REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7863 OF 2009

Nirmal Kumar Parsan … Appellant

Versus

Commissioner of Commercial Taxes & Ors. …Respondents

WITH

CIVIL APPEAL NO. 7864 OF 2009

Parsan Brothers and Anr. … Appellants

Versus

Assistant Commissioner of Commercial Taxes & Ors. … Respondents

J U D G M E N T

A. M. KHANWILKAR, J.

1. The principal question involved in these appeals is whether the subject sales (of goods imported from foreign country and after unloading the same on the land-mass of the State of West Bengal, kept in the bonded warehouse without payment of customs duty) to

foreign bound ships as "ship stores" can be regarded as sale within the territory of the State and amenable to sales tax under the West Bengal Sales Tax Act, 1954 (for short, 'the 1954 Act') or the West Bengal Sales Tax Act, 1994 (for short, 'the 1994 Act').

2. The admitted factual position in the present cases is that after importing foreign made cigarettes, the appellants stored the same in the customs bonded warehouse within the land-mass of the State of West Bengal and some of those articles were sold to the Master of a foreign-going ship as ship stores, without payment of customs duty. Those goods were escorted to the stated ship under the supervision of the officials of the Customs authority.

3. These appeals take exception to the judgment and order of the High Court at Calcutta (for short, 'the High Court'), dated 16.8.2007 in W.P.T.T. Nos. 5/2007 and 6/2007 respectively, whereby it had upheld the decision of the West Bengal Taxation Tribunal (for short, 'the Tribunal') that the stated sales were within the territory of the State of West Bengal and amenable to sales tax.

4. Civil Appeal No. 7863/2009 emanates from the assessment order passed by the Commercial Tax Officer, West Bengal, dated 13.3.1985 pertaining to assessment period – 1.4.1980 to 31.3.1981.

The assessing officer rejected the claim for exemption from payment of sales tax in respect of the stated sales of imported cigarettes from the stock, as the cigarettes were sold to outgoing vessels from the bonded warehouse within the land-mass of the State of West Bengal following the decision of the High Court in ***M/s. Ranjit Shipping Pvt. Ltd. & Anr. vs. State of West Bengal & Ors.***[1]. The authority found that it was not a sale in the course of import as claimed by the assessees (appellants). The appellants unsuccessfully carried the matter in appeal and finally in revision before the Tribunal, which came to be rejected on 30.3.2007. Before the revisional authority, the only contention pursued was that there was no sale within the State of West Bengal or even in India because the buyer had no right to consume the goods before the ship crossed the territorial Waters of India. It was urged by the appellants before the revisional authority that the process of import was not complete at the time of sale to the foreign-going ship and the transaction was a sale in the course of import. Resultantly, the sold goods were not taxable under the concerned West Bengal Sales Tax laws because the goods never entered the local area of the State of West Bengal, crossing the customs frontiers of India as defined in Section 2(ab) of the Central Sales Tax Act, 1956 (for short, 'the CST Act'). The Tribunal, however,

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1 1980 SCC Online Cal 141 : (1980) 2 CHN 192

held that the sale had taken place on the land-mass of the State of West Bengal and the sale was neither for import nor for export. The Tribunal essentially relied upon the exposition in ***Madras Marine and Co. vs. State of Madras***[2] to reject the revision filed by the appellants being devoid of merits. Feeling aggrieved, the appellants carried the matter to the High Court by way of a writ petition being W.P.T.T. No. 5/2007, which came to be rejected by the Division Bench of the High Court whilst upholding the view taken by the Tribunal as just and proper.

5. Civil Appeal No. 7864/2009 emanates from the order dated 22.10.2003 passed by the Assistant Commissioner of Commercial Taxes under Section 65 of the 1994 Act pertaining to assessment periods – 1.4.1999 to 31.3.2000, 1.4.2000 to 31.3.2001, 1.4.2001 to 31.3.2002 and 1.4.2002 to 31.3.2003. The claim of the appellants that the sales in question were in the course of import on high seas and no sales tax was payable thereon came to be rejected. The authority answered the claim as follows:-

> "…..
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> All the judicial edicts relevant and referred to were perused and the documents produced by the dealer were examined. His Lordship Hon'ble West Bengal Taxation Tribunal passed the judgment after considering all the grounds taken by the dealer including the one for the position of the

2 (1986) 3 SCC 552

law after introduction of the section 2(ab) in Central Sales Tax Act. His Lordship Honourable High Court of Kolkata did not express even a mite of doubt in the correctness of the impugned order of the Hon'ble Tribunal. The order was remanded for quantification of sales in dispute. It was observed that, of the total goods imported and stored only a portion was taken out for sale to master of a particular ship. From the same warehouse goods for sales to local persons also were taken. So the sold goods could not have been ascertained and appropriate before those were taken out of the bonded warehouse. The risk in the goods was transferred at that time and at that place only. It might have so happened that the Customs authority took custody of the goods for preventing loss of its own revenue**. No such sale could have been one in the course of import because the sale did not occasion the import. None of those was export because the goods were not supposed to enter into the territory of another country in the form those were dispatched. The analogy of sales from duty-free shops was irrelevant. For, it always remains on the other side customs frontier and so the risk is transferred before crossing of the frontier**.

Thus there was no gainsay that sales of goods to masters of ships were sales in the state and were taxable. The dealer was asked to pay tax on such sales and revise the return for the years yet to be assessed. The assessing authority was requested to revise if necessary, assessments not impugned. The appellate and revisional authorities were requested to treat the tax payable on such sale as admitted one.
….."

(emphasis supplied)

6. Feeling aggrieved, the appellants resorted to revision before the Tribunal, which came to be rejected following the decision of the Tribunal passed on the same date i.e. 30.3.2007 in case of the companion appeal. The appellant carried the matter by way of a writ petition being W.P.T.T. No. 6/2007 before the High Court, which came to be dismissed by the High Court, upholding the decision of

the authority, which had held that the sales in question would be amenable to sales tax under the 1994 Act.

7. The thrust of the argument of the appellants in these appeals is that the process of import was not complete at the time of sale of the goods in question to the foreign-going ship and the transaction of sale was "in the course of import", for which reason it was not amenable to sales tax and in fact, the State would have no authority to levy such tax. To buttress this submission, reliance was placed on Article 286 of the Constitution of India providing for restrictions as to imposition of tax on the sale or purchase of goods and on Section 5 of the CST Act, in particular sub-Section (2) thereof, to contend that the sales in question shall be deemed to have taken place in the course of import of goods in the territory of India. Reliance was placed on the Constitution Bench decision of this Court in ***J.V. Gokal & Co. (Private) Ltd. vs. Assistant Collector of Sales-Tax (Inspection) & Ors.***[3], which had followed the exposition in ***State of Travancore-Cochin & Ors. vs. Shanmugha Vilas Cashew Nut Factory, Quilon & Ors.***[4]. Relying on the definition of expression "crossing the customs frontiers of India" in Section 2(ab) of the CST Act, of "customs area" in Section 2(11) and of "customs station" in Section

3 (1960) 2 SCR 852 : AIR 1960 SC 595
4 (1954) SCR 53 : AIR 1953 SC 333

2(13) of the Customs Act, 1962 (for short, 'the Customs Act'), it was urged that crossing the customs frontiers means crossing the limits of the customs station including crossing the area in which imported goods or exported goods are ordinarily kept before the clearance by the Customs authorities. Reliance was also placed on the decision in ***Minerals & Metals Trading Corporation of India Ltd. vs. Sales Tax Officer & Ors.***[5], which has had occasion to construe Section 5 of the CST Act. It was then urged that the goods in question were kept for warehousing and a declaration was given by the appellants that the said goods would be exported to foreign-going vessels as ship stores in terms of Section 88 of the Customs Act. The appellants have adverted to Sections 69, 85 and 88 of the Customs Act to contend that the stated goods could be exported to a place outside India without payment of import duty and until import duty was paid, the import thereof cannot be said to be complete. Reliance was then placed on the decision in ***Indian Tourist Development Corporation Limited vs. Assistant Commissioner of Commercial Taxes & Anr.***[6], which according to the appellants, applied on all fours, as even in that case, the goods were kept in the bonded warehouses and then supplied to duty-free shops, which transaction has been extricated

5 (1998) 7 SCC 19
6 (2012) 3 SCC 204

from the applicability of sales tax payable to the State on the ground that the goods had not crossed the customs frontiers and the sale was deemed to have taken place in the course of import of goods into the territory of India. According to the appellants, the finding recorded by the authorities below which commended to the High Court, was completely in the teeth of the aforesaid decision. The appellants have distinguished the decision in ***Madras Marine*** (supra) on the premise that in that case the goods were intended for re-export only and in that context, it was held that there was a necessity of a destination in a foreign country. Moreover, the said decision has not considered the efficacy of Section 2(ab) of the CST Act nor noticed the dictum in ***J.V. Gokal*** (supra), which dealt with the case of import/'in the course of import'. It was urged that the decision in ***J.V. Gokal*** (supra) had been followed in a recent decision in ***State of Kerala & Ors. vs. Fr. William Fernandez & Ors.***[7]. It was further urged that the dictum in ***Coffee Board, Bangalore vs. Joint Commercial Tax Officer, Madras & Anr.***[8] is distinguishable and inapplicable to the fact situation of the present case and more so, may have no bearing after the amendment of 1976 to Section 5 by insertion of sub-Section (3) therein, which opens with *non-obstante* clause and provides that the

7 2017 SCC Online SC 1291 : (2017) 12 SCALE 463
8 (1969) 3 SCC 349

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. Emphasis was placed on the objects and reasons of the Amendment Act. In substance, it was urged that the stated sales were in the course of import and could not be subjected to levy of sales tax by the State under the State legislation.

8. Per contra, the respondents would urge that the authorities had considered all aspects of the matter and after due evaluation of the evidence before it, justly concluded that the stated sales were neither in the course of import nor export and had taken place on the land-mass of the State of West Bengal and thus, amenable to sales tax under the 1954 Act and the 1994 Act, as the case may be. It was urged that it is an admitted position that the goods were kept in bonded warehouses on the land-mass of the State of West Bengal and were sold to the Master of a foreign-going ship as ship stores thereat. It was urged that the expression “crossing the customs frontiers of India” has already been defined in the CST Act and limits its application to area of a “customs station”, as defined in the Customs

Act to mean any customs port, customs airport or land customs station. In other words, the expression "crossing the customs frontiers of India" is exhaustive and would not include the bonded warehouses, where the stated goods were kept to be sold to the Master of a foreign-going ship as ship stores. It was urged that being a taxation statute, strict interpretation should be offered to this definition as expounded in ***Commissioner of Customs (Import), Mumbai vs. Dileep Kumar and Company & Ors.***[9]. It was further urged that the stated sales of goods by no stretch of imagination can qualify the expression "in the course of import of goods into the territory of India", as is contended by the appellants. For that, the goods must actually be imported into the territory of India and sale must be a single sale, which itself causes the import or is in the progress or process of import. It was urged that the authorities had rightly opined that there was sale within the State of West Bengal; whilst rejecting the claim of the appellant(s) that merely because buyer had no right to consume the goods in question before the ship had crossed the territorial Waters of India, that would make no difference because the sale was complete by appropriation of the goods in the bonded warehouse itself. Similarly, the fact that customs duty was not paid on the stated goods would be of no

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9 (2018) 9 SCC 1

consequence. It was urged that the appellants have, for the first time, raised a new plea that they had filed declaration. No such plea was taken before the concerned authority nor any document or evidence was produced in support thereof for the relevant assessment period(s). The appellants, therefore, cannot be permitted to pursue this contention. Thus, the appeals be confined to the plea taken before the authorities below that the stated sales were not effected within the territory of the State of West Bengal or in India. The respondents have placed reliance on the decisions in ***Burmah Shell Oil Storage and Distributing Co. of India Ltd. & Anr. vs. Commercial Tax Officer & Ors.***[10], ***Coffee Board*** (supra) and ***Madras Marine*** (supra) to contend that the issue is answered against the appellants. The respondents have distinguished the decision relied upon by the appellants in ***Indian Tourist Development Corporation*** (supra). It was urged that the doctrine of Unbroken Package evolved by American Courts has no application in India, as expounded in ***Fr. William Fernandez*** (supra). It was thus urged that the taxable event had occurred on the appropriation of goods at the bonded warehouse itself, which was within the territory of the State of West Bengal. To buttress this submission, reliance was

10 (1961) 1 SCR 902 : AIR 1961 SC 315

placed on ***Kiran Spinning Mills vs. Collector of Customs***[11], wherein it has been held that the taxable event would be the day of crossing of customs barrier and not the date when the goods landed in India or had entered the territorial Waters. The respondents would urge that the appeals are devoid of merits and be accordingly dismissed.

9. We have heard Mr. Siddharth Bhatnagar, learned senior counsel and Mr. Joydeep Mazumdar, learned counsel appearing for the appellants and Ms. Madhumita Bhattacharjee, learned counsel appearing for the respondents.

10. As noticed from the finding of fact recorded by the authorities, it is not in dispute that after importing the stated goods, the appellants stored the same in the bonded warehouse within the land-mass of the State of West Bengal and some of the articles were then sold to the Master of a foreign-going ship as ship stores, without payment of customs duty thereon. The question is: whether the sales in question would qualify the expression "sale in the course of import"? The phrase "sale in the course of import" would constitute three essential features – (i) that there must be a sale; (ii) that goods must actually be imported and (iii) that the sale must be part and parcel of the import. The factual matrix in the present case clearly depicts that the sales in

11 (2000) 10 SCC 228

question would not cause import of the stated goods. Instead, it would result in taking away the goods (after being unloaded on the land-mass of the State of West Bengal) on the ongoing ship as ship stores outside the territory of Indian Waters for being consumed on the ship and not for export to another destination as such. The appellants have advisedly not pursued the argument that the stated sales would result in an export or would be in the course of export. For, such argument has been rejected by this Court in ***Madras Marine*** (supra).

11. Concededly, the principle underlying the exposition in the above referred reported decision would apply *proprio vigore* for considering the argument as to whether the stated sales can be regarded as sale in the course of import as such. The two-Judge Bench in ***Madras Marine*** (supra) had considered the decision of Constitution Bench in ***Burmah Shell*** (supra). The Court noted the dictum of the Constitution Bench to the effect that in order to exclude the taxation by the State, the appellants had to prove that there was some other State, where the goods could be said to have been delivered as a direct result of the sale for the purpose of consumption in that other State and as they failed to do so, the goods loaded on board of an

aircraft for consumption though taken out of India, was not export since it had no destination, where it can be said to have been imported and so long as it did not satisfy that test, it could not be said that the sale was in the course of export. Besides noticing this dictum of the Constitution Bench, the Court also adverted to the decision in ***State of Kerala & Ors. vs. Cochin Coal Company Ltd.***[12], wherein it was held that the concept of export in Article 286(1)(b) of the Constitution postulates the existence of two termini as those between which the goods were intended to move or between which they were intended to be transported and not a mere movement of goods out of the country without any intention of their being landed *in specie* in some foreign port. Additionally, the Court also extensively adverted to the decision of the Andhra Pradesh High Court in ***Fairmacs Trading Co. vs. The State of Andhra Pradesh***[13] and approved the same dealing with the similar argument. The Court also noted and approved the decision of the Madras High Court in ***Fairmacs Trading Co. vs. The State of Tamil Nadu***[14]. The Court in paragraphs 19 to 21 and 25 to 28 observed as under:-

> "19. The correct position, so far as the facts of the present case are concerned, in our opinion, has been laid in the decision of Burmah Shell Oil Storage and Distributing Co. of

12 (1961) 2 SCR 219 : AIR 1961 SC 408
13 (!975) 36 STC 260 (AP)
14 (1978) 41 STC 157 (Mad)

India Ltd. v. C.T.O. This Court observed at page 781 as follows:

> "**While all exports involved a taking out of the country, all goods taken out of the country cannot be said to be exported. The test is that the goods must have a foreign destination where they can be said to be imported**. It matters not that there is no valuable consideration from the receiver at the destination end. **If the goods are exported and there is sale or purchase in the course of that export and the sale or purchase occasions the export to a foreign destination, the exemption is earned**. Purchases made by philanthropists of goods in the course of export to foreign countries to alleviate distress there, may still be exempted, even though the sending of the goods was not a commercial venture but a charitable one. **The crucial fact is the sending of the goods to a foreign destination where they would be received as imports**."

20. The appellants in that case dealt in petroleum and petroleum products and carried on business at Calcutta. They had maintained supply depots at Dum Dum Airport from which aviation spirit was sold and delivered to aircraft proceeding abroad for their consumption. The question was whether these supplies to the aircraft which proceeded to foreign countries were liable to sales tax under the Bengal Motor Spirit Sales Taxation Act, 1941. The contention of the appellants in that case was that such sales were made in the course of export of such aviation spirit out of the territory of India, that they took place outside the State of West Bengal, that inasmuch as aviation spirit was delivered for consumption outside West Bengal, the sales could not fall within the Explanation to clause (1)(*a*) of Article 286 as it then stood. It was held by this Court that in order to exclude the taxation by the State of West Bengal, the appellants had to prove that there was some other State where the goods could be said to have been delivered as a direct result of the sale for the purpose of consumption in that other State and that as they failed to do so, the aviation spirit loaded on board an aircraft for consumption though taken out of India, was not exported since it had no destination, where it could be said to be imported and so long as it did not satisfy that test, it could not be said that the sale was in the course of export. It was further held that aviation spirit was sold for the use of aircraft and the sale was not even for the purpose of export and all the elements of sale including delivery and payment of price took place within the State of West Bengal and the sales were complete within the territory of that State.

The customs barrier did not set a terminal limit to the territory of West Bengal for sales tax purpose. The sale beyond the customs barrier was still a sale in fact in the State of West Bengal.

21. The ratio of this decision would be applicable to the facts and circumstances of this case. It was rightly urged that the appropriation of goods took place in the State of Tamil Nadu when the goods were segregated in the bonded warehouse to be delivered to the foreign going vessels. It was not a case of export as there was no destination for the goods to a foreign country. The sale was for the purpose of consumption on board the ship. It was not as if only on delivery on board the vessel that the sale took place. The mere fact that shipping bill was prepared for sending it for custom formalities which were designed to effectively control smuggling activities could not determine the nature of the transaction for the purpose of sales tax nor does the circumstances that delivery was to the captain on board the ship within the territorial waters make it a sale outside the State of Tamil Nadu.

xxx xxx xxx

25. In the case before the Andhra Pradesh High Court in Fairmacs Trading Company v. State of A.P., the petitioner imported ship-stores from foreign countries, kept these in bonded warehouses of the customs department without the levy of customs duty and later on sold and delivered to ships' masters for consumption abroad the ship after crossing the port boundaries. On the question whether the sales were outside the State or in the course of export and therefore not liable to tax under the Andhra Pradesh General Sales Tax Act, 1957, it was observed by the Andhra Pradesh High Court that the goods were specific and ascertained and were within the State when the contract of sale took place and therefore the requirements of Section 4(2)(a) of the Central Sales Tax Act, 1956 were fully satisfied and the sales must be said to have taken place inside the State; but as the goods sold were meant for consumption during voyage and they had no destination in any foreign country where they could be received as imports, the sales were not sales in the course of exports. It was further held that mere movement of goods out of the country following a sale would not render the sale, one in the course of export within Article 286(1)(b) of the Constitution of India. Before a sale can be said to be a sale in the course of export, the existence of two termini between which the goods are intended to move or to be transported is necessary.

26. The Madras High Court in the case of *Fairmacs Trading Co.* v. *State of T.N.* was dealing with an assessee, who was a

dealer in ship's stores and was also doing business as ship chandlers and who imported goods from abroad for the purpose of supplying them either to foreign-going vessels or to diplomatic personnel. These goods were received and kept in the customs bonded warehouse and were cleared under the supervision of the customs authorities whenever these were sold by the assessee. In respect of supplies of specific goods made to certain ships located in the Madras harbour, pursuant to orders placed by the Master of the ship or other officers working in the ship, the transportation of the goods to the ship was effected in such a manner as to ensure that the bonded goods, which had not paid any duty, did not enter the local market. The delivery receipt sent along with the goods by the assessee was signed by an officer of the ship in token of having received the goods in good condition. The question that arose for consideration was whether the sale took place within the State of Tamil Nadu and liable to be taxed under the Tamil Nadu General Sales Tax Act, 1959. It was held (*i*) that there was nothing to show in the communications from the ship that the goods had necessarily to be supplied only in the ship. It was open to the officers working in the ship to come and take delivery of the goods in which event the sale would be a local sale. Therefore, assuming that the territorial waters did not form part of the State of Tamil Nadu, as there was nothing in the contemplation of the contracting parties that the goods were to be moved from one State to another, it was held that it was not possible to take the view that the sales were inter-State sales; and (*ii*) that the assessee was not selling specific or ascertained goods, because the goods formed part of a larger stock within the bonded warehouse and had, therefore to be separated and appropriated to the contract as and when orders were placed by the officers of the ship by description. Therefore, the sales were local sales in view of the specific provision of Section 4(2)(*b*) of the Central Sales Tax Act, 1956, read with Section 2(*n*), Explanation 3 of the Act (Tamil Nadu General Sales Tax Act, 1959), and were accordingly taxable under the Act. The court did not find it necessary to consider the question whether the territory covered by the territorial waters formed part of the State of Tamil Nadu or not.

27. Attention of the Madras High Court was drawn to the decision of Andhra Pradesh High Court in *Fairmacs Trading Co.* v. *State of A.P.* The Madras High Court did not examine the question in detail in the view it took.

28. In so far as the High Courts of Andhra Pradesh and Madras in the said two decisions held that sales took place within the State, we are in agreement.”

(emphasis supplied)

The Court finally concluded in paragraphs 36 and 37 as follows:-

> "36. The short question, therefore, that arises in all these matters is whether sale of the goods in question took place within the territory of Tamil Nadu. In these cases sale took place by appropriation of goods. Such appropriation took place in bonded warehouse. Such bonded warehouses were within the territory of State of Tamil Nadu. Therefore, under sub-section (2), sub-clauses (a) and (b) of section 4 of the Central Sales-Tax Act, 1956, the sale of goods in question shall be deemed to have taken place inside the State because the contract of sale of ascertained goods was made within the territory of Tamil Nadu and furthermore in case of unascertained goods appropriation had taken place in that State in terms of clause (b) of sub-section (2) of section 4 of the Central Sales Tax Act, 1956. **There is no question of sale taking place in course of export or import under section 5 in this case. From that point of view the amendment introduced by Act 103 of 1976 by incorporating in clause (ab) of section 2 of the Central Sales Tax Act, 1956 does not affect the position**. In this connection reference may be made from the observations of this Court in Burmah Shell Oil Storage Ltd., where it has been held that customs barrier does not set a terminal limit to the territory of the State for sales-tax purposes. Sale, therefore, beyond the customs barrier is still a sale within the State. **The amendment introduced in section 2 by the Act 103 of 1976 does not affect the position because the custom station is within the State of Tamil Nadu. That question might have been relevant if we were considering the case of sale by the transfer of documents of title to the goods as contemplated by section 5 of the Central Sales-Tax Act.** In the premises we are unable to accept the contentions urged on behalf of the appellants in the civil appeals and also the contentions urged in the writ petition.
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> 37. In the view we have taken, it is not necessary to express our opinion on the arguments whether introduction of clause (ab) of section 2 of Central Sales Tax Act by Act 103 of 1976 is prospective or not. We have, however, noted the submissions. That question, in the light of our aforesaid views, is not material for the present controversy."
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> (emphasis supplied)

12. Applying the principle underlying the said decision, it is clear that the sale to be in the course of import, must be a sale of goods

and as a consequence of such sale, the goods must actually be imported within the territory of India and further, the sale must be part and parcel of the import so as to occasion import thereof. Indeed, for the purposes of Customs Act, only upon payment of customs duty the goods are cleared by the Customs authorities whence import thereof can be regarded as complete. However, that would be no impediment for levy of sales tax by the State concerned in whose territory the goods had already landed/unloaded and kept in the bonded warehouse. For seeking exemption, it is necessary that the goods must be in the process of being imported when the sale occurs or the sale must occasion the import thereof within the territory of India. The word "occasion" is used to mean "to cause" or "to be the immediate cause of". In the present case, the stated sales in no way occasioned import of the goods into the territory of India. For, the goods were taken away by the foreign-going ship as ship stores for being consumed after the goods had crossed the customs frontiers/Indian Waters.

13. Indubitably, the sale which is to be regarded as exempt from payment of sales tax, is a sale which causes the import to take place or is the immediate cause of the import of goods. The appellants having failed to establish that the stated goods would be actually

imported within the territory of India and had not crossed the customs station, cannot contend that the sale was in the course of import as such within the meaning of Section 5 read with Section 2(ab) of the CST Act. Moreover, there is no direct linkage between the import of the goods and the sale in question to qualify as having been made in the process or progress of import. We may usefully advert to Section 5 of the CST Act, which reads thus: -

> "5. **When is a sale or purchase of goods said to take place in the course of import or export**.-(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.
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> **(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.**
>
> (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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> (emphasis supplied)

14. The crucial question is whether the stated sales can be deemed to have taken place in the course of import of the goods into the territory of India before the goods had crossed the customs frontiers

of India, which is the core requirement of Section 5(2) of the CST Act. The expression "crossing the customs frontiers of India" has been defined in Section 2(ab) of the CST Act, which reads thus:-

> "2. Definitions.- In this Act, unless the context otherwise requires,-
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> xxx xxx xxx
>
> (ab) "crossing the customs frontiers of India" means crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.
>
> Explanation.- For the purposes of this clause, "customs station" and "customs authorities" shall have the same meanings as in the Customs Act, 1962 (52 of 1962)."

This definition refers to the expression "customs station", which in turn, refers to "customs port", "customs airport" and "land customs station", as defined in the Customs Act. We may usefully refer to Sections 2(10), 2(11), 2(12), 2(13) and 2(29) of the Customs Act, as applicable for the present cases, which read thus:-

> "2. Definitions.- In this Act, unless the context otherwise requires.-
>
> (10) "customs airport" means any airport appointed under clause (a) of section 7 to be a customs airport;
>
> (11) "customs area" means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;
>
> (12) "customs port" means any port appointed under clause (a) of section 7 to be a customs port [15][, and includes a

15 Inserted by Act 11 of 1983, sec. 46 (w.e.f. 13-5-1983) – applicable to C.A. No. 7864/2009

place appointed under clause (aa) of that section to be an inland container depot];

(13) "customs station" means any customs port, customs airport or land customs station;

xxx xxx xxx

(29) "land customs station" means any place appointed under clause (b) of section 7 to be a land customs station;"

In addition, we may also refer to Section 7 of the Customs Act, which postulates appointment of customs ports, airports etc. The same reads thus:-

"7. Appointment of customs ports, airports, etc.- The Central Government may, by notification in the Official Gazette, appoint-

(a) the ports and airports which alone shall be customs ports or customs airports for the unloading of imported goods and the loading of export goods or any class of such goods;

[16][(aa) the places which alone shall be inland container depots for the unloading of imported goods and the loading of export goods or any class of such goods];

(b) the places which alone shall be land customs stations for the clearance of goods imported or to be exported by land or inland water or any class of such goods;

(c) the routes by which alone goods or any class of goods specified in the notification may pass by land or inland water into or out of India, or to or from any land customs station from or to any land frontier;

(d) the ports which alone shall be coastal ports for the carrying on of trade in coastal goods or any class of such goods with all or any specified ports in India."

16 Inserted by Act 11 of 1983, sec. 47 (w.e.f. 13-5-1983) – applicable to C.A. No. 7864/2009

We have no hesitation in accepting the argument of the respondents that being a taxation statute, strict interpretation of these provisions is inevitable. Going by the definition of "customs port" or "land customs station" as applicable in the present cases, it is customs port or land customs station area appointed by the Central Government in terms of notification under Section 7. It is not the case of the appellants that the bonded warehouses, where the goods were kept and the stated sales took place by appropriation of the goods thereat, were within the area notified as customs port and/or land customs station under Section 7 of the Customs Act. As the stated goods had travelled beyond the customs port/land customs station at the relevant time, in law, it would mean that the goods had crossed the customs frontiers of India for the purposes of the CST Act. Resultantly, the legal fiction created in Section 5(2) of the CST Act will have no application.

15. Notably, the expressions "warehouse" and "warehoused goods" have been defined in the Customs Act in Sections 2(43) and 2(44) respectively. As per the applicable provisions at the relevant time, "Warehouse" means a public warehouse appointed under Section 57 or a private warehouse licensed under Section 58. "Warehoused goods" means goods deposited in a warehouse. As aforesaid, there is

nothing to indicate that the bonded warehouse, where the stated goods were kept by the appellants and eventually sold, formed part of the customs port/land customs station. If so, the legal fiction of sale being deemed to have taken place in the course of import of the goods into the territory of India would have no bearing and applicability to the present cases.

16. To get over this position, emphasis was placed by the appellant on the exposition in the ***Indian Tourist Development Corporation*** (supra), which had considered the situation where the goods were kept in the bonded warehouse and were made available in the duty-free shops for sale. This Court opined that since the goods were supplied to the duty-free shops situated at the International Airport, Bengaluru for sale, it cannot be said that the said goods had crossed the customs frontiers of India. We fail to understand as to how this decision will be of any avail to the appellants. For, the Court was not dealing with a situation as in the present cases, in which the goods had crossed the customs port/land customs station area and kept in the bonded warehouse, where the sale by appropriation of the goods was effected. Indeed, in paragraph 17 of the reported decision, the Court in the facts of that case, has observed that when the goods are kept in the bonded warehouse, it cannot be said that the said goods

had crossed customs frontiers of India. However, the Court finally answered the claim of the appellants therein on the finding that the liquor, cigarettes, perfumes and food articles were sold "at the duty-free shops" at the International Airport, Bengaluru, for which no tax was payable by the appellants as the goods sold at the duty-free shops were sold directly to the passengers and even the delivery of goods took place at the duty-free shops before importing the goods or before the goods had crossed the customs frontiers of India. The issue considered in the said decision, therefore, was whether the sale at the duty-free shops situated at the Bengaluru International Airport would attract levy of sales tax. As noticed earlier, the definition of "customs station" clearly refers to customs airport as defined in Section 2(10) of the Customs Act. As the duty-free shop is situated in airport area, it would mean that the sale of goods at the duty-free shops was deemed to have taken place in the course of import of the goods into the territory of India. Thus understood, the reported decision under consideration is of no avail to the appellants.

17. Even the exposition of the Constitution Bench in ***J.V. Gokal*** (supra) that a sale by an importer of goods after the property of the goods passed to him, either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is

also a sale in the course of import, would equally have no bearing on the present cases. Inasmuch as, the sale of goods must take place before the goods had crossed the customs frontiers of India, which means it was within the customs port/land customs station area. Nothing is shown by the appellants herein to substantiate that the subject bonded warehouse came within the customs port/land customs station area and moreso the stated sales occasioned import of the goods within the territory of India. If so, the finding of fact and conclusion recorded by the authorities below, which commended to the High Court, is unexceptionable.

18. This Court in ***K. Gopinathan Nair and Ors. vs. State of Kerala***[17] has expounded the factors to be reckoned for determining whether the concerned sale or purchase of goods can be deemed to have taken place in the course of import. The relevant portion of the aforesaid judgment reads thus:

> "14. In the light of the aforesaid settled legal position emerging from the Constitution Bench decisions of this Court the following propositions clearly get projected for deciding whether the concerned sale or purchase of goods can be deemed to take place in the course of import as laid down by Section 5(2) of the Central Sales Tax Act:
>
> (1) The sale or the purchase, as the case may be, must actually take place.
>
> (2) Such sale or purchase in India must itself occasion such import, and not vice versa i.e. import should not occasion such sale.

17 (1997) 10 SCC 1

(3) The goods must have entered the import stream when they are subjected to sale or purchase.

(4) The import of the concerned goods must be effected as a direct result of the sale or purchase transaction concerned.

(5) The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.

(6) There must be either a single sale which itself causes the import or is in the progress or process of import or though there may appear to be two sale transactions they are so integrally inter-connected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well integrated transaction consisting of two transactions dovetailing into each other.

(7) A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of Indian importer.

(8) The transaction in substance must be such that the canalizing agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only as a mere name lender through whom it is the local importer-cum-local user who masquerades."

19. It will also be useful to advert to paragraph 6 of ***Kiran Spinning Mills*** (supra), which reads thus:

"6. Attractive, as the argument is, we are afraid that we do not find any merit in the same. It has now been held by this Court in Hyderabad Industries Ltd. v. Union of India that for the purpose of levy of additional duty Section 3 of the Tariff Act is a charging section. Section 3 sub-section (6) makes the provisions of the Customs Act applicable. This would bring into play the provisions of Section 15 of the Customs Act which, inter alia, provides that the rate of duty which will be

> payable would be (sic the rate in force) on the day when the goods are removed from the bonded warehouse. That apart, this Court has held in Sea Customs Act, SCR at p. 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country. Admittedly this was done after 4-10-1978. As on that day when the goods were so removed additional duty of excise under the said Ordinance was payable on goods manufactured after 4-10-1978. We are unable to accept the contention of Mr Ramachandran that what has to be seen is whether additional duty of excise was payable at the time when the goods landed in India or, as he strenuously contended, they had crossed into the territorial waters. Import being complete when the goods entered the territorial waters is the contention which has already been rejected by this Court in Union of India v. Apar (P) Ltd. decided on 22-7-1999. **The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid** and that is what has been termed by this Court in Sea Customs case (SCR at p. 823) as being the taxable event. **The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had landed in India or had entered the territorial waters**, we find that on the date of the taxable event the additional duty of excise was leviable under the said Ordinance and, therefore, additional duty under Section 3 of the Tariff Act was rightly demanded from the appellants."
>
> (emphasis supplied)

20. A priori, for a sale or purchase to qualify as a sale or purchase in course of import, the essential conditions are that such sale shall occur before the goods had crossed the customs frontiers of India and the import of the goods must be effected or the import is occasioned due to such sale or purchase. In the present case, the sales in question did not occasion import.

21. *Arguendo*, for sale or purchase of goods to be regarded as sale or purchase in course of export, Section 5(1) of the CST Act provides for the following conditions: (i) the sale or purchase shall occasion such export or (ii) the sale or purchase shall be effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

22. A Constitution Bench of this Court in ***Md. Serajuddin and Ors. vs. State of Orissa***[18] has held that expression 'in the course' implies not only a period of time during which the movement is in progress but postulates a connected relation. The relevant portion of the judgment is extracted as under:

> "18. ..... A sale in the course of export predicates a connection between the sale and export. No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But it does not mean that distinction between transactions which may be called sales for export and sales in the course of export is not real. **Where the sale is effected by the seller and the seller is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with sale so that the bond cannot be dissociated without a breach of the obligations arising by statute, contract, or mutual understanding between the parties arising from the nature of the transaction the sale is in the course of export.** In the Nilgiri Plantations case (supra) this Court found that the sales by the appellants were intended to be complete without the export and as such it could not be said

18 (1975) 2 SCC 47

> that the sales occasioned export. The sales were for export and not in the course of export."
>
> (emphasis supplied)

23. It is relevant to advert to the definition of export here. Section 2(18) of the Customs Act defines export as follows:

> "2. Definitions.- In this Act, unless the context otherwise requires,-
>
> xxx xxx xxx
>
> (18) - "export", with its grammatical variations and cognate expressions, means taking out of India **to a place outside India**."
>
> (emphasis supplied)

24. In the present case, it is not the case of the appellant that the goods in question were being exported. Since the goods are to be consumed on the board of the foreign going ship and the same would be consumed before reaching a destination, it does not fall under the definition of 'export'. The sale cannot qualify as a sale occasioning export unless the goods reach a destination which is a place outside India. Further, since the goods have been sold from the bonded warehouse and had crossed the customs port/land customs station prior to their sale, it cannot qualify as a sale in course of export within the meaning of Section 5(1) read with Section 2(ab) of the CST Act.

25. In regard to the contention that declaration under Section 69 of the Customs Act was made by the appellant, there is nothing on

record to show that such declaration was made in respect of the goods pertaining to subject sale(s). Even otherwise, the benefit extended under the Customs Act of waiver of customs duty cannot be taken as waiver of sales tax under the relevant state and central laws. Similarly, insertion of sub-Section (3) in Section 5 of the CST Act in 1976 does not affect these cases because the bonded warehouse where the stated sales or appropriation of the goods occurred is within the land-mass of the State of West Bengal and not shown to be within the customs station area.

26. A priori, it must be held that the stated sales or appropriation of goods kept in bonded warehouse within the land-mass/territory of the State of West Bengal are neither in the course of import or export and more so, were effected beyond the customs port/land customs station area. Therefore, in law, it was a sale amenable to levy of sales tax under the 1954 Act and the 1994 Act, as the case may be, read with Section 4 of the CST Act. As a result, these appeals must fail, as we find no infirmity in the view taken by the authorities below and which had justly commended to the High Court.

27. In view of the above, these appeals are dismissed with no order as to costs. Pending interlocutory applications, if any, shall stand disposed of.

................................., J.
(A.M. Khanwilkar)

................................., J.
(Dinesh Maheshwari)

New Delhi;
January 21, 2020.