

VIJAYALAXMI CASHEW COMPANY AND ORS.
v.
THE DEPUTY COMMERCIAL TAX OFFICER AND ANR.

DECEMBER 15, 1995

[A.M. AHMADI, CJ, B.L. HANSARIA AND SUHAS C. SEN, JJ.]

Central Sales Tax Act, 1956 :

S.5(3)—Sale or purchase taking place in the course of export/import—Raw cashew nuts purchased in the penultimate sale—Held, not the same goods as raw cashew kernels—Immunity from taxation by State—Only when goods exported are the same which were purchased.

In the present batch of appeals against the judgment of the Madras High Court, the appellants contended that cashew bought and sold by them in the course of export trade was not different from cashew kernels; that the Judgment in *State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashew Nut Factory & Ors.*, [1954] SCR 53 dealt with Art. 286 of the Constitution and did not conclude the questions raised in these appeals; that the said Judgment was based on peculiar findings of facts made in that case; that the perception of the Court in this type of controversy has changed as would be evident from the later decisions of the Supreme Court; and that sub-section (3) of S.5 of the Central Sales Tax Act, 1956 was not considered in *Shanmugha Vilas* case.

Dismissing the appeals, this Court

HELD : 1.1. Cashew nut kernels are not the same goods as raw cashew nuts. It does not appear that either on facts found or in law, the decision in *Shanmugha Vilas* Case needs reconsideration.

1.2. The distinction sought to be drawn between the provisions of sub-section (3) of Section 5 of the Central Sales Tax Act and Article 286(1) of the Constitution is misconceived. Under Article 286(1) the Court has to examine whether any tax is being imposed by the State Legislature on the sale or purchase of goods "in the course of the import of the goods into or export of the goods out of the territory of India". In order to resist imposition of sales tax by the State, the assessee will have to establish the

A identity of the goods purchased with the goods to be exported out of the territory of India. In order to fulfil an export obligation, if an exporter purchases goods and as a result of some processing, the identity and character of the goods change, then it will not be a case of export of the same goods. There is no dispute that every change does not bring into
B existence new goods nor can it be said that however small the change may be due to the processing, the identity of the goods will be completely lost. It is a question of fact and degree. But the point to note is that the issue before the Supreme Court in *Shanmugha Vilas* case and the issue that has been raised in the present case are the same. Therefore, it will be wrong to distinguish the judgment of the Supreme Court in *Shanmugha Vilas* case
C as confined to Article 286 of the Constitution. It cannot be said that the judgment in *Shanmugha Vilas* does not throw any light on the interpretation of sub-section (3) of Section 5 of the Central Sales Tax Act. The controversy raised in both the cases is about the identity of the goods purchased and the identity of the goods sold. In the present cases the
D penultimate sale is in question. *Shanmugha Vilas* considered only the case of the actual export sale or the last sale in course of export under Article 286 of the Constitution. But the present cases relate to a sale which took place immediately before the actual sale for export. [722-H, 723-A-E]

E 1.3. The question in this case is whether the cashew nut kernels which were exported are 'those goods' which were purchased by the assessee in the penultimate transaction. This was precisely the question that was answered in the negative in *Shanmugha Vilas* case. Therefore, no distinction can be drawn between the cases now under appeal and the decision of this Court in *Shanmugha Vilas's* case on the plea that the scope of sub-section (3) of Section 5 of the Central Sales Tax Act was wider than Article
F 286 of the Constitution. It is true that sub-section (3) by a legal fiction has widened the scope of export sale, but the basic concept remains the same. In order to get immunity from taxation by the State legislature, the goods exported must be the same goods which were purchased. [724-B-C]

G 1.4. In the cases under appeal, it has been noted in the order dated 15th April, 1982 by the Deputy Commercial Tax officer that cashew nut was commercially a different commodity from raw cashew nut as oil was extracted and thereafter kernels were exported under separate contracts. It also appears from the said order of 15th April, 1982 that an amount of Rs.
H 18,419 has been added back to the turn over on account of sale of cashew

husk. Therefore, a purchaser of raw cashew nut can extract oil and sell it in the domestic market, he can also sell the husk locally, he can also extract the kernels after going through an elaborate process and sell them with or without further processing to the exporter for fulfilling his export commitments. Since raw cashew nuts can be used for so many purposes and the process of extracting the kernels so elaborate, it cannot be said that the goods (raw cashew nuts) purchased in the penultimate sale were the same goods (cashew nut kernels) which were sold for export. [729-H, 730-A-B]

State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashew Nut Factory and Others, [1954] SCR 53, explained and held it does not require reconsideration.

Mohd. Serajuddin v. State of Orissa, 36 STC 136 (SC); *M/s Tungabhadra industries Ltd. v. The Commercial Tax Officer, Kurnool*, [1961] 2 SCR 14; *Deputy Commissioner of Sales Tax (Law) v. Pio Food Packers*, 46 STC 63 (SC); *Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan*, 46 STC 256 (SC) and *Sterling Foods v. State of Karnataka*, 63 (STC) 239, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5626-62 of 1985.

From the Judgment and Order dated 12.12.84 of the Madras High Court in W.P. No 3968/82 and Nos. 4332, 9862, 9916, 9863, 4333, 1026, 4663, 9867, 9866, 9864, 9856, 6333, 9861, 9857, 9855, 9860, 4976, 4336 of 1982, Nos. 5579, 4330, 2229, 2234, 2400, 2402, 10968, 4326, 327, 2237, 10969, 5580, 2401, 2403, 2233 of 1983 and Nos. 170, 175, and 1100 of 1984.

H.N. Salve, P.S. Poti, T.L. Viswanatha Iyer, A.K. Ganguli, S. Ganesh, K.J. John, P.K. Manohar, S. Prasad, Kumar Parimal, MKD Namboodiri, S. Balakrishnan, EMS Anam, A. Subba Rao, M.T. George, Ms. Aruna Mathur, Ajay Kapur, A. Mariarputham, M. Veerappa, N. Sudhakaran, S. Ganesh, TVSN Chari and Nikhil Nayyar for the appearing parties.

The Judgment of the Court was delivered by

SEN, J. : The Central Sales Tax Act, 1956 (for short 'the Act') was amended by insertion of sub-section (3) of Section 5 by Act No. 103 of 1976 with effect from 1st April, 1976. The said Section 5(3) reads as under:

A "5. When is a sale or purchase of goods said to take place in the course of import or export.

(1).....

(2).....

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(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

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The common contention of the appellants in this batch of appeals is that the judgment of this Court in the case of *State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashew Nut Factory and Others.*, [1954] SCR 53, deals with Article 286 of the Constitution and does not conclude the questions raised in these cases. It has been contended in the first place that cashew bought and sold by the appellants in the course of export trade is not different from cashew kernels. It has further been contended that the judgment in *Shanmugha Vilas Case* (Supra) was based on peculiar findings of facts made in that case. Moreover, the perception of the Court in this type of controversy has changed as will be evident from later decisions of this Court. Lastly, it was contended that sub-section (3) of Section 5 of the Act did not fall for consideration by this Court in *Shanmugha Vilas Case* (supra). Therefore, in any way, that decision cannot cast any light on the controversy raised in this case. It has been contended that cashew cannot be regarded as a commodity different from the cashew kernels. The last sale or purchase of cashew in this case took place before the sale or purchase occasioning the export of cashew kernel out of the territory of India and, therefore, should also be deemed to be in the course of the export trade. There may be some processing of the cashew purchased by the dealers before the cashew nuts were sold but that will not make the goods which were sold, in any way different from the goods that were purchased. Both were cashew or cashew nuts.

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In our view, the distinction sought to be drawn between the provisions of sub-section (3) of Section 5 of the Act and Article 286(1) of

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the Constitution is misconceived. Under Article 286(1), the Court has to examine whether any tax is being imposed by the State Legislature on the sale or purchase of goods "in the course of the import of the goods into or export of the goods out of the territory of India". In order to resist imposition of sales tax by the State, the assessee will have to establish the identity of the goods purchased with the goods to be exported out of the territory of India. In order to fulfill an export obligation, if an exporter purchases goods and as a result of some processing the identity and character of the goods change, then it will not be a case of export of the same goods. There is no dispute that every change does not bring into existence new goods nor can it be said that however small the change may be due to the processing, the identity of the goods will be completely lost. It is a question of fact and degree. But the point to note is that the issue before the Supreme Court in *Shanmugha Vilas* case (supra) and the issue that has been raised in the present case are the same. Therefore, it will be wrong to distinguish the judgment of the Supreme Court in *Shanmugha Vilas* case (supra) as confined to Article 286 of the Constitution. We are unable to uphold the argument that this judgment does not throw any light on the interpretation of sub-section (3) of Section 5 of the Act. The controversy raised in both the cases is about the identity of the goods purchased and the identity of the goods sold. In the case before us, the penultimate sale is in question. The Supreme Court considered only the case of the actual export sale or the last sale in course of export under Article 286 of the Constitution. But here, we have a case of a sale which took place immediately before the actual sale for export. In the case of *Mohd. Serajuddin v. State of Orissa*, 36 STC 136 (SC), it was held that under Article 286, the sale which was not liable to tax under the State Sales Tax Act was only the actual sale by the exporter, but the benefit of export sale did not extend to the penultimate sale to the Indian exporter for the purpose of export. This led to insertion of sub-section (3) of Section 5 of the Central Sales Tax Act, with effect from 1st April, 1976 whereby the last sale or purchase of any goods preceding the sale or purchase occasioning the export of the goods were also granted exemption from the State levy. But in order to claim protection of sub-section (3) of Section 5, the assessee will have to establish that the last sale or purchase before the sale or purchase occasioning export were of those goods which were exported. The deeming section expands the concept of export sales to include the penultimate sale or purchase of goods preceding sale or purchase occasioning the export. But

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- A the penultimate sale or purchase of goods must be of those goods which were actually exported.

B The question in this case is whether the cashew nut kernels which were exported are 'those goods' which were purchased by the assessee in the penultimate transaction. In other words, whether the raw cashew nuts which were purchased were 'those goods' which were exported? This was precisely the question that was answered in the negative in *Shanmugha Vilas* Case. Therefore, no distinction can be drawn between the cases now under appeal and the decision of this Court in *Shanmugha Vilas's* on the plea that the scope of sub-section (3) of Section 5 of the Central Sales tax Act was wider than article 286 of the Constitution. It is true that sub-section C (3) by a legal fiction has widened the scope of export sale, but the basic concept remains the same. In order to get immunity from taxation by the State legislature, the goods exported must be the same goods which were purchased.

D The question raised in these appeals is whether the purchase of raw goods made by the appellants after which the cashew kernels were extracted and exported to foreign countries could be subjected to the State Sales Tax Act in view of the provisions of Section 5(3) of the Central Sales Tax Act. In other words, the question is whether the export of cashew E kernels obtained out of raw cashew nuts would amount to export of "those goods which had been purchased". The answer will depend on the nature of the cashew kernel that are exported and the raw cashew purchased by the dealers. This aspect of the matter was gone into in depth in *Shanmugha Vilas* Case (supra) by S.R. Das, J. (as he then was). It has been recorded F in the Judgment of Das, J. that the case was heard at great length and over several days and ultimately the High Court was directed to investigate into the disputed facts and a send report. On the basis of the report given by the High Court, the appeals, were heard and finally disposed of. It will be wrong to distinguish this case on the ground of any special facts. It does not appear from the judgment that any special feature of cashew trade G peculiar to *Shanmugha Vilas* was considered by this Court. The appellants have also not been able to show any special fact in this case which is contrary to what has been found in the judgment of Das, J. In fact, no endeavour has at all been made to show how cashew kernels are extracted and in what way the kernels are basically nothing but the fruits originally H plucked. The facts noted in the remand report sent by the High Court have

not been shown to be contrary to the facts found in the case of the appellants. A

The facts which were noted by the Constitution Bench in that case were recorded by Das, J. at page 110 in the following words :

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

On the basis of these facts, Das J. concluded at page 111 that : E

"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 are 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)." F G

It was argued, and some of the High Courts have also taken the view, that this judgment is confined to the facts of this case. But this, in our opinion, will be a wrong view to take. By that judgment as many as eight appeals were disposed of. The High Court on remand had made a report H

- A on how the edible kernels are extracted from raw cashew nuts and having examined minutely the whole process, the Court came to the conclusion that the kernels were not the same goods as raw cashew nuts purchased by the dealers. What was exported were the edible kernels and what was purchased for the purpose of export were raw cashew nuts. This Court has taken the view that after examining the facts in detail the final products were not the same goods as raw cashew nuts.

- It may be mentioned that Patanjali Sastri, C.J., speaking for the majority, was also of the view that raw cashew nuts and kernels manufactured out of them by various processes, partly mechanical and partly manual, were not commercially the same commodity. It was held at page 70 :

"This finding, which is not seriously disputed before us, would be an additional ground for rejecting the claim to examination in respect of these purchases."

- D It has not been shown how the facts of the cases under appeal are different from the facts of that case. It has also not been shown that the kernels in these cases have been extracted from cashew nuts by a different process or the cashew nuts were of some other variety. In that view of the matter, it must be held that the controversy is concluded by the judgment of this Court in *Shanmugha Vilas* case (supra).

- We are also unable to uphold the contention that perception of this Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five-Judge Bench, which has not been doubted by any later judgment of this Court, cannot be treated as overruled by implication. The judgments on which the reliance was placed on behalf of the appellants do not support this contention in any manner. In the case of *M/s. Tungabhadra Industries Ltd. v. The Commercial Tax Officer, Kurnool*, [1961] 2 SCR 14, a Bench of five Judges had to decide the question whether refined oil continues to be groundnut oil within the meaning of Rules 5(1)(k) and 18(2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. It was argued that such oil did not possess the characteristic colour or taste or odour, etc. of raw groundnut oil. The Tribunal as well as the High Court had taken the view that hydrogenated oil (Vanaspati) ceased to be groundnut oil by reason of the chemical changes which resulted in the acquisition of new properties including the loss of its fluidity. The

Tribunal as well as the High Court had taken the view that Vanaspati was not groundnut oil, but a product of groundnut oil, manufactured out of groundnut oil therefore not entitled to the benefit of the deduction under Rule 18(2). This Court upheld the contention made on behalf of the appellant that hydrogenated groundnut oil was no lesser groundnut oil than either refined or even unrefined oil. The fact that the quality of the oil had been improved did not negative its continuing to be oil and the materials before the departmental authorities and the Court held that it continued to be oil and was nothing more.

The Court took the view :

"No doubt, several oils are normally viscous fluids, but they do harden and assume semi-solid condition on the lowering of the temperature. Though groundnut oil is, at normal temperature, a viscous liquid, it assumes a semi-solid condition if kept for a long enough time in a refrigerator. It is therefore not correct to say that a liquid state is an essential characteristic of a vegetable oil and that if the oil is not liquid, it ceases to be oil. Mowrah oil and dhup oil are instances where vegetable oils assume a semi-solid state even at normal temperatures. Neither these, nor coconut oil which hardens naturally on even a slight fall in temperature, could be denied the name of oils because of their not being liquid. Other facts like ghee are instances where the physical state does not determine the identity of the commodity.

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Both the Tribunal as well as the High Court have pointed out that except for its keeping quality without leakage, hydrogenated oil serves the same purpose as a cooking medium and has identical food value as refined groundnut oil. There is no use to which the groundnut oil can be put for which the hydrogenated oil could not be used, nor is there any use to which the hydrogenated oil could be put for which the raw oil could not be used. Similarly we consider that hydrogenated oil still continues to be 'groundnut oil' notwithstanding the processing which is merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desire to consume groundnut oil."

- A We fail to see how the principles laid down in the case of *Tungabhadra* (supra) runs counter to the ratio of the judgment of this Court in the case of *Shanmugha Vilas* (supra). This Court in the *Tungabhadra* case (supra) laid down that liquid state was not an essential characteristic of a vegetable oil. If the oil is not liquid, it did not cease to be oil. The groundnut oil assumed semi-solid condition if kept for long enough time in a refrigerator. There was no use to which the groundnut oil could be put for which hydrogenated oil was not put.

- C As has been noted in the judgment in *Shanmugha Vilas* case raw cashew nut cannot be used as edible nut at all. Moreover, there is no dispute that it can be used for more than one purpose. Therefore, in our judgment, it will not be right to say that the decision in *Tungabhadra's* Case has in any way whittled down the principles laid down in *Shanmugha Vilas* Case.

- D In the case of *Deputy Commissioner of Sales Tax (Law) v. Pio Food Packers*, 46 STC 63 SC, it was held that when pineapple fruit was processed into pineapple slices for the purpose of being sold in sealed cans, there was no consumption of the original pineapple fruit for the purpose of manufacturing and the case did not fall within Section 5A(1)(a) of the Kerala General Sales Tax Act, 1963. The language of clause (a) of Section 5A(1) of the Kerala General Sales Tax Act was "consumes such goods in the manufacture of other goods for sale or otherwise." All that this Court laid down was that when pineapple was sliced and canned for sale, the slices did not cease to be pineapple. It was pointed out in that case that there was no essential difference between pineapple fruit and canned slices. It was held that clause (a) of Section 5A(1) truly spoke of goods consumed in the manufacture of other goods for sale. This Court merely held that if pineapple is sliced and made ready for sale in the market, the slices did not lose the character of being pineapple. There again it was case of a fruit which was merely sliced and made ready for sale by adding preservatives and by canning. This case also does not in any way affect the principle laid down in the case of *Shanmugha Vilas*. Furthermore, in that case, the problem was construction of the word 'consume' in Section 5A(1)(a) of Kerala General Sales Tax Act.

- H In the case of *Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan*, 46 STC 256 (SC), it was held by this Court that "rayon tyre-cord

fabric" was "rayon fabric". It was observed by Pathak, J. (as his Lordship then was) that it was fairly well-settled that the words or expressions must be construed in the sense in which they are understood in the trade, by the dealer and the consumer. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention when the statute was enacted." A

In the instant case also, if the common parlance test is applied, cashew nuts and cashew kernels have different markets altogether. It is true that in the case of *Shanmugha Vilas*, it was noted that the finding of the High Court was not disputed seriously before this Court. But nothing has been brought on record to contradict the finding of the High Court in that case in any one of the cases now before us. B C

Sterling Foods v. State of Karnataka, 63 STC 239 was a case of export of lobsters. In that case the appellants purchased shrimps, prawns and lobsters locally for complying with orders for export and they cut the heads and tails of the shrimps, prawns and lobsters and then they were subjected to peeling, deveining and cleaning and freezing before being exported in cartons. The appellants claimed that no local sales-tax was payable by them in view of Section 5(3) of the Central Sales Tax Act, 1956 which precluded levy of sales-tax on local purchase if they were made pursuant to export orders and the sale was of 'those goods' purchased. It was held by this Court that by reason of processing of the goods after their purchase, there was no change in their identity and that, in fact, commercially they were to be regarded as the original goods. D E

This case does not help the appellants. Even if a purchaser goes to the retail market to buy lobsters, the seller may, if so required by the buyer, peel the shell and cut the head and tail of the lobsters according to the direction of the customer. But the sale will, nonetheless, be of lobsters. If this is done on a big scale by a trader, the character of the goods sold will not change. The goods that were purchased were those goods which were exported. F G

In the cases under appeal, it has been noted in the order dated 15th April, 1982 by the Deputy Commercial Tax officer that cashew nut was commercially a different commodity from raw cashew nut as oil was extracted and thereafter kernels were exported under separate contracts. It also appears from the said order of 15th April, 1982 that an amount of H

- A Rs. 18,419 has been added back to the turn over on account of sale of cashew husk. Therefore, a purchaser of raw cashew nut can extract oil and sell it in the domestic market, he can also sell the husk locally, he can also extract the kernels after going through an elaborate process and sell them with or without further processing to the exporter for fulfilling his export commitments. Since raw cashew nuts can be used for so many purposes and the process of extracting the kernels so elaborate, it cannot be said that the goods (raw cashew nuts) purchased in the penultimate sale were the same goods (cashew nut kernels) which were sold for export.
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- C We are of the view that cashew nut kernels are not the same goods as raw cashew nuts. It does not appear that either on facts found or in law, the decision in *Shanmugha Vilas* Case needs reconsideration. The appeals, therefore, fail and are dismissed. There will be no order as to costs.

G.N.

Appeals dismissed.