STATE OF KARNATAKA

v.

AZAD COACH BUILDERS PVT. LTD. ETC.

FEBRUARY 15, 2006

[ASHOK BHAN AND S.H. KAPADIA, JJ.]

Central Sales Tax Act, 1956:

Section 5(3)—Words "in relation to such exports"—Connotation of—Exporter manufacturing chassis—Giving it to bus-body builder—Body-builder delivering the complete bus to exporter who then exports the same—Claim of assessee body-builder for benefit under Section 5(3)—Held, the point involved in this case is : whether the test of the "same goods" is the essence of Section 5(3) or whether the test of the subject matter of the contract occasioning the export is the principle behind Section 5(3)—It is in this context that the words 'in relation to such exports" became crucial—Judgments of this Court in **Sterling Foods*** *and* **Vijaylakshmi Cashew Company** *need reconsideration by a larger Bench—Papers be placed before Hon'ble the Chief Justice of India for directions—Karnataka Sales Tax Act—Second Schedule—Entry 14—"Bus" and "bus-body".*

Sterling Foods* v. *State of Karnataka,* **[1986] 3 SCC 469 and ***Vijaylakshmi Cashew Company & Ors.* **v.** *Dy. Commercial Tax Officer* **(1996) 1 SCC 468, referred to.**

K. Gopinathan Nair and Ors. **v.** *State of Kerala,* **[1997] 10 SCC 1, relied on.**

Mohd. Serajuddin & Ors. **v.** *State of Orissa,* **[1975] 2 SCC 47;** *Consolidated Coffee* **v.** *Coffee Board,* **[1980] 3 SCC 358 and** *Satnam Overseas (Export)* **v.** *State of Haryana,* **[2003] 1 SCC 561, cited.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5616-5617 of 2000.

From the Final Order and Judgment and dated 8.2.2000 of Karnataka High Court in S.T.R.P. Nos. 4/1997 C/W 5/1998.

A G.E. Vahanvati, S.G. (*Amicus Curiae*), Kavin Gulati, Sanjay R. Hegde, Anil K. Mishra, A. Rohen Singh and Ms. Rashmi for the Appellant.

Soli J. Sorabjee, Joseph Vellapalli, M.N. Shankeregowda, Vikas R, B.K. Choudhary, E.C. Vidya Sagar, E.R. Kumar, N. Prasad Pritesh Kappor, Sumit Goel and P.H. Parekh (for P.H. Parekh & Co.) for the Respondents.

B

The Order of the Court was delivered:

ORDER

Manufacturers of buses, such as, TATA and Ashok Leyland get orders C for export of buses. One such export order is annexed as "R-3" in the paperbook. These manufacturers manufacture chassis and they thereafter place orders on the assessee for building bus-bodies (See: annexure "R-5" in the paperbook). The name of the assessee in the present case is Azad Coach Builders Pvt. Ltd. The foreign buyers place an order on the exporter, namely, D TATAs for supply of "the complete bus/buses" giving specifications of the chassis and the bus-body. In some cases, the foreign buyers even indicate the source from which the exporter in India should get the "bus-body" constructed. After constructing the bus-body as per the specifications and after completing the bus in its entirety, the assessee (body-builder) delivers "the complete bus" to TATA/Ashok Leyland who then exports the same to Sri Lanka for the E purposes of accounting. The exporter raises a bill for chassis on the assessee and instead of making entries in the accounts by first debiting the value of the chassis to the body-builder (assessee) and then deducting the amount of chassis from invoice of a complete bus, the exporter invoices the assessee only in respect of bus-body and not for the entire complete bus. It is not disputed that after getting the bus completed, nothing is done by the exporter F to change the identity of the bus, thus entitling the assessee of the benefit under section 5(3) of the Central Sales Tax Act, 1956 (hereinafter referred to as "the said Act").

According to the department, the contract given to the assessee by the G exporter is for the bus-body; that, "bus" and "bus-body" are different articles mentioned in entry 14 to the second schedule to the Karnataka State Sales Tax Act; that, the bus-body is a separate saleable commodity different from chassis or from the complete bus and, therefore, according to the department, the assessee is not entitled to the benefit of section 5(3) of the said Act. According to the department, in order to attract section 5(3), the assessee H should have manufactured and sold the complete bus in order to constitute

penultimate sale under section 5(3) of the said Act. According to the department, since the sale is only for the bus-body and not for the complete bus by the assessee to the exporter in India, the assessee is not entitled to the benefit of section 5(3) of the Act. According to the department, exemption under section 5(3) is admissible only when the commodity exported is the same as the commodity purchased and in the present case, according to the department, the commodity exported is "the complete bus" whereas the commodity purchased by the exporter is only the bus-body and, therefore, the assessee is not entitled to exemption under section 5(3) of the said Act. In this connection, reliance was placed by the department on the judgments of this court in the following cases:

1. *Consolidated Coffee* v. *Coffee Board*, reported in [1980] 3 SCC 358 (para 17);
2. *Sterling Foods* v. *State of Karnataka*, reported in [1986] 3 SCC 469 (para 3);
3. *Vijaylakshmi Cashew Company & Ors.* v. *Dy. Commercial Tax Officer*, reported in [1996] 1 SCC 468 (para 4); and
4. *Satnam Overseas (Export)* v. *State of Haryana* reported in [2003] 1 SCC 561 (para 44).

According to the department, the word "sale" as defined under section 2(g) of the said Act makes it clear that the word "sale" indicates transfer of property in goods by one person to another for cash or deferred payment. In order to constitute "sale", it is urged, that, there has to be an agreement for sale of goods between two persons competent to contract for consideration and that the property in goods must pass as a result of such transaction. It is submitted on behalf of the department that in order to constitute "sale", the agreement and the sale must relate to the same subject matter. According to the department, "bus-body" is composite item capable of being sold in the market as goods and the transfer of property in goods between the bus-body manufacturer (assessee) and its purchaser (TATA) is confined only to the bus-body and not to the complete bus. According to the department, the words "in relation to export" as found in section 5(3) do not, in any manner, control the first part of the said section which uses the expression "in goods" and the expression "those goods". According to the department, the above two expressions have been used out of abundant caution and that the expression "in relation to export" does not expand the scope of section 5(3) to include the goods other than those which are ultimately exported. According to the

A department, section 5(3) was introduced in the said Act only to get over the decision of this court in the case of *Mohd. Serajuddin & Ors.* v. *State of Orissa,* reported in [1975] 2 SCC 47, in which case this court while construing section 5(1) held that even in relation to the same goods which were sold by the assessee to the State Trading Corporation (STC) for export, Serajuddin was not entitled to the benefit of that section. According to the department, B in order to get over the narrow interpretation placed by this court on section 5(1) in the case of *Mohd. Serajuddin* (supra), section 5(3) was introduced in the Act as indicated by the statement of object and reasons given for the introduction of section 5(3) of the Act and, therefore, the introduction of section 5(3) is not to enlarge the scope of section 5(1) so as to allow C components or raw-materials of the ultimate export to get the benefit of exemption which will defeat the very purpose of the said sub-section. According to the department, the purpose behind introduction of section 5(3) is not to include goods to the benefit of exemption other than those which are ultimately exported.

D On behalf of the assessee, on the other hand, it has been contended that the reason behind the amendment of section 5, after the judgment of this court in the case of *Mohd. Serajuddin* (supra), is to make our exports competitive in the international market and to boost earnings in foreign exchange. According to the assessee, the courts are required to place a E purposive interpretation keeping in view the current realities and developments in the international market. On the scope of section 5(3), it is urged on behalf of the assessee that it is "the complete bus" which leaves the premises of the assessee. According to the assessee, the State seeks to levy CST on "the bus-body" built on to a chassis. The bus-body is constructed by the assessee. According to the assessee, the subject matter of the inter-state movement in F the present case was a bus and not the bus-body because it is the complete bus which is exported to Sri Lanka either through Mumbai or through Chennai port. According to the assessee, it is only on delivery of completed bus that the transfer of property in the bus-body takes place. Merely because the bus-body involved in such a transaction is exigible to local sales tax separately G from the bus, it cannot be contended that the bus-body is the subject matter of export. If the argument of the department is to be accepted, then it would follow that the bus-body is not the subject matter of inter-state movement and if it is so held, then it would not be taxable under section 6 of the said Act. According to the assessee, for a sale to qualify for exemption, it must be a penultimate sale, the goods sold must be for export, the goods must be H exported by the buyer (TATA), the buyer should have a pre-existing export

order and the sale must have been effected for complying with or in relation to the export order. According to the assessee, the aforestated last condition is the principal element under section 5(3). However, the sale will not come under section 5(3) if the buyer (TATA) subjects the goods to process after the sale and before its export if such process results in a change in the identity of the goods. It is pointed out that in the present case, the chassis are moved under customs bond for body building and export to the premises of the assessee; that, the assessee delivers the completed bus, which is moved under the bond directly to the port and exported to Sri Lanka. Consequently, the chain never breaks. Hence, the transaction in question, according to the assessee, is entitled to the benefit of section 5(3). According to the assessee, the expression "in relation to" in section 5(3) is of a wide import. It contemplates two subject matters connected with each other. Thus, in relation to export of a motor vehicle constructed with bus-body, if there is a prior order for sale of bus-body then sale of the bus-body will be in relation to the export of the complete bus and, therefore, sale of bus-body would constitute penultimate sale under section 5(3). Therefore, according to the assessee, due weightage must be given to the words "in relation to such exports", which emphasis has not been given in any of the earlier judgments of this court. According to the assessee, it is true that in the judgments cited hereinabove by the department, the test of "the same goods" has been applied and on that basis this court has repeatedly held that when the commodity exported is the same as the commodity purchased, the benefit of section 5(3) is admissible. However, according to the assessee, it is submitted that the test of "the same goods" is evolved judicially by this court only to indicate that the goods sold by the assessee should not have lost their separate identity at the time of export in order to apply section 5(3). If the goods sold by the assessee do not lose their separate identity at the time of export then the penultimate sale would be deemed to be in the course of export by virtue of section 5(3). However, according to the assessee, the observations of this court to the above effect, in the above cases including *Sterling Foods* (supra) and *Vijaylakshmi Cashew Company* (supra) have got to be understood in the light of the expression "in relation to such exports". According to the assessee, the expression "in relation to such exports" has not received due weightage in any of the earlier judgments. According to the assessee, the test of "the same goods" is not the principle behind section 5(3). That, the said test has been evolved only to explain that the exporter should not have undertaken any process to change the identity of the goods bought by him in order to confer the benefit of exemption on the penultimate sale. If the goods do not lose their identity, the benefit under section 5(3) is available. According to the

A assessee, the only requirement in section 5(3) is that the goods sold to the exporter should be exported as such without loss of identity and if that happens, the penultimate sale gets the benefit of section 5(3).

In our view, the scope of section 5(3) needs to be reconsidered. In none of the above judgments cited on behalf of the department, due weightage has B been given by this court to the words "in relation to such exports" occurring in section 5(3). There cannot be a bus without the bus-body. The subject matter of the inter-state movement and the subject matter of the export is a "bus" and not a "bus-body". It cannot be denied that the sale of the bus-body by the assessee to the exporter is in the course of export of the bus to Sri C Lanka. What is delivered to the exporter by the assessee is a complete bus. It is true that for accounting purpose, there is a bifurcation between the bus-body and a complete bus. Supposing, TATA/Ashok Leyland would have given chassis free of cost to the assessee calling upon the assessee to construct the bus-body on the chassis which construction/ fitment was to be done as per the specifications by the exporter. In such a case, would it not amount to D a transaction in the course of export or in relation to export of the buses? It is in this light, we find merit in the argument advanced on behalf of the assessee that due weightage has not been given to the words "in relation to such exports" occurring in section 5(3). For example, in the case of Computers, we now have a concept of, what is called as, "firmware" under which a E programme is embedded on to the integrated circuits/chips. Supposing, TATAs get an export order for a firmware, which cannot exist with the programme being loaded on to the hardware, and if they provide the hardware to the assessee who loads the programme on to the said hardware which then is sold to TATA who exports it, can it be said that the goods supplied are not the subject matter of the export. If the test of the "same goods" as mentioned in F the aforestated judgments of this court in the case of *Sterling Foods* (supra) and *Vijaylakshmi Cashew Company* (supra) is to be applied then the assessee/ supplier of firmware which contains a programme and which is the heart of the system will never get the benefit of section 5(3). In the earlier days, when *Mohd. Serajuddin's* case (supra) held the field, India was under licence raj. G At that time, exports were through STC. We do not have today such agencies. That system is disbanded. If so, the question which arises for determination is—what are the transactions covered by section 5(3)? The basic point involved in this case is—whether the test of the "same goods" is the essence of section 5(3) or whether the test of the subject matter of the contract occasioning the export is the principle behind section 5(3)? It is in this context that the words H "in relation to such exports" become crucial. If a transaction is in relation to

the exports, can it be denied the benefit of section 5(3). We are, therefore, of the view that the judgments of this court in the above two cases of *Sterling Foods* (supra) and *Vijaylakshmi Cashew Company* (supra) need reconsideration.

Before concluding, we may also refer to the judgment of this court in the case of *K. Gopinathan Nair & Ors.* v. *State of Kerala,* reported in [1997] 10 SCC 1, in which it has been held that section 5(3) will apply to penultimate sales if such sales satisfy two conditions, namely, (a) that such penultimate sale must take place after the agreement or order under which the goods are to be exported; and (b) it must be for the purposes of complying with such agreement or export order. We refer to para 12 of the judgment, which reads as under:

> 12. The aforesaid decision obviously was rendered in the light of the peculiar facts of the case before the Court. In that case the respondent-assessee was acting on behalf of the local importers and was almost as good as their agent for importing the goods on their behalf from foreign countries. The goods imported had to be the property of the licence-holder at the time of clearance from the customs and it was on the basis of the actual user' licence that the goods were imported by the respondent-assessee and therefore, it was held on the facts of that case that there was an integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from contract or mutual understanding or nature of the transaction which linked the sale to import which could not, without committing a breach of contract or mutual understanding be diverted elsewhere. As we will presently see no such conclusion is possible on the facts of these appeals and in the light of the salient features emerging on the record of these cases. On the contrary the decisions of the Constitution Benches of this Court in *Mohd. Serajuddin* v. *State of Orissa,* [1975] 2 SCC 47 and in *Binani Bros. (P) Ltd.* v. *Union of India,* [1974] 1 SCC 459 get squarely attracted. The other decision on which strong reliance was placed by the learned senior counsel for the appellants was rendered by a Bench of three learned Judges in the case of *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore,* [1980] 3 SCC 358, which is called the second *Coffee Board* case. In that case Tulzapurkar, J. speaking for the Bench had to consider the constitutional validity of Section 5 sub-section (3) of the Central Sales Tax Act which was brought on the

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Statute Book In the light of the earlier *Coffee Board* case judgment of the Constitution Bench in *Coffee Board, Bangalore* (supra) and the decision in *Serajuddin's* case (supra). By the said amendment to Section 5(3) the legislature thought it fit to grant exemption also to the penultimate sales prior to the sales in the course of export by the canalising agency. That was with a view to boost up foreign exchange earnings. While upholding the said amendment it was held that Section 5(3) of the Central Sales Tax Act has been enacted to extend the exemption from lax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export. The aforesaid decision, therefore, is confined to the validity of the amended provision which itself postulates that but for such amendment the penultimate sale would have remained outside the sweep of Section 5 sub-section (I) of the Central Sales Tax Act and such penultimate sale could not have been treated as sale in the course of export. Even that apart for interpreting the identical phraseology "in the course of" found both in Section 5(I) and Section 5(2) this decision by three learned Judges' Bench could naturally not be of any assistance to the appellants as obviously the three learned Judges' Bench could not have laid down anything contrary to what the Constitution Benches in *Serajuddin's* case and in the case of *Binani Bros.* had laid down on the true construction of the provisions of Sections 5(1) and 5(2) while interpreting the words 'in the course of export' or 'in the course of import' as found in these provisions."

In our view, these two tests, as mentioned in para 12 of the above judgment, are the only two requirements which every penultimate sale must satisfy in order to attract the benefit of exemption under section 5(3). In our view, the judgment of this court in the case of *K. Gopinathan Nair* (supra) is correct and in the light of this judgment and the tests propounded therein, we are of the view that the aforestated two judgments of this court in the case of *Sterling Foods* (supra) and *Vijaylakshmi Cashew Company* (supra) need reconsideration.

For the reasons aforementioned, we are of the view that the decisions

of this court cited hereinabove in the case of *Sterling Foods* v. State of Karnataka reported in (1986) 3 SCC 469 and *Vijaylakshmi Cashew Company & Ors.* v. *Dy. Commercial Tax Officer,* reported in [1996] 1 SCC 468 need reconsideration by a larger bench. The papers may be placed before Hon'ble the Chief Justice of India for further directions.

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R.P.