods are either bought or sold by a "dealer" [section 2(j)], who is a person carrying on the business of buying and selling goods [section 2 (d)]. "Sale", with all its grammatical variations and cognate expressions, is defined as meaning, among other things, every transfer

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of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration [section 2(h)]. The sale or purchase is to be deemed to have taken place in the State, wherever the contract might have been made, if the goods were actually in the State when the contract was made or, if the goods are actually produced in the State, at any time after the contract in respect thereof was made. By section 3 (4) the turnover is to be determined in accordance with such rules as may be prescribed, and rule 4 of the rules framed under the Act prescribes that, in the case of certain goods including "cashew and its kernel", the gross turnover of a dealer is the amount for which the goods were bought by him, and in all other cases the amount for which the goods were sold by him.

The respondents are dealers in cashew-nuts in the State, and their business consists in importing raw cashew-nuts from abroad and the neighbouring districts in the State of Madras in addition to purchases made in the local market, and, after converting them by means of certain processes into edible kernels, exporting the kernels to other countries, mainly America. The oil pressed from the shells removed from the cashew-nuts was also exported. The Constitution having come into force on January 26, 1950, the respondent in each appeal claimed exemption under article 286 (1) (b) in respect of the purchases made from that date till May 29, 1950, the end of the account year. The sales tax authorities having rejected the claim, the respondents applied to the High Court under article 226, and that court upheld the claim and quashed the assessments in so far as they related to the said period. The State has preferred the appeals.

The appeals were heard in part along with certain other appeals from the same order, and as it was found that the material facts relating to the course of business of the respondents in the present appeals had not been clearly ascertained, these appeals were remitted to the High Court for further enquiry and

findings in regard to those matters. The connected appeals, however, in which the materials on record were found sufficient for their disposal were finally decided, and the decision is reported in *The State of Travancore-Cochin* v. *The Bombay Co. Ltd.* (1) (hereinafter referred to as the previous decision).

Before considering how far the cashew-nut purchases made by the respondents are, on the findings returned by the High Court, entitled to the protection of article 286(1)(b), it is necessary first to ascertain the scope of such protection. That clause, so far as it is material here, reads thus:

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) * * * *

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

In the previous decision this Court referred to four different views then adumbrated in the course of the argument as to the meaning and scope of the said sub-clause as follows:

(1) The exemption is limited to sales by export and purchases by import, that is to say, those sales and purchases which occasion the export or import, as the case may be, and extends to no other transactions however directly or immediately connected, in intention or purpose, with such sales or purchases, and wheresoever the property in the goods may pass to the buyer.

(2) In addition to the sales and purchases of the kind described above, the exemption covers the last purchase by the exporter and the first sale by the importer, if any, so directly and proximately connected with the export sale or import purchase as to form part of the same transaction.

(3) The exemption covers only those sales and purchases under which the property in the goods concerned is transferred from the seller to the buyer during

(1) [1952] S.C.R. 1112.

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the transit, that is, after the goods begin to move and before they reach their foreign destination.

(4) The view which found favour with the learned Judges of the High Court, namely, "the clause is not restricted to the point of time at which goods are imported into or exported from India; the series of transactions which necessarily precede export or import of goods will come within the purview of this clause."

This Court, however, found it unnecessary for the purpose of the cases then before it to go any further than to hold that "whatever else may or may not fall within article 286 (1) (b), sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of or into the territory of India come within the exemption" and that the third view set out above, which was put forward on behalf of the State of Bombay and which seeks to limit the operation of the clause exclusively to sales and purchases effected during the transit of the goods, was too narrow and could not be accepted.

It may be mentioned at once, to clear the ground, that if the Bombay view was considered to be too narrow, the view expressed by the Court below cannot but be regarded as too wide. This, indeed, was recognised by learned counsel who appeared in the cases, none of whom made any serious attempt to support it. Nor was any question raised or argument advanced as to the scope and effect of clause (2) of article 286, for, although the respondents in two of these appeals(1) purchased cashew-nuts in the adjoining districts of the State of Madras during the period in question, it was not disputed that such purchases unless they were exempt under article 286(1)(a), would fall within the explanation to clause (1)(a) as interpreted in the majority decision of this court in the recent case of *The State of Bombay* v. *United Motors (India) Ltd.* (2), or under the Sales Tax Continuance Order, 1950 (C. O. No. 7 of 1950), issued by the President on January 26, 1950, in exercise of the powers conferred by the proviso to clause (2) of article 286, and would, in either case, be taxable.

(1) Civil Appeals Nos. 33 and 36 of 1952. (2) [1953] S.C.R. 1069.

With reference to the aforesaid decision, it may be mentioned in passing that in order to remedy what was felt to be the unsatisfactory position in regard to the levy of tax by the States in America on sales in inter-state commerce, the North Carolina Department of Revenue proposed that Congress should pass legislation authorising the States to tax certain sales in inter-state commerce. The proposed bill ran thus:

"That all taxes levied by any State upon sales of property or measured by sales of property may be levied upon or measured by sales of property in inter-state commerce by the state into which the property is moved for use or consumption therein, in the same manner and to the same extent that said taxes are levied upon or measured by sales of property not in inter-state commerce. Provided: that no State shall discriminate against sales of property in inter-state commerce; nor shall any state discriminate against the sale of the products of any other state. Provided, further: that no state shall tax the sale in inter-state commerce of property transported for the purpose of resale by the consignee as a merchant or as a manufacturer. Provided, further: that no county, city, or town, or other subdivision of any State shall levy a tax upon or measure any tax by sales of property in inter-state commerce"(2).

It is interesting to note that the bill sought to bring about substantially the same result as the combined operation of article 286 clause (1) (a) explanation, clause (2) and article 304 as they were interpreted by the majority in that decision would produce. It is possible that these provisions of our Constitution were inspired by the proposed bill.

The only question debated before us was whether in addition to the export-sale and import-purchase, which were held in the previous decision to be covered by the exemption under clause (1)(b), the following two categories of sale or purchase would also fall within the scope of that exemption:

(2) See Selected Essays on Constitutional Law, Vol. I, Book V, p. 367 published by the Association of American Law Schools, 1938.

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(1) The last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business, and the first sale by the importer to fulfil orders pursuant to which the goods were imported or orders expected to be received after the import.

(2) Sales or purchases of goods effected within the State by transfer of shipping documents while the goods are in the course of transit.

As regards the first mentioned category, we are of opinion that the transactions are not within the protection of clause (1) (b). What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words "import into" and "export out of" in this context do not refer to the article or commodity imported or exported. The reference to "the goods" and to "the territory of India" make it clear that the words "export out of" and "import into" mean the exportation out of the country and importation into the country respectively. The word "course" etymologically denotes movement from one point to another, and the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation. For instance, it has been held that the words "debts due to the bankrupt in the course of his trade" in section 15(5) of the English Bankruptcy Act, 1869, do not extend to all debts due to the bankrupt during the period of his trading but include only debts *connected with the trade* [see *In re Pryce, ex parte Rensburg*(1).] A sale in the course of export out of the country should similarly be understood in the context of clause (1)(b) as meaning a sale taking place not only *during* the activities directed to the end of exportation of the goods out of the country but also *as part* of or connected with such activities. The time

(1) 4 Ch. D. 685 and Williams on Bankruptcy, 16th Edn., p. 307.

factor alone is not determinative. The previous decision proceeded on this view and emphasised the integral relation between the two where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export. It is, however, contended that on this principle of connected or integrated activities a purchase for the purpose of export must be regarded as covered by the exemption under clause (1) (b). We are unable to agree.

The phrase "integrated activities" was used in the previous decision to denote that "such a sale" (*i.e.*, a sale which occasions the export) "cannot be dissociated from the export without which it cannot be effectuated, *and the sale and the resultant export form parts of a single* transaction." It is in that sense that the two activities—the sale and the export—were said to be integrated. A purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done "in the course of the export of the goods out of the territory of India", any more than the other two activities can be so regarded. As pointed out by a recent writer "From the legal point of view it is essential to distinguish the contract of sale which has as its object the exportation of goods from this country from other contracts of sale relating to the same goods, but not being the direct and immediate cause for the shipment of the goods.....When a merchant shipper in the United Kingdom buys for the purpose of export goods from a manufacturer in the same country the contract of sale is a home transaction; but when he resells these goods to a buyer abroad that contract of sale has to be classified as an export transaction"(1). This passage shows that, in view of the distinct character and quality of the two transactions, it is not correct to speak of a purchase for export as an activity so integrated with the exportation that the former could be regarded as done "in the course of" the latter. The same reasoning applies to the first

(1) Schmittoff—Export Trade, 2nd Edn., p. 3.

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sale after import which is a distinct local transaction effected after the importation of the goods into the country has been completed, and having no integral relation with it. Any attempt therefore to invoke the authority of the previous decision in support of the suggested extension of the protection of clause (1)(b) to the last purchase for the purpose of export and the first sale after import on the ground of integrated activities must fail.

Nor is it correct to say that it is necessary to extend the exemption to these transactions to avoid double taxation. It is true that in the previous decision it was indicated that the object underlying the exemption was the avoidance of double taxation on the foreign trade of this country which is of great importance to the nation's economy. But the double taxation sought to be avoided consisted in the imposition of export duty by the Central Government and the imposition of sales tax by the State Government *on the same transaction* in its different aspects as an export and a sale. Such double taxation is already avoided by our holding that the export-sale and the import-purchase are exempt under clause (b) from the levy of sales tax by the State. The foreign trade of this country thus already enjoys immunity from double tax burden and suffers only one tax, namely, the export or import duty as the case may be. The claim now made for extension of the exemption under clause (1)(b) in the name of avoiding double taxation cannot be supported.

Not the least among the reasons for rejecting the view that the last purchase for the purpose of export and the first sale after import are also within clause (1)(b) is the practical difficulty in giving effect to the exemption in regard to these transactions, having regard to the general pattern of sale-tax legislation in this country of which our constitution-makers must have been well aware. The tax is usually levied on the annual turnover of the seller who is allowed under certain conditions to pass it on to the buyer by adding it to the price charged for the goods at each individual sale. Supposing A is the seller from whom

B the export merchant purchases the goods for export. If the sale is to be exempt, how is A to be satisfied that the goods would actually be exported subsequently? And even if they were, it must be difficult for A to prove to the Sales Tax Officer that they were so exported by B if proof was required. On the other hand, B might be keeping the goods, waiting for orders to come, or might change his mind and not export the goods at all but sell them locally. In that case, what would be the position of A *vis a vis* the Sales Tax Officer demanding the tax? Could A escape liability, if he failed to collect the tax from B at the time of the sale? Or is A to collect the tax, ignoring B's declaration of his intention to export and leaving him to apply for refund by producing evidence of actual export, whenever that takes place? Even if a sales tax enactment provides for adjustment on those lines, would not such legislation, in so far as it compels B to suffer the tax until he actually exports the goods, contravene clause (1)(b) which *ex hypothesi* exempts the transaction from sales tax? And what would be the position if the goods were burnt or otherwise lost in the meanwhile, and the export never took place? Athough, as pointed out in the previous decision, American cases are not of much assistance in interpreting article 286 because of the different wording of the import-export clause of the Federal Constitution, it is interesting to see that such uncertainties led the American courts to lay down the rule that—

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.": *Empresa Siderurgica, S. A.* v. *Merced*(1).

Similar difficulties and uncertainties are encountered in bringing within the exemption the first sale after import. How is the exemption to be applied to the

(1) 337 U.S. 154.

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goods imported from abroad after they are mingled with other goods and lose their distinctive character as imports? Here again, the American courts, with their practical approach to such problems, have evolved the doctrine of "original or unopened package", that is to say, the rule that the first sale of imported goods will be exempt from State taxation provided only such sale is made in the original packages in which the goods have arrived. Any sale of such goods made after the package is opened does not enjoy such exemption. Are we to import the same doctrine here to make the exemption workable? Even in America, as pointed out in *Balsara's* case(1), difficulties arose from time to time in applying the doctrine as "sometimes very intricate questions arose before the courts such as whether the doctrine applied to the larger cases only or to the smaller packages contained therein or whether it applied to smaller paper packages of cigarettes taken from loose files of packages at the factory and transported in baskets." Hence this court has unanimously decided that "the doctrine has no place in this country" following the lead of Gwyer C. J. in the earlier case of *Boddu Paidanna*(2).

It was said that clause (1) (b) should be construed in the light of the constitutional purpose and the commercial background and reference was made to the manner in which a large proportion of the export trade of the country was carried on by merchant houses who purchased goods from the producers and manufacturers to resell them to buyers abroad by means of contracts concluded with them. Similarly with regard to import trade, large import houses imported machinery and consumer goods wholesale and sold them to retail dealers or, in some cases, to the customers direct. This practice, it was argued, must have been well known to the makers of our Constitution, and it was reasonable to assume that they realised the importance of the foreign trade to the well-being of the country and would not have desired to cripple the same by allowing the States to

(1) [1951] S.C.R. 682, 699. (2) [1942] F.C.R. 90.

tax such purchases and sales by the export and import merchants in this country. Such general considerations based largely on speculation are not of much assistance in construing the scope and effect of a specific constitutional provision seeking to restrict the power of State taxation. 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.

As regards sales or purchases effected in the State by transfer of shipping (c.i.f.) documents while the goods are still in transit, we have already observed that the words "in the course of" imply a movement or progress and, therefore, a beginning and an end of such movement or progress. As clause (1) (b) is concerned only with exempting certain sales or purchases from taxation by the States in this country, it is

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sufficient to determine where the course of export begins and where the course of import ends. In this connection, it is useful to remember that the power to make laws with respect to duties of customs including export duties (entry 83 of List I) and also with respect to import and export across customs frontiers and the definition of customs frontiers (entry 41 of List I) is vested exclusively in the Central Legislature, and detailed provisions have been made in the Indian Sea Customs Act, 1878, for the levy of customs duties by the officers of the Central Government who are stationed along customs frontiers as defined by the Central Government where, after appraising the goods exported or imported, the duties chargeable, if any, are computed and levied, and it is not until this process is completed that the goods can be shipped for transportation or cleared by the consignee or his representatives as the case may be. It would seem, therefore, logical to hold that the course of the export out of, or of the import into, the territory of India does not commence or terminate until the goods cross the customs barrier. It is, however, to be noted that the question of imposing sales tax on transfer of goods in the course of *export* would not often arise in practice for, where the goods are transported pursuant to a contract of sale already concluded with a foreign buyer and the shipping documents have been forwarded to him, any further sale of such goods by the Indian seller is impossible, and where the export trade is conducted through representatives or branch offices, the sale by the latter of the exported goods usually takes place abroad and would not then be subjected to tax by the State in India. It is in relation to import of goods from abroad that the question of exemption assumes practical importance. It is well known that sales or purchases by transfer of shipping documents while the goods are in transit are a characteristic feature of foreign trade and as they take place in the course of import as defined above, and are regarded commercially as incident to the import transaction, they fall within the terms of clause (1) (b) and would be entitled, in our view, to the protection of that

clause, if the State is constitutionally competent to tax such sales, as to which we express no opinion.

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 barrier 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 barrier 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, 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

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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.

As regards Group II, the High Court has found that such purchases were made only by the respondents in Civil Appeals Nos. 33 and 36 of 1952. The High Court's finding as to how these purchases and the deliveries under them were effected is by no means clear. The respondent's contention was that the purchases were effected and the deliveries taken by their own paid servants outside the State of Travancore-Cochin, and it was thus a case of a person buying goods and taking delivery thereof outside the State and bringing them across the border after the transaction was completed in all respects outside the State. On the other hand, the contention on behalf of the State was that though the purchases were made outside the State in the neighbouring districts of Madras, deliveries were effected through the ordinary commercial channels by employing commission agents who made the purchases and arranged for the deliveries at the respondents' depots at Trichur or Quilon. All that can be said here is that, if the transactions took place in the manner alleged by the respondents in these two appeals, they would be exempt under clause (1) (a). This indeed was not disputed by the Advocate-General of the appellant State. On the other hand, if, as claimed by the Advocate-General, the purchases were effected by the employment of firms doing business as commission agents outside the State, and the deliveries were made through normal commercial channels, the transactions would partake of an inter-State character and fall under clause (2). In that case, it would be un-

necessary to inquire further whether they would be covered by the explanation to clause (1)(a), as they would be clearly taxable under the President's Order (C. O. No. 7 of 1950) to which reference has been made already, as it was admitted that sales tax was validly levied on such purchases before the commencement of the Constitution. As the taxability of such purchases on either view of the facts was not disputed, no arguments were addressed to us on the scope of clause (2) and the explanation to clause (1)(a), as has been stated.

Group III may be sub-divided into two categories according to the findings of the High Court: (a) purchases made through intermediaries called in these proceedings as "the Bombay party" doing business as commission agents at Bombay, who acted as agents for the respondents charging commission. The dealings are thus described by the High Court: "The goods are purchased when they are in the high seas and shipped from the African port to Cochin or Quilon. Goods are never landed at Bombay. The Bombay party only arranges for purchases on behalf of the assessees, gets delivery of the shipping documents on payment at Bombay through a bank which advances money against the shipping documents and collects the same from the assessees at destination", and (b) the Bombay party indented the goods on their own account and sold the goods as principals to the respondents and other customers; but the goods were shipped direct to Cochin or Quilon on c. i. f. terms. The shipping documents were made out in the name of the Bombay party as consignees and were delivered to them against payment through bankers at Bombay. The Bombay party cleared the goods through their own representatives at the port of destination and issued separate delivery orders to the respondents and other customers for the respective quantities ordered.

It will be seen that in respect of the purchases falling under (a), the Bombay party acted merely as the agents of the respondents, privity being established between the latter and the African sellers. The purchases are

were heard together immediately after the hearing of C.A. No. 204 of 1952 [*The State of Bombay* v. *The United Motors (India) Ltd & Others*(1)] had been concluded and judgment had been reserved by another Constitution Bench. The question of construction of article 286 of the Constitution which is involved in the present appeals was also raised in the Bombay appeal. That Constitution Bench has since delivered judgments in that appeal. The majority of that Bench have put upon clause (1) (a), the Explanation thereto and clause (2) of that article a meaning which, in spite of my profound respect for their opinions, I am unable to accept as correct. It is again my misfortune that I am unable to agree to the interpretation my learned brethren are now seeking to place upon clause (1)(b) of that article. As the questions involved in these appeals are of very great importance and as the draft of this judgment was prepared before the judgments in the Bombay appeal had been delivered I consider it right to keep my views on record for whatever they may be worth. It is, however, needless for me to say that the majority decision in that Bombay appeal, so long as it stands, is binding on me.

The respondents in each of these appeals carry on business in what is now the United State of Travancore-Cochin. They buy raw cashew-nuts locally and in neighbouring States and also import them from Africa and after putting them through a certain process they obtain cashew-nut oil and edible cashew-nut kernels. They export the edible kernels to foreign countries in large quantities.

In compliance with the requirements of the relevant Sales Tax Act then in force the repondents filed returns in the prescribed forms of their respective turnovers for the period between the 17th August, 1949, and the 29th May, 1950. Each of the respondents claimed exemption from sales tax on their respective purchases made between the 26th January, 1950, when the Constitution came into force, and the 29th May,

(1)[1953] S. C. R. 1069.

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1950. The claim, however, was rejected by the Sales Tax Officer. On appeal the Assistant Commissioner upheld the assessment orders. The respondents appealed to the High Court. By its judgment dated the 10th January, 1952, the High Court accepted the appeals, quashed the assessment orders in so far as they included tax on the purchases made after the date of the Constitution and directed a refund of the tax overpaid. The State has now come up on appeal before us.

As the questions involved in these appeals are of general importance and the other States as well as the Union of India are interested in the decision, notices were directed to be issued by this court to the Advocates-General of all interested States and to the Attorney-General for India. Many of these States as also the Union of India intervened and participated in the general discussion on the legal points involved in these appeals. After several days' hearing before us in September and October, 1952, it was found that the parties were seriously at variance on several material facts and it was felt that the appeals could not be satisfactorily disposed of without proper findings on those facts. Accordingly on the 8th October, 1952, the appeals were remitted to the High Court with directions to investigate into the disputed facts under certain heads set forth in the annexure to the order of remand. The High Court has now returned the records with their findings and the appeals are before us again for final disposal.

The assessments in question were made under the Travancore General Sales Tax Act, 1124 (Act XVIII of 1124). That Act came into force on the 7th March, 1949, and was, after the commencement of the Constitution, continued in force subject to the other provisions of the Constitution and it was in operation during the period of assessment. After the integration of Travancore and Cochin that Act was replaced by the United State of Travancore and Cochin General Sales Tax Act, 1125 (Act XI of 1125) but we are not concerned with the latter Act, for it came into force

on the 30th May, 1950, that is to say, immediately after the expiry of the period relevant for the purposes of these appeals.

The relevant provisions of Act XVIII of 1124 have been summarised in the judgment just read by my Lord the Chief Justice and need not be set forth again. Suffice it to say that the rules framed under the Act prescribed that in the case of cashew and its kernels the gross turnover of a dealer would be the amount for which those goods were purchased by him and, therefore, sales tax was payable on the purchase and not on the sale of cashew and its kernels.

The respondents do not contend that it was not within the power of H.H. the Maharaja of Travancore to enact that law at the time he did so but they maintain that, as after the commencement of the Constitution Travancore-Cochin became a Part B State and as such amenable to and bound by the Constitution, that law, in view of article 286, could no longer impose or authorise the imposition of any tax on their purchases of raw cashew-nuts. This contention, therefore, raises important questions as to the extent of the power of the States under the Constitution to impose a tax on the sale or purchase of goods. In order, however, to correctly appreciate the meaning and import of the relevant provisions of the Constitution it will be helpful to bear in mind what the position was prior to the commencement of the Constitution.

Under the Government of India Act, 1935, the Federal Legislature alone could make laws, under entry 19 in List I, with respect to import and export across customs frontiers as defined by the Federal Government and, under entry 44 of the same List, with respect to duties of custom including export duties. On the other hand the Provincial Legislatures alone could make laws, under entry 26 in List II, with respect to trade and commerce within the Province, under entry 29, with respect to production, supply and distribution of goods, under entry 48, with respect to taxes on the sale of goods and under entry 49, with respect to cesses on the entry of goods into a

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local area for consumption, use or sale therein. Section 297 of that Act, however, prohibited the Provincial Legislature or Governments from imposing certain restrictions on internal trade and ended by saying that any law passed in contravention of that section would, to the extent of the contravention, be invalid. It should be noted that clause (a) of sub-section (1) of that section was directly and expressly related to and constituted a restriction on the legislative power of the Province under entries 27 and 29 and not entry 48 in List II. That section obviously was inserted in that Act for the purpose of achieving, as far as possible, free trade within India by preventing the Provinces from checking or hampering the distribution of goods or from setting up barriers against internal trade in India regarded as one economic unit.

Pursuant to the legislative power thus conferred on them the Provincial Legislatures enacted Sales Tax Acts for their respective Provinces. In enacting the Sales Tax Acts, the Provincial Legislatures, however, did not confine the operation of their legislation to sales or purchases which took place exclusively within their respective territories. Although in most of those Acts "sale" was first defined as meaning a transfer of the property in the goods, so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet by means of Explanations to that definition, they gave extended meanings to that word and thereby enlarged the scope of their operation. Thus some of those Acts purported to tax a sale or purchase irrespective of the place where it took place, if only the goods were within the Province at the time the contract for sale or purchase was made or the goods were produced or manufactured within the Province after the contract had been made. In short, if any one or more of the ingredients of sale, *e.g.* the contract, delivery, payment of price, or the passing of property etc., took place within a particular Province or the goods were produced or manufactured or otherwise found there that Province felt free to impose a tax on that transaction of sale or purchase

although all the other ingredients thereof took place outside that Province.

The Indian States were not governed by the distribution of legislative powers contained in the Government of India Act, 1935, and were, therefore, generally free to make whatever laws they thought fit to make. They, however, enacted Sales Tax Acts on the model of the Sales Tax Acts of neighbouring Provinces in British India. Thus the Travancore Act XVIII of 1124 was substantially a reproduction of the Madras Sales Tax Act.

The result of the imposition of tax on the sale or purchase of goods on the basis of a very slight connection or nexus between the sale or purchase and the taxing Provinces or States was that in some cases one single transaction of sale or purchase became liable to be taxed in different Provinces or States. This imposition of multiple taxes was certainly calculated to hamper and discourage free trade within India, which section 297 of the Government of India Act, 1935, was designed to achieve. This was the position immediately before the Constitution of India came into operation. Our Constitution makers were well aware of this evil.

Articles 245 and 246 distribute legislative power between Parliament and the State Legislatures as per three Lists set forth in the Seventh Schedule to the Constitution. Thus Parliament alone is empowered to make laws, under entry 41 in the Union List, with respect to trade and commerce with foreign countries, under entry 42, with respect to inter-State trade and commerce and under entry 83, with respect to duties of customs, including export duty. The State Legislatures, on the other hand, are alone authorised to make laws, under entry 26 in the State List with respect to trade and commerce within the State, under entry 27 with respect to production, supply and distribution of goods, under entry 52 with respect to taxes on the entry of goods into a local area for consumption, use or sale therein and under entry 54 with respect to taxes on sale or purchase of goods other than newspapers,

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It may be mentioned in passing that in List I in the Seventh Schedule to the Government of India Act, 1935, there was no separate or specific entry corresponding to entry 42 in the Union List in the Seventh Schedule to the Constitution. This shows that our Constitution has deliberately assigned inter-State trade and commerce, like foreign trade, to the exclusive care of Parliament and, therefore, out of the reach of the law-making powers of the State Legislatures. Having thus distributed legislative powers between Parliament and the State Legislatures, article 265, which is in Part XII of the Constitution and headed "Finance, Property, Contracts and Suits", provides that no tax shall be levied or collected except by authority of law. Article 286, which is also in Part XII, imposes some restrictions on the legislative competency of the State Legislatures. That article runs as follows:

"286. *Restrictions as to imposition of tax on the sale or purchase of goods.* (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(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.

Explanation.—For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions, of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

In these appeals we are not concerned with sales or purchases of essential commodities and, therefore, nothing further need be said about clause (3). Leaving out that clause, the rest of the article, broadly speaking, enjoins that no State law shall impose or authorise the imposition of tax on sale or purchase of goods made—

(a) outside the State,

(b) in the course of the import of the goods into or the export of the goods out of India,

(c) in the course of inter-State trade and commerce.

I may here mention that in the exercise of the powers conferred on him by the proviso to clause (2) of article 286 the President did, by the Sales Tax Continuance Order, 1950, direct that any tax on the sale or purchase of any goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution should, until the 31st March, 1951, continue to be levied notwithstanding that such imposition was contrary to the provisions of clause (2) of article 286.

Quite apart from the marginal note to article 286, a cursory perusal of that article will show that its avowed purpose is to put a restriction on the power of the

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State Legislatures to make a law imposing tax on the sale or purchase of goods under entry 54 in the State List. It may be recalled that the Provincial Legislatures purporting to act under entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, enacted Sales Tax Acts imposing tax on sales or purchases of goods on the basis of one or more of the ingredients of sale having some connection with the Province and that this practice resulted in the imposition of multiple taxes on a single transaction of sale or purchase thereby raising the price of the commodity concerned to the serious detriment to the consumer. That evil had to be curbed and that is what has been done by clause (1)(a) of article 286. It imposes a ban that 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 outside the State. This provision clearly indicates that in making it our Constitution proceeds on the footing that a sale or purchase has a location or situs. The explanation to clause (1)(a) then goes on to say that for the purpose of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has, by reason of such sale or purchase, passed in another State. The *non obstante* clause in the Explanation also clearly implies that the framers of the Constitution adopted the view that a sale or purchase has a situs and further that it ordinarily takes place at the place where the property in the goods passes. The Explanation, however, provides that, in spite of such general law, a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. In effect, therefore, the Constitution, by this Explanation to clause (1)(a), acknowledges that under the general law the sale or purchase of the kind therein

mentioned may not really take place in the delivery State, but nevertheless requires it to be treated as if it did. That is to say, the Explanation creates a legal fiction. Reference may be made to *Income-tax Commissioner, Bombay* v. *Bombay Trust Corporation*(1) where Viscount Dunedin explains the meaning of a legal fiction.

When a legal fiction is thus created, for what purpose, one is led to ask at once, is it so created? In *In re Coal Economising Gas Company*(2) the question arose as to whether under section 38 of the Companies Act, 1867, a shareholder could get his name removed from the register on the ground that the prospectus was fraudulent in that it did not disclose certain facts, or whether his remedy was against the promoter only. James L.J. said at pages 188-9:

"The Act says that an omission shall be deemed fraudulent. It provides that something which under the general law would not be fraudulent shall be deemed fraudulent and we are dealing with a case of that kind. Where the Legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed. Now the Act does not say that the prospectus shall be deemed fraudulent simpliciter but that it shall be deemed fraudulent on the part of the person wilfully making the omission as against a shareholder having no notice of the matter omitted; and I am of opinion that the true intent and meaning of that provision is to give a personal remedy against the wrongdoer in favour of the shareholder."

So it was held that the fiction did not operate as against the company and there could, therefore, be no rectification of the register. Again, in *Ex parte Walton*(3), referring to section 23 of the English Bankruptcy Act, 1869, James L.J. said:

"When a statute enacts that something shall be deemed to have been done, which in fact and in truth

(1) [1929] L.R. 57 I.A. 49 at p. 55.
(2) [1875] L.R. 1 Ch. D. 182.
(3) [1881] L.R. 17 Ch. D. 756.

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was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

The above observations were quoted with approval by Lord Cairns and Lord Blackburn in *Arthur Hill* v. *The East and West India Dock Company*(1). Lord Blackburn went on to add at page 458:

"I think the words here 'shall be deemed to have surrendered'.....mean, shall be surrendered so far as is necessary to effectuate the purposes of the Act and no further;....."

In the case now before us, we have fortunately not to speculate as to the purpose for which the Explanation has introduced the fiction. It will be noticed that the Explanation does not say simpliciter that the sale or purchase is to be deemed to take place in the delivery State. By its opening words it expressly says that the sale or purchase is to be deemed to take place in the delivery State for the purposes of clause (1)(a). Therefore, the only effect of this assignment of a fictional location to a particular kind of sale or purchase in a particular State is to attract the ban of clause (1)(a) and to take away the taxing power of all other States in relation to such a sale or purchase even though the other ingredients which go towards the making up of a sale or purchase are to be found within these States or even if under the general law the property in the goods passes in any of those States. The purpose of the Explanation ends there and cannot be stretched or extended beyond that purpose.

It is said by some of the Advocates-General that a sale or purchase which falls within the Explanation is subject to the taxing power of the State in which the property in the goods passes under the general law as well as to the taxing power of the State in which, by virtue of the Explanation, the property in the goods is to be deemed to pass. On the other hand some of the other Advocates-General contend that by virtue of the Explanation the latter State alone becomes entitled to tax such a sale or purchase. Both these contentions

(1) [1884] L.R. 9 App. Cas. 448.

appear to me to be founded on a misapprehension as to the real purpose of clause (1)(a) and the Explanation thereto. As I have already said, the only object of clause (1)(a) is to prevent the imposition of multiple taxes on a single sale or purchase and, therefore, it provides that no law of a State shall impose a tax on sale or purchase which takes place outside the State. Thus by one stroke the taxing power of all States outside whose territories the sale or purchase is, by the fiction, deemed to take place is eliminated. To say that the effect of clause (1) (a) read in the light of the Explanation is to permit both States, namely, the State where the property passes under the general law as well as the State in which, by force of the Explanation, the sale or purchase is deemed to take place, to tax such sale or purchase is to stultify the very purpose of that clause, for, then it will fail to prevent the imposition of multiple taxes which it is obviously designed to prevent. It is quite clear also that clause(1)(a) in terms only takes away the taxing power of all States with respect to a sale or purchase which, by reason of the fiction introduced by the Explanation, is to be deemed to take place outside their respective territories. The purpose of the Explanation is only to explain the scope of clause (1)(a). By fictionally locating a sale or purchase in a particular State it, in effect, says that it takes place outside all other States so as to give it the benefit of the exemption of clause (1)(a). The Explanation is neither an exception nor a proviso. It is not its purpose nor does it purport, substantively and *proprio vigore*, to confer any power on any State, not even on the delivery State, to impose any tax. The fiction of the Explanation cannot be extended to any purpose other than the purpose of clause (1)(a), that is, to any purpose other than the purpose of taking away the taxing power of all States outside whose territories the sale or purchase is, by the fiction, deemed to take place. There its purpose ends and it cannot be used for the purpose of giving any taxing power on the delivery State, for that is quite outside its avowed purpose. Whether the

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delivery State can tax the sale or purchase of the kind mentioned in the Explanation will depend on other provisions of the Constitution. Neither clause (1) (a) nor the Explanation has any bearing on that question.

It is urged that even if by virtue of clause (1)(a) all States in relation to which a sale or purchase is, by the Explanation, to be deemed to take place outside their limits are precluded from taxing such sale or purchase and assuming that the Explanation does not, by implication or otherwise, permit even the delivery State to tax such sale or purchase, nevertheless the delivery State has the power under entry 54 in the State List read with article 100(3) of the Constitution to make a law imposing a tax on such sale or purchase. This certainly would be the position if there was nothing else in the Constitution. It should be borne in mind that the State Legislatures may make laws with respect to taxes on sale or purchase of goods (entry 54). If in purported exercise of powers under those entries a State Legislature makes a law imposing taxes on sale or purchase which partakes of the character of a sale or purchase made in the course of inter-State trade or commerce it may quite easily encroach upon the Union Legislative field under entry 42 in the Union List and such encroachment may conceivably give rise to questions as to the validity of the State legislation. It is in order to protect the free flow of inter-State trade, which is placed in the care of Parliament alone, against any interference by State taxation and to prevent a recourse to the argument of pith and substance in justification of such encroachment by a State on the Union field that the Constitution, by article 286 (2), has expressly placed a restriction on the legislative power of the State in relation to tax on inter-State sale or purchase. Clause (2) of article 286 provides that, except in so far as Parliament may by law otherwise provide, no law of a State shall impose a tax on the sale or purchase of goods when such a sale or purchase takes place in the course of inter-State trade or commerce. Clause (2),

therefore, places yet another ban on the taxing power of the State under entry 54 read with article 100 (3), in addition to the ban imposed by clause (1) (a). A sale or purchase contemplated by the Explanation to clause (1) (a) undoubtedly partakes of the nature of a sale or purchase made in the course of inter-State trade and, therefore, no State, whether it is the State in which the property in the goods passes under the general law or the State where the goods are delivered as mentioned in the Explanation, can impose a tax on such sale or purchase, unless and until Parliament lifts this ban. This appears to me to be the purpose and design of clause (2).

It is said that if the sale or purchase referred to in the Explanation is to be hit by clause (2) then clause (1) (a) was wholly redundant, for there was no point in exempting it from the ban imposed by clause (1)(a) and hitting it by clause (2). As already stated the purpose of clause (1)(a) is to place a sale or purchase taking place outside a State beyond the taxing power of that State. The Explanation only explains, by an illustration as it were, the scope of that ban. Clause (1) (a) only contemplates one aspect of a sale or purchase, namely, its territorial location, and by imposing a ban on the taxing power of a State with respect to a sale or purchase, which takes place outside its limits, it purports to remedy the particular evil of multiple taxation founded on the nexus theory to which reference has been made. That is the limited purpose of clause (1) (a) and that purpose is fulfilled by placing a ban on those States in relation to which a sale or purchase is, by reason of the Explanation, deemed to take place outside their territories. Whether the delivery State where the sale or purchase is deemed to take place can tax such a sale or purchase is not, as I have said, the concern of clause (1) (a) or the Explanation. It is only when the question of the competency of a State Legislature under entry 54 of the State List to make a law imposing a tax on a sale or purchase which by the fiction is deemed to take place within its territory is raised that clause (2) comes

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into play. That clause looks at a sale or purchase in its inter-State character and imposes another ban in the interest of the freedom of internal trade. The immediate purpose of the two bans are, therefore, essentially different and I see no reason to hold that although clause (1)(a) read with the Explanation does not expressly authorise the State, in which the sale or purchase is, by the Explanation, to be deemed to take place, to tax such sale or purchase, it must nevertheless, by implication, be regarded not only as having authorised that State to do so but as having also exempted it from the ban imposed by clause (2). To adopt this course is to resort to the fiction created by the Explanation for quite a different and collateral purpose which is entirely beyond its avowed purpose. This, as I have explained, is, on principle and on authority, not permissible for the court to do.

The same argument is advanced in a different and more attractive language. It is urged that once it is determined, with the aid of the fiction introduced by the Explanation that a particular sale or purchase has taken place within the delivery State, it must follow as a corollary that the transaction loses its inter-State character and falls outside the purview of clause (2), not because the definition in the Explanation is used for the purpose of clause (2) but because such sale or purchase becomes, in the eye of the law, a purely local transaction. I am unable to accept this argument which appears to me to overlook the declared purposes of clause (1)(a) and of the Explanation. In all inter-State sale or purchase the property passes and the sale or purchase takes place in one or the other State according to the rules laid down in the Sale of Goods Act and the inter-State character of the sale or purchase is not affected or altered by the fact of the property passing in one State rather than in another. What is an inter-State sale or purchase continues to be such, irrespective of the State where the property passes. While, therefore, to locate a sale or purchase, by a legal fiction, in a particular State, is to make it appear to be an outside sale or purchase in relation to

all other States, so as to attract the ban of clause (1)(a) on those States, such location cannot possibly alter the intrinsic inter-State nature or character of the sale or purchase. A sale or purchase which falls within the Explanation does not become, in the eye of the law, a purely local sale for all purposes or for all times. It is to be deemed to take place in the delivery State only for the purpose of clause (1)(a), *i.e.*, for taking ing away the taxing power of all other States. I can see no warrant for the argument that the fiction embodied in the Explanation for this definitely expressed purpose, can be legitimately used for the entirely foreign purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase for all purposes. Such metamorphosis appears to me to be completely beyond the purpose and purview of clause (1) (a) and the Explanation thereto. To accede to this argument will mean that the Sales Tax Officer of the delivery State will have jurisdiction to call upon dealers outside that State to submit returns of their turnover in respect of goods delivered by them to dealers in that State under transactions of sale made by them with dealers within that State. Thus a dealer in, say, Pepsu who delivers goods to a dealer in, say, Travancore-Cochin will become subject to the jurisdiction of the last mentioned State and will have to file returns of their turnover and support the same by producing their books of account there. I cannot imagine that our Constitution-makers intended to produce this anomalous result. On the contrary, it appears to me that they enacted clauses (1) (a) and (2) for the very purpose of preventing this anomaly. I repeat that it is not permissible, on principle or on authority, to extend the fiction of the Explanation beyond its immediate and avowed purpose which I have explained above. In my judgment, until Parliament otherwise provides, all sales or purchases which take place in the course of inter-State trade or commerce are, by clause (2) of article 286, made immune from taxation by the law of any State, irrespective of the place where the sales or purchases may take place, either under the general law or by virtue

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of the fiction introduced by the Explanation to clause (1) (a). If a particular inter-State sale or purchase takes place outside a State, either under the general law or by virtue of the fiction created by the Explanation, it is exempted from taxation by the law of that State both under clause (1) (a) and clause (2). If such inter-State sale or purchase takes place within a particular State, either under the general law or by reason of the Explanation, it is still exempt from taxation even by the law of that State under clause (2), just as a sale or purchase which takes place within a State, either under the general law or by reason of the Explanation, cannot be taxed by the law of that State, if such sale or purchase takes place in the course of import or export within the meaning of clause (1) (b).

It is next contended that the ban imposed by article 286 (2) is itself subject to the provisions of article 304. That article is one of the seven articles (articles 301 to 307) grouped under the heading "Trade, commerce and intercourse within the territory of India" in Chapter XIII. Article 301 proclaims that, subject to the provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. Article 302 empowers Parliament to impose by law such restrictions on the freedom of trade, commerce and intercourse between one State and another as may be required in public interest. Indeed, entry 42 in the Union List gives exclusive power to Parliament to make laws with respect to inter-State trade and commerce and clause (2) of article 286 also recognises this power of Parliament. Article 303 prohibits both Parliament and State Legislatures from showing preference to one State over another, or discriminating between the States. Then comes article 304 which runs as follows:—

"304. Notwithstanding anything in article 301 or article 303, the legislature of a State may by law—

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however as not

to discriminate between goods so imported and goods so manufactured or produced, and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

The argument is that the ban imposed by clause (2) of article 286 should, like article 301, be subordinated to article 304. I am unable to accept the correctness of this argument. Article 301 is expressly made subject to the other provisions of Chapter XIII which includes article 304 but no part of article 286 is so subjected. Article 304 (a) gives power to the State Legislatures to put a tax on goods imported from other States whereas article 286 restricts their taxing power on sale or purchase, *i.e.*, the transaction itself as distinct from the goods. Article 304 appears to me to be closely related to entry 52 in the State List and restricts the State's powers under that entry but article 286 controls the State's powers under entry 54 in the State List. In the circumstances article 304 cannot properly be read into article 286. Article 304, of course, can have no bearing whatever upon clause (1) (b) of article 286.

An argument is advanced suggesting that if all sales or purchases that take place in the course of inter-State trade and commerce are put beyond the taxing power of the States then that fact will very seriously and prejudicially affect the economy of the States and may prevent them from discharging the responsibilities, which all welfare States are expected to do. Apart from the benefit that a free flow of trade is likely to bring to the public generally the apprehended danger appears to me to be more assumed than real. The proviso to clause (2) empowers the President to direct the continuation, up to the 31st March, 1951, of the sales tax which was being levied before the commencement of the Constitution and in fact the President, on

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the same day as the Constitution came into force, actually made an order in exercise of this power as hereinbefore stated. There was, therefore, no immediate danger to State revenue and the *status quo* was maintained. Further, clause (2) itself empowers Parliament to lift the ban imposed by it, should Parliament, in the interest of State economy, think fit to do so. The Constitution has thus itself provided ample safeguards and this court need not assume unto itself the functions of Parliament and indirectly under the guise of interpretation seek to secure the safety of State finance which Parliament itself has adequate direct power to do.

Finally, it is said that the effect of holding that the ban imposed by clause (2) extends to all sales or purchases which take place in the course of inter-State trade or commerce will be to place at a disadvantage the consumers of similar goods manufactured or produced locally, for the actual consumer will have to pay no tax if he buys similar goods manufactured in another State direct from the manufacturers or sellers in that other State. I do not think this objection has much force. Very few actual consumers take the trouble of importing goods for their own consumption direct from the manufacturers or sellers outside their State. Further, the cost of carriage, handling charges and the risk of loss and damage in transit will effectively deter actual consumers from procuring goods direct from outside, for in all probability the cost of such enterprise will exceed the sales tax which the consumer will save by not buying the local goods. Besides, if India is to be regarded as one economic unit there can be no objection to a consumer in one State getting goods cheaply from a neighbouring State.

I now pass on to another important object of article 286 which is to encourage our foreign trade. Power is given exclusively to Parliament to make laws under entry 41 with respect to trade and commerce with foreign countries and under entry 83 with respect to duties of custom including export duties. If in addition to the import or export duty, which Parliament

alone can impose, the State Legislatures were left free to make a law under entry 54 in the State List levying another tax on a sale or purchase which takes place in the course of the import of the goods into or the export of the goods out of the territory of India such double taxation will necessarily increase the price of the goods. Such imposition may easily result in our not getting imported goods which may be of everyday requirement at a reasonable price or our not being able to compete in the world market with our exported goods. This will discourage and hamper our foreign trade and eventually affect the Union revenue. It is to avoid that calamity that article 286(1)(b) was introduced in the Constitution.

Article 286 (1) (b) has to be construed in the light of its aforesaid constitutional purpose and against its commercial background. Import and export trade is principally carried on by big mercantile houses. They purchase goods locally either against orders secured from overseas buyers or in anticipation of such orders and send the goods out of India by land or sea to be delivered eventually to the overseas buyers. They purchase goods in foreign countries against orders secured from local Indian buyers who may be wholesale or retail dealers or in anticipation of such orders and bring them into India by land or sea to be delivered to their constituents. In some cases the manufacturers or producers in India may themselves export their goods direct to overseas buyers and the retail dealers or even actual consumers in India may occasionally import goods direct from overseas sellers. Export and import transactions of this clause are, however, comparatively speaking, smaller in volume than the great bulk of foreign trade put through by the big export and import houses. The constitutional purpose is to foster this foreign trade and to preserve the Union revenue. For achieving that purpose, the Constitution has by clause (1) (b) of article 286 imposed a ban on the State Legislatures preventing them from impinging upon the Union field of foreign trade and imposing tax on sales or purchases made in the course of import or export under the guise or pretence of making laws

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with respect to taxes on sale or purchase of goods under entry 54 in the State List.

The question arises: what is the scope of the ban thus imposed on the States? The answer will depend on the meaning that may be ascribed to the phrase "in the course of" occurring in clause (1) (b). It should be noted that the same phrase is also used in clause (2) of that article. In *The State of Travancore-Cochin* v. *The Bombay Company Ltd.*(1), this court has held that "Whatever else may or may not fall within article 286(1)(b) sales and purchases which themselves occasion the exports or imports of the goods, as the case may be, out of or into the territory of India come within the exemption....." In other words, this court has held that sales or purchases which themselves occasion the imports or exports are sales or purchases which take place "in the course of" import or export. This was sufficient to dispose of that case and it was not then necessary to decide what else might fall within that phrase. This court is now called upon to decide that point.

Article 286(1)(b) exempts from taxation by a State law all sales or purchases which take place "in the course of the import of the goods into or the export of the goods out of the territory of India." The word "course" conveys to my mind the idea of a gradual and continuous flow, an advance, a journey, a passage or progress from one place to another. Etymologically it means and implies motion, a forward movement. The phrase "in the course of" clearly has reference to a period of time during which the movement is in progress. Therefore, the words "in the course of the import of the goods into and the export of the goods out of the territory of India" obviously cover the period of time during which the goods are on their import or export journey. This view, which has been said to be founded on mechanical test, is accepted by the Advocate-General of the appellant State and, indeed, by all Advocates-General other than those of Uttar Pradesh and Mysore. The Advocates-General of the two last mentioned States seek to limit the

(1) [1952] S.C.R. 1112.

exemption only to such sales or purchases as themselves occasion the export or import. That narrow view, however, fails to take note of the etymological meaning of the word "course" and the very large number of sales or purchases that take place while the goods are on the high seas by the endorsement and/or delivery against payment from hand to hand of the relative shipping documents covering goods worth crores of rupees. In the case of exports from India, such sales or purchases in India will not be many for the shipping documents will ordinarily be sent to the foreign country and the sales or purchases, if any, during transit, by delivery of the shipping documents will take place there. In some cases, however, where the goods are shipped to the exporter himself or his agent without any previous sale, such sale by delivery of shipping documents may take place in India. But take the case of an Indian importer who places an order or indent with an overseas merchant for the supply of a large quantity of goods. The goods are shipped and the shipping documents are sent by air mail and presented to the Indian importer by the overseas merchant through his bank. The Indian importer receives the shipping documents against payment. The goods are, however, on the high seas on their import journey and it will take some time before the steamer will arrive. The market may fluctuate in the meantime. Is the importer to wait patiently with folded hands trusting to luck that the market may be in his favour when the goods actually arrive? Is he not to be allowed to make a gain in case there is a rise in the market rate or cut his loss if there is a downward tendency in the market price? Is he to keep his money locked up all this time? The exigencies of foreign trade require that he must be permitted to sell the goods by delivering the shipping documents and realise his money and to again invest it in fresh imports. This is how foreign trade is done. It is stated in Halsbury's Law of England (Hailsham Edn.), Vol. 29, p. 210:

"280. The commercial reason for the evolution of the 'c.i.f.' contract lies in the length of the time taken

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in the carriage of goods by sea. It is to the advantage of neither seller nor buyer that the goods, the subject matter of the contract should remain *en dehors* commerce while they are in course of shipment. It is to the seller's interest to receive the money equivalent to the goods as soon as possible after the date of the contract of sale, and until he has received actual payment of the price he normally desires to be able, if he wishes, to obtain credit upon the security of the transaction. The buyer, on the other hand, normally desires to be able to deal with the goods, for resale or finance, as soon as possible. To meet these business necessities on the part of both buyer and seller the 'c.i.f.' contract was evolved."

Such sales or purchases, by delivery of shipping documents while the goods are on the high seas on their import journey were and are well recognised species of transactions done every day on a large scale in big commercial towns like Bombay and Calcutta and are indeed the necessary and concomitant incidents of foreign trade. To hold that these sales or purchases do not take place "in the course of" import or export but are to be regarded as purely ordinary local or home transactions distinct from foreign trade, is to ignore the realities of the situation. Such a construction will permit the imposition of tax by a State over and above the customs duty or export duty levied by Parliament. Such double taxation on the same lot of goods will increase the price of the goods and, in the case of export, may prevent the exporters from competing in the world market and, in the case of import, will put a greater burden on the consumers. This will eventually hamper and prejudicially affect our foreign trade and will bring about precisely that calamity which it is the intention and purpose of our Constitution to prevent. It is, therefore, clear, to my mind, that the ban imposed by article 286(1)(b) protects all sales or purchases of goods that take place during the period the goods are on the high seas. This construction appears to me to be imperative not only etymologically but also commercially and constitutionally. Indeed, this view is implicit in our judgments in the case of *The State of*

Travancore-Cochin v. *The Bombay Company Ltd.*(1) referred to above, in which we said at page 1120:—

"We are not much impressed with the contention that no sale or purchase can be said to take place 'in the course of' export or import unless the property in the goods is transferred to the buyer during the actual movements, as for instance where the shipping documents are endorsed and delivered within the State by the seller to a local agent of the foreign buyer after the goods have been actually shipped or where such documents are cleared on payment or an acceptance by the Indian buyer before the arrival of the goods within the State. This view which lays undue stress on the etymology of the word 'course' and formulates a mechanical test for the application of clause (b) places, in our opinion, too narrow a construction upon that clause in so far as it seeks to limit its operation only to sales and purchases effected during the transit of the goods, and would, if accepted, rob the exemption of much of its usefulness."

The question immediately arises as to how the period of time covering the "course" of import or export is to be measured. When does it begin and when does it end? The learned Advocate-General of Travancore-Cochin contends—and in this he is supported by all the Advocates-General other than those of Uttar Pradesh and Mysore—that this period is confined within two terminii, namely, when the journey of the goods begins and when it ends. They maintain that the process of import or export ordinarily begins and ends at water's edge, although the period of journey of the goods from the port to the place of the importer or his representative in case of import or to the port from the place of the exporter or his representative in case of export may be added to the period of the actual voyage on the high seas. This contention cannot be accepted in view of our decision in the case of *The State of Travancore-Cochin* v. *The Bombay Co. Ltd.*(1) referred to above. According to that decision the phrase "in the course of" is not limited within these two terminii, *i.e.*, from the point of time the goods are handed over to the carrier

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up to the time they are delivered by the carrier. By adopting the principle of integrated activities we have included the agreement for sale to, or purchase from, the foreign merchant as taking place within the period connoted by that phrase. The agreement for sale or purchase, which occasions the export or import as the case may be, is obviously, in point of time, anterior to the actual and physical handing over of the goods to the carrier for taking the goods out of the country or for bringing them into the country as the case may be, but, nevertheless, such a sale or purchase has been held to have taken place "in the course of" export or import and as such exempt from taxation by the States. The question is how far backward we can trace the commencement of the "course" of export and how far forward we can fix the termination of the "course" of import.

In my judgment the purchase made by the exporter to implement his agreement for sale with the foreign buyer is to be regarded as having taken place "in the course of" export. I take this view, not because I read the words "in the course of" as synonymous with the words "for the purpose of" but because I regard the purchase by the exporter as an activity so closely integrated with the act of export as to constitute a part of the export process itself and, therefore, as having taken place "in the course of" the export. The learned Attorney-General accepts this position but the Advocates-General of the States demur. They maintain that in this view of the matter one cannot stop at the last purchase by the exporter but has to include the purchase by the person who sells to the exporter and all previous sales or purchases until one reaches the producer. I find no substance or cogency in this line of reasoning. In the last purchase by the exporter we have at least one party who is directly concerned with or interested in the actual export. The exporter is the connecting link, the commercial vinculum, as it were, between the last purchase and the export. But in the earlier sales or purchases neither the sellers nor the purchasers are personally concerned with or interested in the actual

export of the goods at all. Therefore the earlier sales or purchases may be too remote and may not be regarded as integral parts of the process of export in the same sense as the last purchase by the exporter can be so regarded. The line of demarcation is easily perceptible.

Let me explain my meaning step by step. As I have already stated, in some cases the exporters receive orders from the foreign buyers and then export the goods. It has been held by us that these orders themselves occasion the export and, therefore, they take place " in the course of" export. But these orders can occasion the export only if the exporters have the goods to export. The exporters are not necessarily the producers or manufacturers and in great many cases they have to procure the goods to implement the foreign orders. The overseas orders in such cases immediately necessitate the purchase of the goods and eventually occasion the export. The three activities are so intimately and closely connected, like cause and effect, with the actual export that they may well be regarded as integral parts of the process of export itself. As according to our previous decision the contract for sale with the foreign buyer starts the export stream and occasions the export, the purchases by the exporter to implement such contract necessarily take place, chronologically speaking, after the export stream has started and, therefore, must be an activity undertaken in the course of the export. Logically there can be no getting away from this conclusion. Therefore, these purchases to implement the sale which occasions the export must be immune from sales tax.

Is there any compelling reason to confine this immunity to sales or purchases to implement a foreign order or sale ? It cannot be overlooked that in a great majority of cases the export merchants, who, as I have said, are not, generally speaking, the actual producers or manufacturers of goods, start purchasing goods in advance, after taking into account the estimated quantity of the year's total production, the prevailing local prices, the likely demand from foreign countries

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and the prices ruling or likely to rule in the foreign markets. Such anticipatory purchases form by far the largest part of the activities of the export merchants and are regarded by businessmen as necessary incidents of the export trade. Is there any logical reason why purchases by the exporters in anticipation of future foreign orders should not also be taken as starting the "course" of the flowing stream of the export trade? The goods, it is true, are stored in godowns for a while awaiting actual exportation but that is like a stream falling into a lake and getting out by an outlet at the other end so that the undercurrent of the flow, even if imperceptible on the surface, is nevertheless continuous. One cannot overlook or ignore these well known preliminary but essential activities of the export merchants which necessarily precede and lead up to and, indeed, occasion or eventually make possible the ultimate physical movement of the goods. To hold that these purchases are independent local purchases totally distinct from the export trade will be to unduly narrow down the wide meaning of the flexible phrase "in the course of".

I find support for the views I have expressed above by the recent decision of the High Court of Australia in *The Queen* v. *Wilkinson*: *Ex parte Brazell, Garlick and Coy* (1) to which reference may now be made. Section 11(3) of a New South Wales statute called the Marketing of Primary Products Act, 1927-1940, provides, *inter alia*, that every producer who, except in the course of trade or commerce between the States, sells or disposes of or delivers any commodity, in respect of which a Board has been appointed, to persons other than the Board, and every person other than the Board who, except as aforesaid, buys, accepts or receives any such commodity from a producer shall be guilty of an offence. Brazell, a producer of potatoes in New South Wales at Dorrigo in New South Wales agreed to sell 48 bags of potatoes of Garlick Coy & Co., who were buying agents for J. E. Long & Co., general produce merchants, whose head office was at Jennings on the New South Wales side of

(1) (1952) 85 C.L.R. 467.

the border of that State and Queensland and who carried on business of purchasing and selling potatoes in both States. It was a term of the sale that the potatoes should be delivered from Brazell's lorry on trucks at Dorrigo in New South Wales. The potatoes were loaded at Dorrigo railway station into a truck and consigned by Garlick Coy & Co. to J. E. Long & Co. at Wallangarra on the Queensland side of the border adjoining Jennings. The potatoes arrived at Wallangarra and were sold by J. E. Long & Co. to a purchaser in Queensland. Brazell was charged with the offence of disposing of and Garlick and Coy, the two partners of Garlick Coy & Co. were charged with the offence of receiving the potatoes in contravention of section 11(3) of the Act. The question was whether the sale by Brazell to Garlick Coy & Co. in New South Wales was in the course of trade and commerce between the States. It was found that it was no part of the contract of sale between Brazell and Garlick Coy & Co. that the potatoes would go to any ascertained buyer in New South Wales or in any other State other than Garlick Coy & Co. who were, as Brazell believed, acting as agents for J. E. Long & Co., that Brazell was only concerned with the sale of his potatoes and that when he received his money he had no further interest in the potatoes, that there was no evidence that at the time Garlick Coy & Co. received the potatoes from Brazell there was any contract in existence for sale of them to any person in Queensland or any other State or that J. E. Long & Co. had any definite orders for the supply of them to any ascertained inter-State buyers or that the potatoes purchased by Garlick Coy & Co. were to fill any such orders. There was no binding agreement between Brazell and Garlick Coy & Co. or J. E. Long & Co. that the potatoes would be sold to buyers in Queensland. The Magistrate answered the question in the negative and convicted Brazell, Garlick and Coy, who thereupon moved for a writ of prohibition to restrain the informants and the Magistrate from further proceeding on those convictions. In a joint judgment Dixon, McTiernan, Fullager and Kitto, JJ. said :—

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"In our opinion on the foregoing facts the disposal and the receiving made the subject of the informations were in the course of trade and commerce between the States, within the meaning of the exception in section 11(3). Under the agreement for the sale and purchase of the potatoes the agents buying were required to consign the potatoes to a railway station in Queensland, and they did so consign them. For the purpose of the exception the delivery of the potatoes from the lorry into the railway truck can bear only the aspect of an essential and integral, even if initial, step in the transportation of the potatoes to Queensland."

In a separate but concurring judgment Williams J. said :—

" It was submitted to the Magistrate that the transaction must be looked at as a whole and not split up into separate contracts of sale and purchase. The Magistrate rejected this submission. In doing so he fell into error. He should have regarded the transaction as a whole. On this basis the facts proved that the acts done by the appellants were done in the course of trade and commerce between the States."

After stating the facts shortly Webb J. said :—

" The potatoes went to Queensland and were sold by the principals in that State. It may be that there was no binding stipulation that the potatoes would be sold in another State, and that they could have been resold in New South Wales without breach of agreement. But a legal nexus with inter-State trade, by a contract with the grower, is not required to secure the immunity given by section 92."

Reference was made in this case to the earlier case of *Clements and Marshall Pty Ltd.* v. *Field Peas Marketing Board* (1) where there were two sets of contracts, the first being contracts of sale by the producers to the dealers and the second contracts of resale by the dealers to buyers in other States. After pointing out that it was only the second set of contracts which in themselves were inter-State transactions Dixon J. said at page 429 :

(1) (1947) 76 C.L.R. 401.

"We should consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade, which, apart from the theoretical legal possibilities, must commercially involve transfer from one State to another."

The reasonings adopted by the learned Judges in the above cases apply with full force not only to clause (2) but also to clause (1)(b) of article 286 and we should construe the words "in the course of" in the same way as it has been done in the case of *Queen* v. *Wilkinson*(1). So construed, the purchases made by the exporter even without any previous order for export form "an essential and integral, even if initial, step" in the exportation of the goods. They form "an integral part of a continuous flow" which is commercially involved in the export process. No "legal nexus" between these purchases and the actual physical export is required to secure immunity from State taxation. In my judgment the last purchases by the exporters—whether in fulfilment of foreign orders already secured or in anticipation of future orders—must, in a commercial sense, be "in the course of" the export. The only way to give business efficacy to article 286 (1)(b) is to construe it in this commercial sense. Tax such purchases and you tax the export itself and by that process eventually cripple our export trade and bring about an adverse trade balance against us in the long run. It must always be borne in mind that with our exports we pay for our imports.

The same considerations apply to the first sale by the importers of the imported goods. I leave out of consideration the comparatively few cases of retail dealers themselves importing goods direct from overseas sellers and the still fewer cases of actual consumers importing goods for their own consumption. In by far the largest majority of cases it is the import merchants who bring goods into the country from abroad. Their business is to bring in the goods and thereby augment the general mass of goods in the country. In some cases the importers secure orders from local dealers and pursuant to such orders the importers import the goods

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from foreign lands. In most cases, however, the importers, in intelligent anticipation of local demands for such goods, place orders or indents with foreign sellers who, pursuant to such orders, send out the goods. Each of these orders or indents placed with the foreign sellers by the intending importers occasions the import and these purchases by the importers are certainly "in the course of" import of the goods into India within the meaning of our previous decision, and as such exempt from sales tax. We have also seen that the sale or purchase of goods during the period they are on the high seas is also "in the course of" import and as such immune from taxation by State law. The question then arises as to where the course of import ends. Does it end at the water's edge? If the sale by the importers while the goods are on the high seas be "in the course of" import and not liable to sales tax, there can be no logical reason why the first sale by the importers to dealers should not also be exempted. If such sale is to be regarded as purely a local sale and as such liable to taxation by the States, then, in effect, the tax will be a burden on the import itself. The importers have to pay the customs duty imposed by Parliament and if again the States impose additional taxes on the same goods such multiple taxation will raise the price of the goods to the detriment of the actual consumers and will eventually have an adverse effect on our import trade which it is the purpose of the Constitution to prevent. After all the business of the importers who bring the goods into our country is only to make the goods available to the internal trade, for they are not usually retail dealers who sell to the consumers direct. That business is completed only by the first sale by the importers to the dealers, wholesale or retail. It is only after that first sale of the goods by the importers to the dealers that the goods become parts of the general mass of property in the State concerned and thereafter subject to the taxing power of that State. The first sale by the importers to dealers, therefore, appears to me to be so inextricably wound up with the import itself that it may be commercially regarded as the culmination of the import activities and,

therefore, the end of the course of import. I arrive at this conclusion not by applying the American doctrine of unopened original package, which has now been abandoned even by the Supreme Court of America and has recently been rejected by us in the *Prohibition Case*(1) but on a construction of the phrase "in the course of" in the light of its etymology, the purpose of the Constitution and against the background of the known notions and practices of businessmen engaged in foreign trade. If, however, a particular importer himself happens to be a retail dealer of the goods and sells the goods to the actual consumers—and such cases are comparatively few—then such retail sales may, like local retail sales of similar goods, be liable to sales tax by the State. Whether an importer is or is not a retail dealer is a question of fact which is capable of proof and, therefore, need not be regarded as creating any insuperable difficulty in the matter of the assessment of the sales tax. For reasons stated above, I find no difficulty in holding that just like the last purchases by the exporters themselves for the purpose of sending the goods out of the country the first sales by the importers to dealers of goods brought by them into the country also come within the somewhat elastic expression "in the course of" export or import. As stated above, it is possible to draw the line there.

Reference is made to Clive M. Schmitthoff's Export Trade (2nd Edition, page 3) where the learned lecturer says:—

"When a merchant shipper in the United Kingdom buys, for the purpose of export, goods from a manufacturer in the same country the contract of sale is a home transaction, but when he resells these goods to a buyer abroad that contract of sale has to be classified as an export transaction."

The argument formulated on this authority is that this passage clearly establishes that the last purchase by the exporters and the first sales by the importers are home transactions and cannot be classified as export or import transactions at all. This distinction between

(1) [1951] S.C.R. 682.

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a home transaction and an export transaction made by the learned lecturer for the purposes of his book takes us nowhere. Nor do the American decisions which distinguish between intra-State trade and inter-State trade throw any light on the problem of construction of article 286 (1)(b) which is couched in language quite different from that used in the American Constitution. In America the question is clear cut, namely, is it an inter-State transaction or an intra-State transaction. Our problem, on the other hand, is to find out whether a given sale or purchase has taken place "in the course of" import or export. Simply to say that the particular sale or purchase is a home transaction does not solve our problem, for to say so is not to say that it cannot have taken place "in the course of" import or export. Indeed, article 286 (1)(b) postulates a home transaction, that is, a transaction which takes place within the State and then places it beyond the taxing power of that State on the ground that the transaction, has taken place "in the course of" import or export. If the transaction is not a home transaction, *i.e.*, if it takes place outside the State, clause (1)(b) need not be invoked at all, for then clause (1)(a) will prevent that State from taxing that outside transaction. It is only when a particular transaction is a home transaction in the sense that it takes place within the State that the further question arises, namely, whether that home transaction has taken place "in the course of" import or export within the meaning of clause (1)(b). The circumstance that a sale or purchase is a home transaction does not, therefore, conclude the matter and we have yet to solve that further question by the proper construction of clause (1)(b) according to its natural meaning and in the light of the Constitutional purpose and against the commercial back-ground as explained above.

A second argument founded on that passage is that if those home transactions are removed from the sphere of State taxation then the States will be deprived of one of the principal and fruitful sources of revenue and the economy of the States will be crippled and may

even collapse. It is pointed out that there is no provision in clause (1)(b), such as there is in clause (2), under which Parliament may lift the ban and, therefore, to place these home transactions beyond the taxing power of the States will irretrievably deprive them of a very large part of revenue which they have been realising from these sales or purchases made by the big importers or exporters many of whom are foreigners. There is no reason, it is urged, why they should not be made to pay sales tax like ordinary sellers or buyers in the States. As already stated, the imposition of double taxation may eventually hamper our own foreign trade. The object of our Constitution, apparent from the distribution of legislative powers and from article 286, is to place our inter-State trade and our foreign trade beyond the taxing power of the State. In the case of inter-State trade power is expressly given to Parliament by clause (2) of that article to lift the ban but in the case of foreign trade no such power is given to Parliament by that article to relax or lift the ban imposed by clause (1) (b) on the legislative power of the State Legislatures. It is for Parliament alone to make laws with respect to foreign trade. If the import or export of particular commodities is not beneficial to our country then Parliament, which is in a much better position than this court to know and judge of such matters, will, I am sure, make laws restricting or even prohibiting such imports or exports. If our imports or exports may bear the additional burden of taxation without any detriment to the consumers and our foreign trade and without any risk to the Union revenue, Parliament, I have no doubt again, will increase the customs or export duty and augment the revenue of the Union. If on its correct interpretation clause (1)(b) of article 286 causes loss to the States' revenue by depriving them of the taxes on such sales or purchases then such loss will clearly and solely be attributable to the intention of the Constitution as expressed in that clause. If that clause results in any danger to the economy of the States, I have no manner of doubt that Parliament

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will make good the loss to the States on the recommendation of the Finance Commission under some appropriate article out of articles 268 to 281 grouped under the heading " Distribution of Revenues between the Union and the States " in the very chapter in which occurs article 286 which is engaging our attention. In any event, the court must construe the Constitution as it finds it and if the construction of the plain language leads to any inconvenience to the States it will be for authority other than this court to rectify and remove the same.

It is said that it will be very difficult for the Sales Tax Officer to ascertain how much of the goods purchased by the exporters had actually been exported or how much of the goods imported by the importers had actually been distributed amongst the dealers as opposed to actual consumers. It is pointed out that ordinarily sales tax is levied on sales and the sellers are permitted to pass on the tax to the purchasers at the time of such sales. How, it is asked, is the seller to know whether his purchaser will actually honour his representation that he wants the goods for the purpose of export ? If the seller has no confidence in the integrity of his purchaser he will not sell to him without sales tax. The purchaser who is really exporter will not then perhaps buy from such a seller or if in the case of urgency he buys on payment of the sales tax may claim the refund, if there be any provision in that behalf, on proof that he actually exported the goods. It is said that exporters may change their minds and sell the goods locally after obtaining the exemption or the importers may sell the goods themselves in retail to the consumers after having got the exemption. There is no substance in this line of theoretical reasoning, for these are matters capable of being proved. If the exporters or their sellers cannot prove to the satisfaction of the officer that the exporters purchased so much goods for export and did actually export the same or the importers or their purchasers cannot prove that the importers imported so much goods and distributed so much amongst the dealers as

opposed to actual consumers, they will not get the benefit of the exemption and that is all. If the Sales Tax Officer finds no difficulty in ascertaining whether the goods are delivered in a State only for the purpose of consumption within that State or whether they were delivered for the purpose of resale out of that State so as to ascertain the applicability of the Explanation to clause (1)(a), why cannot the same officer find out what goods were purchased by the exporters for the purpose of export or what part of the imported goods were sold by the importers to the dealers? If the Income-tax Officer can without difficulty ascertain the income, profits and gains of a business and work out the provisions of section 10 of the Indian Income-tax Act and also can ascertain under section 42 of that Act the income deemed to accrue or arise within the taxable territory, there cannot be any insuperable difficulty in the way of the Sales Tax Officer determining the turnover of a particular dealer and working out the exemptions he is entitled to under article 286(1)(b). In any case the assumed difficulty of the Sales Tax Officer cannot alter or affect the correct construction of the constitutional provisions in question.

To summarise: The State Legislatures, under entry 54 of the State List, have power to make laws with respect to tax on the sale or purchase of goods. On this general power article 286 places four restrictions, namely, that no law of a State shall impose or authorise the imposition of tax on the sale or purchase of goods when such sale or purchase takes place (1) outside the State, (2) in the course of import or export, (3) in the course of inter-State trade and commerce and (4) in respect of essential commodities. The Explanation to clause (1)(a) only explains what is an outside sale or purchase, for by saying that a particular sale or purchase is to be deemed to take place in a particular State it only indicates that it is to be deemed to take place outside all other States so as to attract the ban of clause (1)(a) and thereby take away the taxing power of those other States with respect to such sale or purchase. The Explanation does not operate as an

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exception or a proviso but only explains sub-clause (a). The fiction created by the Explanation is only for the purposes of sub-clause (a), so that sales or purchases of the kind which fall within the Explanation get the benefit of the ban imposed by sub-clause (a). Therefore, the purpose of the Explanation read with sub-clause (a) is only to take away the power of taxation of those States in relation to those sales or purchases which are to be deemed to be outside sales or purchases. Its purpose is not and, indeed, it does not purport, to confer any taxing power on any State, and it cannot be resorted to for any such extraneous or collateral purpose. It does not convert an inter-State sale or purchase into an intra-State sale for any purpose other than the limited purpose of sub-clause (a). If a sale or purchase takes place outside a State, either under the general law or by virtue of the fiction created by the Explanation, then that State cannot, under clause (1) (a), tax such sale or purchase. If a sale or purchase takes place within a State, either under the general law or by reason of the Explanation, then, if such a sale or purchase takes place "in the course of" inter-State trade and commerce, no State, not even the State where the sale or purchase takes place as aforesaid can tax it by reason of clause (2), unless and until Parliament by law provides otherwise. A sale or purchase "in the course of" import or export within the meaning of clause (1) (b) includes (i) a sale or purchase which itself occasions the import or export as already held by this court, (ii) a sale or purchase which takes place while the goods are on the high seas on their import or export journey and (iii) the last purchase by the exporter with a view to export and the first sale by the importer to a dealer after the arrival of the imported goods. If a sale or purchase takes place within a State, either under the general law or by reason of the Explanation, then, if it takes place in the course of import or export as explained above, no State, not even the State within which such sale or purchase takes place can tax it by reason of clause (1) (b). This, in short, is the true meaning and import of article 286 as I read and understand it.

I have already stated, however, that the majority decision of this court in C. A. No. 204 of 1952 [*The State of Bombay* v. *The United Motors (India) Ltd.*(1)] has taken a different view of the meaning of clause (1) (a), the Explanation and clause (2) of article 286. In disposing of the present appeals, in so far as such disposal depends on those provisions, I am bound to follow the majority decision rather than my own view of them.

Bearing in mind the principles laid down by this court in *The State of Travancore-Cochin* v. *The Bombay Company Ltd.*(2) and in C. A. No. 204 of 1952 [*The State of Bombay* v. *The United Motors (India) Ltd. and others* (1)] and those explained above, I now proceed to consider the rival claims on their respective merits. There is really no substantial controversy as to the nature of the business carried on by the respondents. All of them are exporters of cashew-nut kernels on a fairly big scale. They procure raw cashew-nuts from three sources, namely, (i) from within the State of Travancore-Cochin, (ii) from neighbouring States and (iii) from Africa. Then they put the raw cashew-nuts through a certain process and obtain oil and edible kernels. These edible kernels they export to foreign countries. It will be recalled that the Travancore Sales Tax Act imposes taxes only on the purchase of "cashew and its kernels" but not on the sale thereof. The respondents claim exemption from sales tax for the period between the 26th January, 1950, when the Constitution came into force and the 29th May, 1950, which is the close of the assessment year. In support of their claim for exemption they rely on article 286 of the Constitution. It is necessary, therefore, to take each of the three categories of purchases and see if they or any part of them come within any of the exemptions provided by that article.

As regards local purchases of raw cashew-nuts there is no controversy that those purchases take place within the State and are, therefore, not entitled to the protection of article 286 (1) (a). These purchases do not take place "in the course of" inter-State trade or

(1) [1953] S.C.R. 1069. (2) [1952] S.C.R. 1112.

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commerce and, therefore, are not within clause (2) of that article. The only question is whether these local purchases can be said to take place "in the course of" export within the meaning of article 286 (1) (b). There is no dispute that the respondents do not sell the raw cashew-nuts or any portion of it within or without the State of Travancore. They do not sell the edible kernels, which they obtain as a result of the manufacturing process or any part of them within Travancore-Cochin or any other State in India except what have been described as factory rejections of negligible quantity which are not fit for export. All edible kernels are exported to foreign countries. Therefore, the respondents claim that all their purchases, whether made locally or in neighbouring States or from abroad, are, "in the course of" export within the meaning of clause (1) (b) in the sense explained above. The appellant State, however, maintains that commercially "the goods" exported are entirely different from "the goods" purchased by reason of the process of manufacture they are put through and are, therefore, not entitled to the benefit of the ban imposed by clause (1) (b).

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, pealing, 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 pealing 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 commerical 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).

As regards the purchases of raw cashew-nuts from the neighbouring States, the position, as found by the High Court on remand, is that the bulk of such purchases were made by the respondents or their agents from sellers in the neighbouring States and the goods so purchased were delivered by the sellers to the respondents or their agents in the States where the purchases took place. The contract of purchase was fully implemented when as a direct result of the purchase delivery was given outside Travancore. The respondents or their agents thereafter brought, the goods, which by then had become their own goods, into Travancore, by rail or otherwise. The delivery of the goods under the contract for purchase having already taken place outside Travancore, the subsequent despatch of those goods to Travancore cannot possibly be said to have been delivery within that State as a direct result of the purchase within the meaning of the Explanation. Indeed, the learned Advocate-General of Travancore-Cochin concedes that as purchases of this type did not fall within the Explanation they must be regarded as having taken place outside Travancore-Cochin and must, accordingly, be exempt from taxation by Travancore-Cochin under article 286 (1) (a). If it could be shown that although such sales or purchases took place entirely in those other States yet they were made between two parties residing or carrying on business in two States and for the purpose of consumption or of sale in the purchasers' State then these sales or purchases might have been said to have

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been made "in the course of" inter-State trade and commerce and as such exempt from taxation by both the States under article 286 (2). The transactions of sale or purchase withwhich we are concerned having taken place within the period covered by the President's order made under the proviso to that clause, no protection under clause (2) can be claimed for these transactions. Further, if the cashew-nuts purchased in neighbouring States were for the purpose of exporting them out of the territories of India and were actually so exported, then these purchases would be "in the course of" export and as such exempt from tax under article 286 (1) (b). As a matter of fact, however, the cashew-nuts purchased in the neighbouring States were not actually exported but were put through a process of manufacture and the goods that were exported were not the same as those that were purchased as explained above and, therefore, clause (1) (b) gives no protection to these purchases. On the facts of these cases, these purchases, however, took place outside Travancore-Cochin and as such are, therefore, immune from taxation by Travancore-Cochin only under clause (1) (a) which is not affected by the President's order made under the proviso to clause (2).

The learned Advocate-General of Travancore-Cochin says that there is another type of purchase from neighbouring States where the seller in the neighbouring State directly delivers the goods under the contract for sale or purchase to the respondents in Travancore. Learned counsel for the respondents maintains that there is actually no case of purchase of this type. It is not necessary at this stage to go into this controversy, for, the matter having been fully argued, it is just as well to lay down the correct principle applicable to such purchases, if any. If there is no such purchase where the seller from the neighbouring State delivers the goods as a direct result of such purchase to the respondents in Travancore, no question will arise. Assuming that ther are cases of such purchases, then it is clear that the first condition of the Explanation is satisfied, namely, the goods are delivered within the State as a direct result of such purchase. The next question is

—was such delivery for the purpose of consumption in the State? The raw cashew-nuts, after they reach the respondents, are put through a process and new articles of commerce, namely, cashew-nut oil and edible cashew-nut kernels, are obtained. It follows, therefore, that the raw cashew-nut is consumed by the respondents in the sense I have mentioned. Consequently, such purchases will fall squarely within the Explanation and will be deemed to take place in Travancore so that under clause (1)(a) the neighbouring States will not be entitled to impose any tax on these sales or purchases. According to my view, and on the reasonings adopted in the Australian case, these purchases are "in the course of" inter-State trade and as such will be protected by clause (2) but according to the majority view in the Bombay appeal, which must prevail, such purchases will become, as a result of the Explanation, an intra-State purchase in Travancore and consequently out of the protection of clause (2) and liable to taxation by Travancore law. Even if according to my view these purchases fall within clause (2) they will nevertheless be liable to be taxed under the Travancore Act, in spite of that clause, by virtue of the order made by the President in exercise of the powers conferred on him by the proviso to that clause. These purchases will not get any protection under clause (1) (b) because the goods purchased were not the goods that were exported. These purchases, if any, will, therefore, be liable to be taxed under the Travancore Act.

The third source from which the respondents purchase raw cashew-nuts is Africa. The respondents place orders for the purchase of raw cashew-nuts with commission agents in Bombay and the Bombay agents pass on the orders to the African sellers or their agents in Bombay. The African sellers then send the goods by steamer and send the bills of lading, invoice etc. to their bank in Bombay. The bank presents the documents to the Bombay agents of the respondents and the Bombay agents pay the price

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and take delivery of the shipping documents in Bombay. The Bombay agents then prepare their own invoice showing the amounts paid by them on account of the respondents and their own commission and send their invoice together with the shipping documents to their Travancore bank. The Travancore bank presents all these documents to the respondents who pay the Bombay agents' invoice amount and take delivery of the shipping documents. All these generally happen while the goods are on the high seas. On arrival of the goods at Travancore port, the respondents clear the goods on presenting the bill of lading etc. This is the main type of purchase of African raw cashew-nuts. The appellant State concedes that these are not liable to tax. In the first place the purchases were outside the State and, therefore, clause (1)(a) applies. In the next place these purchases took place "in the course of" import and as such are exempt from taxation under article 286(1)(b), because (i) they themselves occasioned the import as already held by this court and (ii) the property in the goods passed and the purchases took place when the goods were on the high seas. These purchases, however, cannot be said to have taken place "in the course of" export, for reasons already explained.

There is another type of purchase of African raw cashew-nuts. There the African sellers ship raw cashew-nuts on their own initiative or at the instance of their Bombay agents and while the goods are on the high seas, they are sold by endorsement and delivery of the bills of lading etc. at Bombay to the Bombay agents of the respondents and then the same procedure is followed as in the first case. Here the purchase by the respondents did not occasion the import, but, nevertheless, the sale or purchase was outside the State and further the goods being on the high seas at the time when the property passed such sale or purchase must be regarded as having taken place "in the course of" import of the goods according to the mechanical test explained above. The learned Advocate-General of the appellant State does not dispute that such purchases are also to go free from sales tax.

The next type of purchase of African raw cashew-nuts is as follows: The different respondents place separate orders with the same Bombay commission agents and the Bombay commission agents place one consolidated order for the entire quantity of the goods with the African sellers. The African sellers thereupon ship the entire lot of goods under one bill of lading and they send the bill of lading and invoice etc. to their Bombay bank and the Bombay bank presents the same to the Bombay agents. The Bombay agents pay for the entire lot of goods and obtain delivery of the shipping documents and then they prepare separate invoices for each of their constituents, namely, the respondents, including their own commission and split up the consignment in the sense that they draw separate delivery orders covering the respective quantity of goods ordered by each respondent and send such invoice and delivery orders to the Travancore bank, who presents the same to the respondents who receive the delivery orders against payment. The goods are then cleared on the original bill of lading on arrival of the steamer at Travancore and thereafter the respondents take delivery of the goods from the warehouse of sellers or the Bombay agents against their respective delivery orders. A purchase of this type cannot properly be said to occasion the import of the goods. What really occasions the import of the goods is the order placed by the Bombay agents. The Bombay agents not having passed the orders placed by the respondents separately to the African sellers and the African sellers not having shipped the respective quantities of goods under separate bills of lading none of the orders can be said to have occasioned the import, for in such a case there is no privity between the African sellers and the individual respondents and the import is referable only to the order placed by the Bombay agents which in the eye of the law is not the order of any of the respondents but a consolidated order placed by the Bombay agents on their own responsibility and account with the object of eventually distributing the goods amongst the different respondents in fulfilment of their respective orders. In the next place the delivery of the bill of

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lading covering the entire goods to the Bombay agents cannot be said to be a delivery to the respondents of the goods separately ordered by each of the respondents. The sale in such a case takes place in Travancore on the handing over of the delivery orders to the respective respondents and the delivery of the goods thereunder from the warehouse in Travancore. These goods, therefore, cannot claim exemption from tax under the provisions of article 286 (1) (a) or 286 (1) (b) or 286 (2).

The last type of transaction in African raw cashew-nuts is where the purchase takes place after the cashew-nuts arrive in Travancore port and are thereafter sold and delivered ex-godown to the respondents. This is clearly a case of intra-State sale and clauses (1) (a) and (2) of the article can have no application to it. The respondents cannot claim exemption under clause (1)(b) for reasons stated above.

As the respondents do not claim any exemption from taxation with respect to pre-Constitution purchases, the same need not be discussed separately.

For reasons stated above, the decision of the High Court must be upheld only to the extent that the assessments should be quashed. The matter must, however, go back to the Sales Tax Officer who must make a reassessment in the light of the principles laid down in the two previous cases referred to regarding clause (1) (a), the Explanation and clause (2) and in the light of the principles discussed above regarding clause (1)(b).

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