(1992) 07 KL CK 0050

High Court Of Kerala

Case No: O.P. No. 10598/89 and T.R.C. No. 203/89

N. Sundereswaran	APPELLANT
Vs	
State of Kerala and Others	RESPONDENT

Date of Decision: July 2, 1992

Acts Referred:

- Central Sales Tax Act, 1956 - Section 14, 15, 5, 5(1), 5(3)
- Constitution (Sixth Amendment) Act, 1956 - Article 286 , 286(2)
- Constitution of India, 1950 - Article 141, 286, 286(1)
- Federal Motor Carriers Act - Section 203(6)
- Kerala General Sales Tax Act, 1963 - Section 5, 5A, 5A(1)

Hon'ble Judges: M. Jagannadha Rao, C.J; P. Krishnamoorthy, J; K.S. Paripoornan, J

Bench: Full Bench

Advocate: T.R.G. Wariyar and K.M.R. Menon and Arikkat Vijayan Menon, in TRC No. 203/89, for the Appellant;

Final Decision: Allowed

Judgement

Jagannatha Rao, C.J.
The point that aries before this Full Bench in these two cases is as follows:

Whether the State of Kerala is, or is not, entitled to levy sales tax under the Kerala General Sales Tax Act, 1963, on the purchases of raw cashewnuts made by the Petitioners, out of which cashew kernel is extracted, and exported to foreign countries, in view of the provisions of Section 5(3) of the Central Sales Tax Act, 1956; and, whether the export of the cashew kernel obtained out of the cashewnut-with-shell purchased by the Petitioners, would amount to export of ''those goods'' which had been purchased.

2. These two matters have been referred to a Full Bench by a Division Bench consisting of one of us, (Paripoornan, J.) and Nayar, J. by a common order. It is

pointed out in the referring order that the decision of the Division Bench of this Court in State of Kerala v. Sankaran Nair (1986) 63 S.T.C. 225 (Ker.), requires reconsideration inasmuch as it has overlooked two earlier Division Bench decisions of this Court. It is also stated that a new trend has been set by the Supreme Court in a catena of recent cases,-in particular- Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, : AIR 1980 S.C. 1227, Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , and other cases. The question also arises whether the decision of S.R. Das, J. (as he then was) in State of Travancore-Cochin v. Shanmugha Vilas Cashew-nut Factory (1953) 4 S.T.C. 205 SC holds the field in view of the trend in the recent decisions of the Supreme, Court above referred to.

3. The facts of the case in the Writ Petition, O.P. No. 10598 of 1989, are that the Writ Petitioner is a cashew exporter who exports cashewnuts (i.e., cashew kernels) mostly to U.S.A. He has, however, purchased cashewnuts-with-shell from the Kerala Cashew Workers Apex Industrial Co-operative Society Ltd., extracted kernels, cleaned and packed them for export. He claimed that no local sales tax was payable on the purchases of cashewnut-with-shell so purchased by him inasmuch as the goods exported, namely, the cashew kernel cannot be said to be different goods than those purchased for purposes of Section 5(3) of the Central Sales Tax Act, 1956. He has questioned the validity of the provisional assessment orders, Exts. P-2, P-3 and P-4, which are passed on 5th July 1989, 26th August 1989 and 7th September 1989 for the months of May 1989, June 1989; and July 1989 respectively. The Petitioner has approached this Court seeking reconsideration of the ruling in State of Kerala Vs. G. Sankaran Nair and Others, . In T.R.C. No. 203 of 1989, the Petitioner who has similarly purchased cashewnut-with-shell locally and extracted cashew kernel there from and then exported the cashew kernels seeks relief u/s 5(3) of the Central Sales Tax Act, 1956 in regard to the total assessment for the assessment year 1985-86. In both the O.P. and the T.R.C. it is contended that the purchases are made pursuant to export orders.

4. The purchases of cashewnut-with-shell in these cases are undoubtedly liable to sales tax u/s 5 of the Kerala General Sales Tax Act, 1963 read with entry 31 of Schedule I. The entry relating to last purchases (and Anr. entry relating to first sales) in the State by a dealer read as follows:

5. We heard counsel on both sides at length. Counsel for the Petitioners (Assessees) and counsel for the Revenue submitted their rival pleas and brought to our notice a Jew decisions to substantiate their pleas. In this judgment, we are dealing with all such decisions placed before us as focused by the respective counsel in respect of their pleas. The various aspects arising in this case are discussed in this judgment only from that angle. It is the case of the Petitioners that the State cannot levy any sales tax on the purchases of cashewnut with-shell in view of the provisions

contained in Section 5(3) of the Central Sales Tax Act, 1956 read with Article 286(1)(b) of the Constitution of India. It will be necessary to briefly refer to the history of the export sales. In the cases decided by. the Supreme Court before 1956, and in fact as per the majority view in Shanmugha Vilas Cashewnut Factory''s case (1953) 4 S.T.C. 205 (S.C.), the prohibition contained in Article 286(1)(b) restricting the power of the State to levy sales tax was applicable only to the particular export sale or import sale and did not extend, in the case of the export sale, or the penultimate sale of goods by the exporter for the purpose of the export. It did not also extend, in the case of import-sales, to the subsequent sale by the Indian importer, and therefore, the State could levy sales tax on the penultimate or subsequent, sales. However, the Supreme Court in Shanmugha Vilas Cashewnut Factory''s case (1953) 4 S.T.C. 205 (S.C.) (supra), S.R. Das, J. (as he then was) took a different view and held that the prohibition restricting the State''s power to levy sales tax extended also to the penultimate sale to the Indian exporter and this was what was intended by Article 286(1)(b) and such an interpretation would promote export trade. The learned Judge, however, held on facts, that the cashewnut-with-shell purchased by the exporter and the cashew kernel which was extracted and exported were commercially different goods, and therefore, on facts, the levy of sales tax by the State on the purchases by the exporter, was valid.

6. After these decisions, the Constitution (Sixth Amendment) Act, 1956 was passed amending Article 286. After the amendment, Clause (1) of Article 286 states that no law of a State Shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Clause (2) of Article 286 states that Parliament may, by law, formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1) of Article 286. Pursuant to Clause (2) of Article 286, the Central Sales Tax Act, 1956 was enacted. Section 5 of that Act states as to when there is, in law, a sale or purchase of goods taking place ''in the course of import or export'' so as to prohibit the States from imposing sales tax on such import or export sales. Twenty years after 1956, it was decided in 1975 in Serajuddin and Others Vs. The State of Orissa, , that the sale which was not liable to sales tax was only the actual sale by the exporter and the said benefit did not extend to the penultimate sale to the Indian exporter for the purpose of the export. In the view that this would adversely affect foreign exports, Section 5(3) was introduced by the Central Act 103 of 1976 which reads as follows:

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.

(emphasis supplied)

7. After the insertion of Section 5(3) into the Central Sales Tax Act, 1956, a contention was raised in Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore, that the ''agreement'' referred in Section 5(3) was the agreement between the exporter and the person from whom he purchased the goods. Rejecting the said contention, the Supreme Court held that the ''agreement'' or ''sale'' referred to in Section 5(3) meant the agreement with the foreign buyer or the firm order placed by the foreign buyer. In that context, Tulzapurkar, J. observed that there were two competing public interests involved, one relating to foreign exports and the other regarding the States revenues and that Section 5(3) can be construed neither liberally nor strictly. Obviously, the two public interests are to be balanced to the extent provided in Section 5(3). Consolidated Consolidated Coffee Ltd. and Another Vs. Coffee Board, Bangalore, did not have to deal with the meaning of the words ''any goods'' and ''those goods'' in Section 5(3). Such a question arose only in 1986, in the case of Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , wherein it was held that the purchases of shrimps, prawns and lobster locally meant for purposes of export'' were not, liable to sales tax under the Karnataka Sales Tax Act, 1957, even though the heads and tails of those shrimps, prawns and lobster were cut and there was peeling, de-veining, cleaning and freezing. It was held that there was, in the eyes of those who deal with these goods, no change in the identity or character of the goods purchased and hence the purchases would still not be liable to sales tax. In Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , the earlier decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, (not a Section 5(3) case) was followed.

8. The cases before us have to be decided in the context of the above statutory provisions and in the light of the above rulings of the Supreme Court.

9. It was argued for the State (Respondents) that the purchases of cashewnut-with-shell are liable to Sales tax inasmuch as what is exported to the foreign buyer is not the cashewnut-with-shell, but a different commodity, namely, the cashew kernel. Reliance is also placed on the separate judgment of S.R. Das, J. (as he then was) in Shanmugha Vilas Cashewnut Factory''s case (1953) 4 S.T.C. 205 (S.C.) to say that the cashew kernel is commercially different and distinct from cashew-nut-with shell. It was also argued that the said decision is binding on this Court under Article 141 of the Constitution of India, and that the test applied by S.R. Das, J. (as he then was) in 1953 is, in no way, different from the test applied by Bhagwati, C.J. in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, .

10. On the other hand, it was argued for the Petitioners that the decision of S.R. Das, J. (as he then was) in Shanmugha, Vilas Cashewnut Factory''s case (1953) 4 S.T.C. 205

(S.C.) was rendered long before the Constitution (Sixth Amendment) Act, 1956, long before the enactment of the Central Sales Tax Act, 1956, and even long before the insertion of Section 5(3) in that Act by Central Act 103 of 1976. Hence the said decision cannot be treated as binding. It is pointed out that the Supreme Court which had initially laid down a "common parlance" test and then a "commercial parlance" test, has now laid down a "substantial identity" test in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, and other cases, and therefore there is a new test evolved and a new trend. It is argued that in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, the words "any goods" and "those goods" have been specifically considered and that decision, having been rendered u/s 5(3), is more binding on this Court, than the view of S.R. Das, J. (as he then was) in Shanmugha Vilas Cashewnut Factory"s case (1953) 4 S.T.C. 205 (S.C.). Reliance is also placed on the decision of the Supreme Court in Tungabhadra Industries v. State of A.P. (1960) 11 S.T.C. 827, and other cases. It is argued that State of Kerala Vs. G. Sankaran Nair and Others, overlooked Swasti Cashew Industries Private Ltd. Vs. The State of Kerala, and The Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Neroth Oil Mills Company Ltd., .

11. In the light of the above submissions, the following points arise for consideration;

1. What are the different principles of construction applicable to words or entries in statutes dealing with sales tax?

2. What is the appropriate test applicable for construing the words "any goods" and "those goods" in Section 5(3) of the Central Sales Tax Act, 1956?

3. Did S.R. Das, J. (as he then was) in his separate judgment in Shanmugha Vilas Cashewnut Factory"s case apply any test different from the one applied by the Supreme Court in Sterling Foods, etc., and can it be said that the judgment of S.R. Das, J. is no longer binding on this Court under Article 141 of the Constitution of India?

12. Point No. 1-To attempt to review the various tests laid down by the Supreme Court in the sales tax branch of the law in regard to construction of words or entries, is a difficult task. Some attempts in this direction have, however, been made by the Karnataka High Court in Sri Lakshmi Coconut Industries v. State of Karnataka (1989) 46 S.T.C. 404 (Karnataka) and by the Gauhathi High Court in Chitta Renjan Saha v. State of Tripura (1990) 79 S.T.C. 31 (Gau.). We shall also make an earnest endeavour.

13. The "common parlance" test applies to articles in daily use by the common man. We shall refer to a few cases decided by the Supreme Court. In Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, , it was held that the word

''vegetable'' used in the Act was to be construed in the ''common parlance'' as referring to the class of vegetables which are grown in the kitchen garden or in a farm and used for the table and that ''betel leaves'' were not vegetables. The Supreme Court referred to the Canadian case in Planters Nut Chocolate Co. Ltd. v. The King (1952) 1 Dom. L.R. 385, wherein, while construing the provisions of the Excise Tax Act, 1927, it was held that the Act was not using words which were applied to any particular science or art and are therefore to be construed in common language. The Court there was dealing with the question whether ''salted peanuts'' and ''cashew nuts'' fell within the category of either ''fruits'' or ''vegetables''. It was held that they did not. Carcron, J. observed:

The object of the Excise Act was to raise revenue and for this purpose to class substances according to the general usage and known denomination of trade. In my view, therefore, it is not the botanists conception as to what constitutes a ''fruit'' or ''vegetable'' which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such.

''Green ginger'' was held included in the meaning of ''vegetables'' in the popular sense in State of West Bengal and Others Vs. Washi Ahmed and Others, , But ripened coconut (neither tender nor dried) was held not included in the meaning of ''vegetable'' or ''fresh fruit'' in P.A. Thillai Chidambara Nadar Vs. Addl. Appellate Asstt. Commissioner, Madurai and Another, . It was there stated that the word was to be understood in the common parlance in which a householder would understand the word, because the kernel of the coconut was not used as a substantial item at the table but was only used as an ingredient in other culinary preparations. Likewise ''sugarcane'' was held not to be a ''green vegetable'' in Motipur Zamindary Co. v. State of Bihar AIR 1962 S.C. 600. Construing ''sanitary fittings'' in the popular sense, it was held in State of U.P. v. Indian Hume Pipe Ltd. (1977) 39 S.T. 335 (S.C.), that heavy G.I. pipes intended to be laid underground for carrying water could not be treated as ''sanitary fittings''. ''Rice'' was held to include ''parched rice'' and ''puffed rice'' varieties as per the common sense test in Alladi Venkateswarlu and Others Vs. Govt. of Andhra Pradesh and Another, . ''Bullion in common parlance was held not to include ''ornaments'' Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. G.S. Pai and Co., : Only pliable felts could be treated as ''cloth'' in the popular sense: Filter v. Commr. of Sales Tax (1984) 61 S.T.C. 318 (S.C.). ''Dryer felts'' made of cotton or wollen were ''textiles'' in common parlance: Porris and Spencer (Asia) Ltd. v. State of Haryana (1978) 48 S.T.C. 433; ''Ammonia paper'' and ''ferro paper'' could not be treated as ''paper'' in the popular sense having regard to the use to which each of them was put; Commissioner of Sales Tax, U.P. Vs. Macneill and Barry Ltd., Kanpur, In Mukesh Kumar Aggarwal and Co. Vs. State of Madhya Pradesh and Others, , it was held that ''eucalyptus wood'' after separating ''bailies'' and ''poles'' was not ''timber'' in the

common parlance. But in State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, , it was held that timber and sized and dressed timber were the same commercial commodity. In. fact, Bhagwati, J. (as he then was) pointed out in State of West Bengal and Others Vs. Washi Ahmed and Others, , above referred to, that the principle of construing words in taxation statute in common parlance was the same in Canada, England and America as in India and quoted Planters Nut Chocolate''s case 1952 1 Dom. L.R. 385 (Canada) (already referred to), Grenjal v. I.R.C. (1876) Ex. D. 242 (Eng.), and 200 Chests of Tea (1824) Wheaton 430 (U.S.A.).

14. Then comes the ''commercial parlance'' test which is normally applied while construing words which are familiar to the business or tradesmen. We shall again refer to a few cases decided by the Supreme Court. In Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, it was held that ''charcoal'' was covered by the entry ''coal including coke in all its forms''. It was then pointed out that resort should not be had to the scientific or the technical meaning of such terms, but resort was to be made to their meaning, that is attracted to these words in their commercial sense by the merchant and the consumer, that is, those dealing with the goods: ''Glassware'' would never comprise articles like clinical syringes, thermometers, lactometers and the like which have specialised significance and utility. In fact, a merchant dealing in glassware will not deal with these articles which may be found rather in a medical store and even a consumer would not ask for these articles in a glassware shop: Indo-International Industries v. S.T. Commr. U.P. (1981) 47 S.T.C. 338 (S.C.) ''Food colours'' and ''Syrup essences'' are edible goods but not ''dyes and colours'' nor ''scents and perfumes'': Commissioner of Sales Tax, U.P. Vs. S.R. Brothers, Kanpur, . In commercial parlance, ''carbon paper'' was not paper: State of Uttar Pradesh and Another Vs. Kores (India) Ltd., , ''Meat on hoof'' which meant the thorny covering at the end of the foot of certain animals was also exempt if ''meat'' was exempt from sales tax, construing the words in the commercial parlance: Chiranjit Lal Anand Vs. State of Assam and Another, . In Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, , it was laid down that ''rayon tyre-cord fabric'' was ''rayon fabric''. In that case, Pathak, J. (as he then was) observed:

In determining the meaning or connotation of words and expressions describing an article or commodity, the turnover of which is taxed in a sales tax enactment, if there is one principle fairly well-settled, it is 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 is enacted.

15. Dictionary and scientific meaning are not to be resorted normally inasmuch as the ''Legislature does not suppose our merchants to be naturalists or geologists or

botanists'' as stated by Story, J. in 200 Chests of Tea (1824) 9 Wheaton (U.S.) 430 quoted in Porritts and Spencer (Asia) Ltd. Vs. State of Haryana, , Mukesh Kumar Aggarwal and Co. Vs. State of Madhya Pradesh and Others, . Though when a special type of goods is subject matter of a fiscal entry, the entry must be understood in the context of the particular trade, where, however, there is no evidence either way, then the definition given, and the meaning flowing from the particular statute at the particular time would be the decisive test: Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co., (35). In Akku Badruddin Jowani v. Collector of Customs, Bombay (36), it has been also held (at page 1595) that the commercial parlance test applies only when the word in the Tariff Entry has not been used in a scientific or technical sense.

16. The user test is yet Anr. test which has been applied in certain cases. In Annapurna Carbon Industries v. State of A.P. (37), it was held, on facts, that the deciding factor was the predominant or ordinary purpose or user. There the question was whether ''arc carbon'' known as ''cinema arc carbon'' fell within ''cinematographic equipment, etc.'' It was held that it was not sufficient to show that the article could be put to other uses also. It is the general or predominant user which would determine into which category an article may fall. The Court has to find the intention of the framers of the Schedule in making the entry in each case. In Thungabhadra Industries v. C.T.O. (38), it was, however, observed that there was no use to which ''groundnut oil'' could be put for which hydrogenated oil could not be used, nor was there any use to which the hydrogenated oil could be put for which the raw oil could not be used. It has been recently stated in Mukesh Kumar Aggarwal and Co. Vs. State of Madhya Pradesh and Others, , on facts, that the user test was not conclusive.

17. We shall then take up the ''substantial identity'' test. This test is being applied whenever the goods are passing through a process. The question is arising whether the resultant goods are the same as the original goods or at least substantially the same or are different and distinct goods. A question is also arising as to when the processing stage can be said to have passed and there is, indeed, a manufacture. It is in this area that cases arising under the Sales Tax law, and those arising under the Excise Act are being jointly considered as laying down, more or less, similar principles, even though the taxable event in sales tax is the sale of goods, and the taxable event in the excise law is the production or manufacture of exciseable goods. This commonness in these two areas has been brought out in State of Tamil Nadu Vs. Pyare Lal Malhotra and Others, , which related to ''declared goods'' u/s 14 of the Central Sales Tax Act, 1956. There, Beg, J. (as he then was) observed:

It is true that the question whether goods to be taxed have been subjected to a manufacturing process so as to produce a new marketable commodity, is the decisive test in determining whether an excise duty is levable or not in certain goods. No doubt, in the law dealing with the sales tax, the taxable event is the sale

and not the manufacture of goods. Nevertheless, if the question is whether a new commercial commodity has come into existence or not, so that its sale is a new taxable event in the sales tax law, it may also become necessary to consider whether a manufacturing process, which has altered the identity of the commercial commodity, has taken place. The law of sales tax is also concerned with ''goods'' of various descriptions. It, therefore, becomes necessary to determine when they ceased to be goods of one taxable description and became those of a commercially different category and description.

In the same case, Anr. principle was elucidated, namely, that the ordinary meaning to be assigned to a taxable item in a list of specified items is that each item as specified is considered as a separately taxable item for purposes of single point taxation in a series of sales unless the contrary is shown. The mere fact that the substance or raw material out of which it is made has also been taxed in some other forms, when it is sold as a separate commercial commodity, would make no difference for purposes of the law of sales tax. The object is to tax sale of each commercial commodity and not the sale of the substance out of which they are made. Each commercial commodity becomes a separate object of taxation on a series of sales of that commercial commodity so long as it retains its identity as that commodity.

18. On one side, we have cases where the Supreme Court has treated the processed goods as being different from the original goods or substance. On the other, we have a series of cases, some of them very recent, where by applying the ''substantial identity'' theory, it is held that the new goods and the old commodity are the same.

19. We shall first refer to soma of the cases where the commodity, after some processes, has been treated as a different commodity for purposes of taxation. In Jagannath and Others Vs. Union of India (UOI), , the Supreme Court has held that tobacco in the ''whole leaf'' and the tobacco in the ''broken leaf'' are two different commodities. In Anwarkhan Mehboob Co. v. State of Bombay (1960) 1 S.T.C. 698 S.C., raw tobacco'' was manufactured into bid patti and they were held to be different commodities. Again in State of Madras v. Swastic Tobacco Factory (1966) 17 S.T.C. 316, ''raw tobacco'' manufactured into chewing tobacco were held to be different. Paddy husked into rice was held to be different commodities in Ganesh Trading Co. v. State of Haryana (1973) 32 S.T.C. 623. So, in A. Hajee Abdul Shakoor and Company Vs. State of Madras, , it was held that raw hides and skin are different from dressed hides and skins. The fact that certain articles are mentioned under the same heading in a statute does not mean that they all constitute one commodity. The inclusion of several articles under the same heading may be for a reason other than that the articles constitute one and the same thing. Again, in Sri Siddhi Vinayaka Coconut and Co. and Others Vs. State of Andhra Pradesh and Others, ''watery coconuts'' and ''dry coconuts'' were held to be different commodities, commercially speaking. Watery coconuts are put to a variety of uses, e.g., for

cooking purposes, for religious and social functions, whereas dried coconuts are used mainly for extracting oil. In T.G. Venkataraman, etc. Vs. State of Madras and Another, ., cane jaggary'' and ''palm jaggary'' were held to be different commodities, the former being produced from juice of sugarcane, while the latter is produced from juice of palm tree. In State of Tamil Nadu v. Pyare Lal Malhotra (1976) 36 S.T.C. 319 (S.C.), it has been held that manufactured goods consisting of ''steel rods, flats, angles, plates, bars, etc.'' could be taxed again even if the material out of which they were made had already been taxed once as ''iron and steel scrap''. Each sub item in the entry was treated as a separate taxable commodity and each separate species for each sires of sales although they may all belong to the same genus ''iron and steel''. The earlier case in State of M.P. v. Hiralal (1966) 17 S.T.C. 313, was distinguished on the ground that in view of the words ''goods prepared from any metal other than gold or silver'' the substance out of which the goods were made was the main subject of exemption and that that was why bars, flats and plates, which were rolled in the mills were treated as no different from iron and iron plates purchased out of which these were made. In Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, ., it was held that when scrap iron ingots were converted into rolled steel sections, they go through a process of manufacture which brings into existence a new marketable commodity.

20. The cases where in it has been held that the commodity has not gone any change have been there although. No doubt, eurrently, there is more emphasis on the method of construction of the entries. In Kailash Nath and Another Vs. State of U.P. and Others, ., it was argued that cloth which was purchased and then printed, coloured or dyed, gets transformed into some other material and that therefore what is exported is not the same cloth so as to come within the words ''such cloth'' in the exemption notification. This contention was rejected stating that by using the word ''such'' what the legislature has laid down is not that the identical thing shall be exported in bulk and quantity, nor did the legislature mean that any change in appearance would be crucial and alter its nature. Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, , is, of course, one of the leading cases in this class of cases. The High Court had held that ''refined oil'' was not different from ''groundnut oil'', but that ''hydrogenated oil'' or ''Vanaspathi'' was different from groundnut oil and therefore a new commodity. But the Supreme Court held that even ''hydrogenated oil'' or ''vanaspathi'' was substantially not different from ''groundnut oil''. The Court referred to the entire process of refinement and hydrogenation and observed that mere fact that the viscous liquid became semi-solid-a liquid state was not a necessary condition for the commodity to be treated as oil. Even after the hardening process, in its ''essential nature'', there was no change. The addition of hydrogen atoms was made to make it more stable, thus improving its quality and utility. It was also observed:

...neither mere absorption of other matter, nor intermolecular changes necessarily affect the identity of a substance as ordinarily understood..... It would undoubtedly

be very bad groundnut oil but still it would be groundnut oil and if so, it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural process of deterioration through oxidation is increased, it should be held to be not oil.

(emphasis supplied)

''Sugar'' was held to include within its ambit all forms of sugar called ''patasa'', ''harda'' and ''alchinda'' State of Gujarat v. Sakarwala Brothers (1967) 19 S.T.C. 24. In Commissioner of Sales Tax, U.P. v. Harbilas Rai and Sons (1968) 21 S.T.C. 17, bristles plucked from pigs, boiled, washed with soap and other chemicals and sorted out in bundles according to their size and colour, were regarded as remaining the same commercial commodity, namely, pigs bristles.

21. The principle came up for a more detailed discussion in a trend-setting judgment in the ''pineapple slices'' cases in Deputy Commissioner of Sales Tax v. Pio Food Packers (1980) 46 S.T.C. 63. The question no doubt, arose u/s 5A(la) of the Kerala General Sales Tax Act, 1963 wherein the words ''consumes such goods in the manufacture of other goods for sale or otherwise'' fell for consideration. It was held that when pineapple fruit is washed and then the inedible portion, the end crown, the skin and the inner core were removed, thereafter the fruit is sliced and the slices are filled in cans, sugar is added as a preservative, the cans sealed under temperature, and then put in boiling watter for sterilisation there was no manufacture of new goods, Pathak, J. (as he then was) observed that the generally prevalent test is whether the article produced is regarded in trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and intent of processing may vary from one case to Anr. , and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. The Supreme Court observed:
With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity. But instead is recognised as a new and distinct article that a manufacture can be said to have taken place.....Although it has undergone a degree of processing, it must be regarded as still retaining its original identity.

It was stated that the question in all those cases is "Does the processing of the original commodity bring into existence a commercially different and distinct article?" Pathak, J. (as he then was) referred to two leading American cases. The first one is Anheusur Boech Brewung Association v. United State (1907) 207 U.S. 556 : 521 R. 336, wherein while dealing with ''manufacture'', it was observed:

At some point, processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been ''manufactured''.

(emphasis supplied)

There, certain corks, imported from Spain, were cut by hand without steaming, assorted, branded with date and name of brewer, the name of the beer with a special private mark to show what firm the cork came from. All this was done by hand. Then the selected corks were put in a machine or ''air-fan'' (the unpatented invention of a man in the employ of the claimant) and all dust, noal, bugs and worms removed. They were then thoroughly cleansed by washing and steaming, removing the tansim and gains and making the cork soft and elastic, and they were next exposed to blasts of air in a machine until they were absolutely dry. Then they were put for a few seconds into a bath of glycerin and alcohol, the proportions of which are a trade secret, then dried in a special system. This bath closes up all the seams, holes and crevices and then the corks are given a coating which prevents the beer (contained in the bottles which are corked with these corks) from acquiring a cork taste. The corks are finally dried by absorption of the chemicals that had covered them. The whole process would take one to three days. The cleaning and pasterisation of corks make them soft, elastic, reliable and free from germs or foreign substance. The U.S. Supreme Court held that there was no ''manufacture'' of new goods. There could be manufacture, unless there was transformation; ''a new and different article must emerge, having a distinct name, character and use''. But the cork was still a cork. Pathak, J. (as he then was) also referred to East Texas Lines v. Prozen Food Express (1955) 351 U.S. 49 : 100 L. Edn. 917. In that case, the provisions of Section 203(b)(6) of the Federal Motor Carriers Act granting exemption of vehicles carrying ''agricultural'' commodities (not including manufactured products thereof) were being interpreted. The finding of the District Court that fresh and frozen meat was not exempt was not appealed against, but that fresh and frozen dressed poultry were exempt. On appeal, the said decision was affirmed., Douglas, J. (as he then was) held that ''processing of chickens'' in order to make them marketable, but without changing their substantial identity, did not turn chickens from agricultural commodities into manufactured commodities. The exemption was designed to preserve for the farmers the advantage of cow-cart motor transportation. The exemption was not lost by incidental or preliminary processing but by manufacturing. It was observed:

Killing, dressing and freezing a chicken is certainly a change in the commodity. But it is no more drastic a change than the change which takes place in milk from pasteurising, homogeneousing, adding vitamin concentrates, standardising and bottling.

There was, it was observed no difference between chicken in the pan and the one that was dressed. Anheusar-Bosch''s case (1907) 207 U.S. 556 : 52 L.R. 336 was

followed:

22. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, , decided in 1980 has been followed in several recent cases. In Chowgule and Co. Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, , while dealing with the meaning of the words in the manufacture or processing of goods for sale or in mining'' occurring in Section 8(1)(6) of the Central Sales Tax Act, 1956, it was held that there was no manufacture involved when iron ore is extracted, washed, screened and dressed, and the different parts of the ore are blended together in a ''mechanical ore handling plant'' to achieve a homogeneous ''physical and chemical composition'' to suit the export order specification. The ore that is produced, it was held, could not be regarded as ''a commercially new and distinct commodity''. ''Processing'' may involve an operation as a result of which a commodity experiences some change. There is no manufacture unless a different and distinct commercial commodity is produced. In State of Tamil Nadu Vs. Mahi Traders and Others, , the Supreme Court held, while dealing with Section 14(iii) and Section 15(a) of the Central Sales Tax Act, 1956, that ''leather splits'' and ''coloured leather'' continue to be hides and skins inasmuch as they are merely cut pieces of hides and skins. The entry was ''hides and skins'', whether in a raw or dressed state''. No reference is found to Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, . In Gujarat Steel Tubes v. State of Kerala (1990) 74 S.T.C. 176 (S.C.) , it was held that ''galvanised tubes'' are steel tubes within the meaning of ''steel tubes'' in Section 14(iv)(xi) of the Central Sales Tax Act, 1956. No reference was made to Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, .

23. We now come to two cases decided by the Supreme Court directly u/s 5(3) of the Central Sales Tax Act, 1956 with which we are presently concerned, and where Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, decided in 1980 was directly applied for holding that the goods exported are ''those goods'' that was purchased by the Indian Exporter and hence the goods so purchased earlier were not liable to local sales tax. Sterling Foods v. State of Karnataka (1980) 63 S.T.C. 238 is, in fact, the sheet- anchor of the Petitioners'' case. 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, de-veining and cleaning and freezing before being exported in cartons. The Appellants claimed that no local sales tax is payable by them in view of Section 5(3) of the Central Sales Tax Act, 1956 which precludes levy of sales tax on local purchases if they were made pursuant to export orders and the sale was of "those goods" purchased. The High Court rejected their claim. But, the Supreme Court allowed the appeal and held that by reason of the 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. They are only made ready for the

table. Following Pio Foods'' case (2), and East Texas case (53), the Supreme Court held that it is not every processing that brings about change in the character and identity of a commodity. The nature and extent of processing may vary from one case to Anr. and indeed there may be several stages of processing and perhaps different kinds of processing at each stage. With each process suffered, the commodity experiences a change but it is only when the series of changes convert it into a different commercial commodity that it can be said that there is a new commodity. Bhagawati, C.J., observed:

The test is whether in the eyes of those dealing in the commodity or in commercial parlance, the processed commodity is regarded as distinct in character and identity from the original commodity.

This case was followed in Dy. Commissioner of Sales Tax v. Shippy International (1988) 69 S.T.C. 325, which also arose u/s 5(3) of the Central Sales Tax Act, 1956. There, the Assessee was a purchaser of fresh frog legs for export and after purchase, the skin was removed and the goods were washed and freeze for export. It was held that the exported goods were the same commodity that was purchased. The process of freezing was to prevent decomposition. Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, were followed and reference was made to East Texas Case (1955) 351 U.S. 49 : 100 L Edn. 917 also.

24. The above discussion completes a general survey of the easel cited at the Bar in support of the rival pleas put forward before us. Goods may fall within the taxation entry or in the provision relating either to non-taxability or the notification relating to exemption. But, in either case, questions would arise whether the goods in question are the goods which fall within the taxation-net or outside. The common parlance test is pressed into service if the article is one in daily household use or is used by the common man. The commercial parlance test is called in aid while dealing with the construction of goods known to the merchant community and the consumers of those goods. The question is as to how the ''substantial identity'' test is to be applied is seen discussed by the Gauhati High Court in Modern Candle Works v. Commissioner of Taxes (1988) 71 S.T.C. 362.

25. Saikia, C.J. (as he then was) had occasion to consider this aspect in Modern Candle Works v. Commissioner o| Taxes (1988) 71 S.T.C. 362. There the Division Bench of the Gauhati High Court was considering whether ''wax candles'' could be taxed under the Assam Sales Tax Act or whether they were still ''wax'' to be taxed only under the Assam (Sales of Petroleum and Petroleum Products etc.) Taxation Act, 1955. After referring to several decided cases, including Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Anheusar-Bosch''s case (1907) 207 U.S. : 52 L.R. 336 it was observed that according to the latest cases there could perhaps be some distinction between ''edible goods''

and other ''non-edible'' goods. Saikia, C.J. (as he then was) observed:

From the above decisions involving edible articles, some of the criteria found are whether the entry-article is a genus of which the test-article is a species; whether the essential characteristics of the entry-article are still to be found in the new-article; whether there has been addition of external agents thereby making it different and whether there has been a process of transformation of such a nature and extent as to have resulted in the production of a new article as commonly understood in the market where it is dealt with. So long as it does not result in a new article, the nature, duration and transformation of the original commodity would not be material.

Referring to ''non-edible'' item of goods, the learned Judge observed:

In the other line of decisions involving articles which are not as such edible, we And that it is the concept of the consumption of the original commodity in the course of production of a new commodity as understood commonly by the people who use it would be material. The nature and content of the process, whether the labour is manual or mechanical, whether the duration is short or long, whether the production requires experience or not, would no doubt be relevant but would not alone be decisive.

After referring to decided cases, Saikia, C.J. (as he then was) further held that the same criterion or test cannot be applied to all kinds of commodities. The crucial question is whether there is a new product, out of the other, as a result of the processing of any kind. For example, ''wax'' may be used as a raw material for production of a new article. Wax is consumed in production of wax-candle. If artistic dolls axe produced out of wax, it may be reasonable to hold that the wax doll, though made of wax, is a new commodity. As has been held, if ice is produced out of water bringing it to the required temperature, even though it is composed entirely of water, it can be regarded as a new commodity. In case of earthen vessels, the new commodity is nothing but clay burnt at a certain temperature. Cups and saucers are produced out of china-clay; and bricks are produced out of suitable clay. The fact that nothing more has been added and the process is simple and manual, may not justify regarding the brick as only clay and nothing more. If gunny bags are woven out of jute, they do not remain jute but transformed into a new product. In all the above cases, the fact that the essential characteristics are not lost, would not be material. What is material is whether a distinct article as understood by the people who commonly deal with it, has come into being. In other words, whether in the market, it is regarded as a distinct article. On these principles, it was held that ''wax is consumed in production of candle and (with) different form, utility and marketability added to it, is a different commercial commodity falling under the Assam Sales Tax Act. That is what the Gauhati High Court held.

26. As stated earlier, in paragraph 5 of this judgment we have discussed in extenso the various aspects canvassed before us by counsel on both sides to substantiate their rival pleas. It is not for us to say which of these principles set out above would apply in any particular case. We have the ''common parlance'' test, the ''commercial parlance test'' and the ''substantial identity test''. It will be difficult for us to say that one test overrides the other or anyone of them is the dominant one. It will be for the Court to consider in each case the principle to be applied on an overall view of the matter and taking guidance from the decided cases, which will guide the Courts. It will be for the Supreme Court to lay down the relevant guidelines by which it could be said that one principle would outweigh the other. Point No. 1 is decided accordingly.

27. Point No. 2. In dealing with Section 5(3) of the Central Sales Tax Act, 1956 the tests mentioned above would be obviously applicable, the appropriateness of the test being related to the articles, the common man or the dealer as stated above. The use of the words ''those goods'' and ''any goods'' are not of much significance and do not lead to the laying down of any new principle of construction. There was some argument based on R.B. Takker (P) Ltd. v. Coffee Board (1991) 80 S.T.C. 199 (Mad.), decided by the Madras High Court in which a distinction was made between the words ''those goods'' used in Section 5(3) as being different from ''such goods'' and that it is only if the words ''such goods'' are used, the goods must be the same. The distinction made is ingenius and plausible, but we are, with great respect, unable to agree. The learned Judges relied upon Kailash Nath and Another Vs. State of U.P. and Others, . But, in our view, in that case the words ''such goods'' were not treated differently and in fact, there the cloth was subjected to a process of printing, colouring and dying and was still held to be ''such goods''. In other words, ''such goods'' in the Supreme Court case were given the same meaning as given to ''those goods'' by the Madras High Court. We, therefore, hold that the broad principles mentioned in Point No. 1 will apply to cases u/s 5(3) of the Central Sales Tax Act, 1956. Point No. 2 is found accordingly.

28. Point No. 3.- If the principle of substantial identity stated in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods (1986) 6 S.T.C. 239 (S.C.) and East Texas (1955) 351 U.S. 49 : 100 L. Edn. 917 cases all dealing with ''edible'' goods are to be applied to ''cashew with shell'' purchased and the resultant ''cashew nut'' exported, it may be plausible to hold that the goods purchased and the goods exported are substantially the same in identity and are not different and distinct in character or use from the point of the man to whom the cashew nuts are served at the table. The goods would be ''those goods'' within Section 5(3) and cashew nut with shell purchased would be outside the taxable net going by Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, as applied in Sterling Foods case (1986) 6 S.T.C. 239 (S.C.).

29. However, it is to be seen that in Shanmugha Vilas''s case (1953) 4 S.T.C. 205 (S.C.), the High Court had submitted a finding that the cashew with shell have been subjected to different processes by different dealers and there is, in effect, a new and distinct commodity of cashewnut. The majority judgment says that this finding of the High Court was not questioned and also holds that the penultimate purchase by the exporter is not within Article 286(1)(b) as it then stood in 1953. The majority judgment therefore does not touch upon the aspect with which we are concerned here. However, Das, J. (as he then was) while holding that the penultimate purchase by the exporter was within Article 286(1)(b) entitled to non-taxability, held that the goods purchased and the goods exported should be the same and not commercially different. This is what Das, J. (as he then was) stated at page 247:

The High Court has, on remand, enquired into the process of manufacture through which the raw cashewnuts are passed before the edible kernels are obtained. The High Court, in its judgment on remand, goes minutely into the different processes of baking, pressing, pealing and so forth. Although most of the process is done by hand, part of it is also done mechanically by drums. Oil is extracted out of the outer shells as a result of roasting. After roasting the outer shells are broken and the nuts are obtained. The poison is eliminated by pealing off the inner skin. By this process of manufacture the Respondents really consume the raw cashew and produce new commodities. The resultant products, oil and edible kernels, are well recognised commercial commodities. They are separate articles of commerce quite distinct from the raw cashewnuts. Indeed, it is significant that the Respondents place orders for ''cashewnuts'' but orders are placed with them for ''cashewnut kernels''. In the circumstances, "the goods'' exported are not the same as the goods purchased. The goods purchased locally are not exported. What are exported are new commodities brought into being as a result of manufacture. There is a transformation of the goods. The raw cashews are consumed by the Respondents in the sense that a jute mill consumes raw jute, or a textile mill consumes cotton and yarn. The raw cashews not being actually exported the purchase of raw cashews cannot be said to have been made ''in the course of'' export so as to be entitled to immunity under Clause (1)(b).

But can it be said that the view adopted is consistent with the later view of the Supreme Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, or Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, In our opinion, the matter may require a second or fresh look. The difference between a process which makes the goods more edible from the point of the man at the table and the commercial dealer as stated in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, or Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, or as stated by Saikia, C.J., (as he then was) and a process which goes beyond that, was not available in 1953 when

Das, J., (as he then was) decided the case. Such a test became available only [after Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool,] in 1980 when Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, was decided. The process referred to by Das, J. (as he then was) may not, in the context of the new rulings, and specifically in relation to edible foods, today be treated as amounting to consumption of goods or manufacture. But inasmuch as Das, J., (as he then was) decided the matter specifically with regard to ''cashew'' and ''cashewnut'', it will be difficult for this Court not to follow that judgment and to prefer the general principles laid down in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, cases. Nor can we say that Das, J., (as he then was) was dealing with the entry ''cashew'' and its kernel'', and that we are dealing with a different entry, viz., ''cashewnut with shell'', at the purchase point. In our view, it will, in fact, be a matter for the Supreme Court to reappraise the entire matter in the context of Article 141 of the Constitution of India. It will be difficult for us not to follow S.R. Das, J. (as he then was).

30. It is true that when Das, J. (as he then was) decided the case in 1953, Article 286(1)(b) was in its unamended stage, further the, Central Sales Tax Act, 1956 was itself not enacted and Section 5(3) which came in 1976 was also not there. But, on that ground alone, it may not be proper for this Court to bye-pass the provision of Article 141 of the Constitution of India. Judicial discipline is different from the change in the legal principles. Judgment of Das, J. (as he then was) deals directly with cashewnut with shell and cashewnut and we cannot by taking shelter under Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , cases, by-pass the judgment of Das, J- (as he then was).

31. We, therefore, have no option but to hold against the Petitioners for this reason. Point No. 3 is held accordingly.

Krishnamoorthy, J.

32. Though I agree with my Lord the Chief Justice regarding the ultimate order to be passed in these two cases, I am not in a position to agree with certain conclusions reached by him in the case which compels me to write a separate judgment. The facts of the case, the legislative history of Section 5(3) of the Central Sales Tax Act, the interpretation of which arises for consideration in these two cases, are fully stated in his judgment and it is not necessary to repeat them.

33. The question involved in these two cases is as to whether the local purchases of cashew by the Petitioners for the purpose of exporting cashew kernel will be entitled to exclusion from sales tax u/s 5(3) of the Central Sales Tax Act. Section 5(3)

of the above Act reads as follows:

(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.

On a reading of Section 5(3) it is clear that in order to claim protection under that section, it is necessary that the last sale or purchase of any goods preceding the sale or purchase of occasioning the export must be for the purpose of exporting those goods out of the territory of India. Though various decisions were cited by counsel for the Petitioners and the learned Special Government Pleader (Taxes) to find out the principle to decide as to whether goods purchased and goods exported are the same, the only cases where the question directly arose u/s 5(3) of the Act before the Supreme Court are the cases reported in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, and Deputy Commissioner of Sales-tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Shiphy International, Alleppey, . In the former case it was held:

It is clear on a plain reading of Sub-section (3) of Section 5 of the Central Sales Tax Act, 1956, that in order to attract the applicability of that provision, it is necessary that'' the goods which are purchased by an Assessee for the purpose of complying with the agreement or order for or in relation to export, must be the same goods which are exported out of the territory of India. The words "those goods" in this Sub-section are clearly referable to "any goods" mentioned in the preceding part of the Sub-section and it is therefore obvious that the .goods purchased by the Assessee and the goods exported by him must be the same. If by reason of any processing to which the goods may be subjected after purchase, they change their identity so that commercially they can no longer be regarded as the original goods, but instead become a new and different kind of goods and then they are exported, the purchases of original goods made by the Assessee cannot be said to be purchases in the course of export.

Again it was observed:

The test which has to be applied for the purpose of determining whether a commodity subjected to processing retains its original character and identity is as to whether the processed commodity is regarded in the trade by those who deal in it as distinct in identity from the original commodity or it is regarded, commercially and in the trade, the same as the original commodity. It is necessary to point out that it is not every processing that brings about change in the character and identity of a commodity. The nature and extent of processing may vary from one case to another and indeed there may be several stages of processing and perhaps different kinds of processing at each stage. With each process suffered, the original

commodity experiences change. But it is only when the change or a series of changes take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct commodity that it can be said that a new commodity, distinct from the original, has come into being. The test is whether in the eyes of those dealing in the commodity or in commercial parlance the processed commodity is regarded as distinct in character and identity from the original commodity....

(emphasis supplied)

In coming to this conclusion their Lordships followed the principles laid down in Dy. Commr. of Sales Tax (Law) v. Pio Food Packers 46 S.T.C. 63.

34. It can thus be seen that in interpreting Section 5(3), the Supreme Court has laid down that the commercial identity of the goods is the main and important test, to determine whether the goods purchased and exported are the same. The principle is clear and there is no, difficulty in understanding the same, but the actual difficulty arises when it has to be applied to the facts of a particular case.

35. The question that arose for consideration in the aforementioned case-63 S.T.C. 239-was whether shrimps, prawns and lobsters subjected to processing like cutting of heads and tails, peeling, deveining, cleaning and freezing cease to be the same commodity and become a different commercial commodity for the purpose of the Central Sales Tax Act, 1956. After applying the test, their Lordships held that processed or frozen shrimps, prawns and lobsters are commercially regarded the same commodity as raw shrimps, prawns and lobsters.

36. Pio Food''s case (3), arose out of a case u/s 5A(1)(a) of the Kerala General Sales Tax Act, where the question was as to whether any goods were consumed in the manufacture of other goods. In that case the Assessee purchased pineapple which was washed and then the inedible portion, the end crown, the skin and the inner core were removed and thereafter the fruit was sliced and the slices were filled in cans, sugar was added as a preservative, the cans were sealed under temperature and then put in boiling water for sterilisation. The question arose as to whether pineapple fruit was consumed in the manufacture of pineapple slices and the Supreme Court came to the conclusion that there is no essential difference in identity between the original commodity and the processed article and that it is not possible to say that one commodity has been consumed in the manufacture of another.

37. A large number of cases were cited before us by both sides to determine the question as to whether by a particular processing of the original commodity, a new commercially different and distinct article will come into existence. In Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others, the Supreme Court held that when raw tobacco was converted into bidi patti, a different commercial article came into existence. In A. Hajee Abdul Shakoor and Company Vs.

State of Madras, it was held that raw hides and skins constituted a different commodity from dressed hides and skins with different physical properties. In State of Madras Vs. Swastik Tobacco Factory, Vedaranyam, , the Supreme Court held that raw tobacco and chewing tobacco are different commercial commodities, in Ganesh Trading Co., Karnal Vs. State of Haryana and Another, and State of Karnataka Vs. B. Raghurama Shetty and Others, , the Supreme Court held that paddy when dehusked into rice, they are commercially different commodities and that paddy and rice cannot be treated as the same commodity for the purpose of sales tax. On the other hand, in certain other cases, the Supreme Court has held that the original commodity, though underwent processing, has not lost its original identity. In Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, , it was held that hydrogenated groundnut oil is the same as groundnut oil. On going through these decisions, especially the decision in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , which directly arose u/s 5(3) of the Central Sales Tax Act, it is clear that the test to be applied is whether the commodity purchased by the exporters and the commodity exported by them outside the territory of India are commercially different and distinct in character and identity from the original commodity.

38. The only case before the f Supreme Court wherein the Supreme Court considered the question as to whether cashew and cashew kernels are the same commodities, is the one reported in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory 4 S.T.C. 205. The question that arose for consideration was the interpretation of Article 286 of the Constitution of India as it stood at that time. Patanjali Sastri C.J., on behalf of four Judges of the Constitution Bench, though held that purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption of Article 286(1)(b), further considered the question as to whether the cashewnut purchases made by "the exporters in that case are within the exemption under Article 286. After considering the question, it was held that the purchases are not covered by the exemption on the construction which was placed on Clause (1)(b) of Article 286 of the Constitution of India, even if the difference between the raw materials purchased and the manufactured goods (kernels) exported is to be ignored. But after that it was observed as follows:

It may however be mentioned here that the High Court has found that the raw cashewnuts and the kernels manufactured out of them by various processes, partly mechanical and partly manual are not commercially the same commodity. This finding, which is not seriously disputed before us, would be an additional ground for rejecting the claim to exemption in respect of these purchases, as the language of Clause (1)(b) clearly Requires as a condition of the exemption that the export must be of the goods whose sale of purchase took place in the course of export.

Das, J., as he then was, in the very same case, at page 247, observed as follows:

The High Court has, on remand, enquired into the process of manufacture through which the raw cashewnuts are passed before the edible kernels are obtained. The High Court, in its judgment on remand, goes minutely into the different processes of baking or roasting, shelling, pressing, pealing, and so forth. Although most of the process is done by hand, part of it is also done mechanically by drums. Oil is extracted out of the outer shells as a result of roasting. After roasting the outer shells are broken and the nuts are obtained. The poison is eliminated by pealing off the inner skin. By this process of manufacture the Respondents really consume the raw cashew and produce new commodities. The resultant products, oil and edible kernels, are well recognised commercial commodities. They are separate articles of commerce quite distinct from the raw cashewnuts. Indeed, it is significant that the Respondents place orders for "cashewnuts" but orders are placed with them for "cashewnut kernels". In the circumstances, "the goods" exported are not the same as the goods purchased. The goods purchased locally are not exported. What are exported are new commodities brought into being as a result of manufacture. There is a transformation of the goods. The raw cashews are consumed by the Respondents in the sense that a jute mill consumes raw jute, or a textile mill consumes cotton and yarn. The raw cashews not being actually exported the purchase of raw cashews cannot be said to have been made ''in the course of'' export so as to be entitled to immunity under Clause (1)(b).

39. As stated earlier, in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, , the Supreme Court held that the test to be applied in such cases is as to whether the commodity exported can be regarded commercially the same as the original commodity which was purchased by the exporter. The very same test was applied by Das, J. (as he then was) in 4 S.T.C. 205, though his Lordship was interpreting Article 286(1)(b) of the Constitution of India. Thus applying the very same test that is to be applied for deciding the question u/s 5(3), the Supreme Court in 4 S.T.C. 205 held that raw cashewnuts purchased and the cashew kernels exported are different commercial commodities and cannot be regarded as the same. It was contended by counsel for the Petitioners that majority of the Judges in the aforesaid case did not consider the case on merits but proceeded only on the basis that the finding of the High Court on that question was not challenged before them so that it cannot betaken as a dictum or a binding dictum laid down by the Supreme Court. It was further contended that the question as to whether raw cashewnuts and cashew kernels are different commodities was not disputed in that case and so the observations made by Das, J. cannot be relied on for coming to the conclusion that they are commercially different and distinct commodities. I find it difficult to agree with this contention of the Petitioners. The very question was considered by the Supreme Court in that case-, Moreover, the Supreme Court in the subsequent decisions- Kailash Nath and Another Vs. State of U.P. and Others, , Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others, Tungabhadra Industries Ltd. Vs. The

Commercial Tax Officer, Kurnool, and Kathiawar Industries Ltd. Vs. Jaffrabad Municipality, -noted the decision in Shanmugha Vilas case 4 S.T.C. 205 and proceeded as if the Supreme'' Court has come to the conclusion that raw cashewnuts and cashew kernels are commercially different and distinct commodities. In that view of the, matter, it has to be taken that in the Shanmugha Vilas case 4 S.T.C. 205, the decision of the Supreme Court was to the effect that raw cashew and cashew kernel are different and distinct commercial commodities. If that be so, this Court is bound by the aforesaid decision and is not entitled to take a different view, as Article 141 of the Constitution of India interdicts the High Courts from taking a different view from that of the Supreme Court: I. do not find my way .to subscribe to the contrary view expressed by the Andhra Pradesh High Court in Singh Trading Company Vs. Commercial Tax Officer and Others, , and I express my respectful dissent.

40. Relying on the observations made by Saikia, C.J., (as he then was) in Modern Candle Works v. Commissioner of Taxes (1988) 71 S.T.C. 362, it was contended that a distinction has to be made in regard to the ''substantial identity test'' in respect of ''edible'' and ''non-edible'' goods. It was contended that in the former case, the matter has to be viewed not through the eyes of the merchant but through the eyes of those at the table and that the common parlance test is more appropriate in the latter case. I find it difficult to accept this contention. Sterling Food''s case (1) decided by the Supreme Court was in respect of an edible item-prawns-and it was held therein:

If by reason of any processing to which the goods may be subjected after purchase, they change their identity so that commercially they can no longer be regarded as the original goods, but instead become a new and different kind of goods and then they are exported, the purchases of original goods made by the Assessee cannot be said to be purchases in the course of export.

Again it was observed that the test to be applied is as to whether the processed commodity is regarded in the trade by those who deal in it as distinct in identity from the original commodity or it is regarded, commercially and in the trade, the same as the original commodity. Ultimately it was held that the test is whether in the eyes of those dealing in the commodity or in commercial parlance the processed commodity is regarded as distinct in character and identity from the original commodity". The most apt instances where the Supreme Court considered this aspect of the matter in respect of edible commodities are cases in which the question as to whether paddy and rice are identical goods came up for consideration in the context of certain State Sales Tax Laws. It is well known that rice is nothing but dehusked paddy "and no other process is involved in the making of rice. In spite of that the Supreme Court has taken the view that they are different commodities, applying the commercial parlance test in Ganesh Trading Co., Karnal Vs. State of Haryana and Another, Babu Ram Jagdish Kumar and Others Vs. State of

Punjab and Others, and State of Karnataka Vs. B. Raghurama Shetty and Others, . In Ganesh Trading Co., Karnal Vs. State of Haryana and Another, it was observed:

This Court has firmly ruled that in finding out the true meaning of entries mentioned in a Sales Tax Act, what is relevant is not the dictionary meaning but how those entries are understood in common parlance, specially in commercial circles. Sales Tax primarily deals with dealers who are engaged in commercial activity. Therefore what is of the essence is to find out whether in commercial circles, paddy is considered as identical with rice.

(emphasis supplied)

Again, it was held:

Now, the question for our decision is whether it could be said that when paddy was dehusked and rice produced, its identity remained. It was true that rice was produced out of paddy but it is not true to say that paddy continued to be paddy even after dehusking. It had changed its identity. Rice is not known as paddy. It is a misnomer to call rice as paddy. They are two different things in ordinary parlance. Hence quite clearly when paddy is dehusked and rice produced, there has been a change in the identity of the goods.

The aforesaid principles were reiterated by the Supreme Court in the two later cases mentioned above. It is therefore clear that it is the commercial parlance test that is to be applied even in the case of edible commodities in the context of Sales Tax laws which are applicable to dealers who are engaged in the commercial activities. Applying the above test in the light of the decision of the Supreme Court in Shanmugha Vilas case 4 S.T.C. 205 it has to be held that raw cashew purchased by the Petitioners and cashew kernel exported are different and distinct commercial commodities.

41. I do not find my way to agree with the view expressed by my lord the Chief Justice on point No. 3 that in view of the principles stated in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, and Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, and the East Texas case (1955) 351 U.S. 49 : 100 L. Edn. 917, ''cashew with shell'' purchased and the resultant ''cashewnut'' exported are substantially the same in identity and are not different and distinct in character or use from the point of the man to whom the cashewnuts are served at the table. I have already held that even in such cases the main test to be applied is the commercial identity test. Even applying the commercial identity test (without the aid of the Supreme Court decision in 4 S.T.C. 205), the common parlance test or the user test which had been adopted by the Supreme Court in some cases. I have no hesitation to hold that raw cashewnuts and cashew kernels-are entirely different commercial commodities. Commercially they are different, as raw cashewnuts and cashew kernels can be separately purchased1.

This test was applied by the Supreme Court in Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others, . Even in common parlance these two commodities have two distinct names, namely and they are considered different by the common man. Even if we apply the user test, the purpose for which cashew kernels can be used, raw cashew cannot be used as such nor can cashewnuts be used for the purposes for which raw cashew is used. When raw cashew with shell is processed, three distinct commercial commodities emerge out of it, namely, (1) the shell, (2) cashewnut shell liquid (cashew oil) which has a separate commercial use in polymer based industries, paints and varnishes, resins and foundry chemicals and for water proofing and (3) cashew kernel which is used only as a food article. Looking at the matter from any angle, raw cashewnut with (shell and cashew kernel are different commercial commodities and in that view of the matter, Petitioners are not entitled to protection u/s 5(3) of the Central Sales Tax Act.

42. Considerable reliance was placed by counsel for the Petitioners on the decision of a Division Bench of this Court in Swasti Cashew Industries Private Ltd. Vs. The State of Kerala, and that of the Supreme, Court in K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, . In the former case, it was held that the word ''cashew'' in Rule 4(2)(c) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 includes ''cashew kernel'' and therefore ''cashew kernel'' is eligible to sales tax under the Madras General Sales Tax Act, 1939. The question involved in the case was as to whether the word ''cashew'' includes ''cashew kernel'' as well and in the context of the provisions of the Madras General'' Sales Tax Act, it was held that ''cashew'' will ''include ''cashew kernel'' as well. The decision in Shanmugha Vilas case 4 S.T.C. 205 was considered and it was distinguished on the ground that what was considered there was regarding ''cashew and its kernel'' and the observations therein were in connection with the Travancore-Cochin Act. In the latter case the question considered by the Supreme Court was as to whether raw cashewnut is a foodstuff so as to come within the definition of ''essential commodity'' in Essential Commodities Act, 1955. It was held that even raw cashewnut is a foodstuff, even though some processing is necessary to make it fit for human consumption. These two decisions rendered in an entirely different context can hardly be of any assistance in interpreting Section 5(3) of the Central Sales Tax Act.

43. It was contended that the entry in the State Sales Tax Act at the time when Shanmugha Vilas case 4 S.T.C. 205 was decided was cashew and its kernel but the present entry in the Schedule to the Sales Tax Act, namely entry 31, is cashewnut with shell. It was contended that under the present entry both the genus and the species are included in the same entry and accordingly different consideration will arise in the context of the present entry in the Schedule to the Sales Tax Act. The same argument was considered and rejected by the Supreme Court in Sterling Foods, A Partnership Firm represented by its Partner Shri Ramesh Dalpatram Vs. State of Karnataka and Another, in the following manner:

The question whether raw shrimps, prawns and lobsters after suffering processing retain their original character or identity or become a new commodity has to be determined not on the basis of a distinction made by the State Legislature for the purpose of eligibility to State sales tax because even where the commodity is the same in the eyes of the persons dealing in it the State Legislature may make a classification for determining liability to sales tax. This question, for the purpose of the Central Sales Tax. Act has to be determined on the basis of what is commonly known or recognised in commercial parlance. If in commercial parlance and according to what is understood in the trade by the dealer and the consumer, processed or frozen shrimps, prawns and lobsters retain their original character and identity as scrimps, prawns arid lobsters and do not become a new distinct commodity and are as much ''shrimps, prawns and lobsters'' as raw shrimps, prawns and lobsters, Sub-section (3) of Section 5 of the Central Sales Tax Act would be attracted* * *

Thus, there is no merit in this contention as well.

44. In view of what is stated above, I do not find my way to agree with the reasoning of the Andhra Pradesh High Court in Singh Trading Company Vs. Commercial Tax Officer and Others, nor to dissent from the conclusion reached by a Division Bench of this Court in State of Kerala Vs. G. Sankaran Nair and Others, and I hold that on the facts of this case the Petitioners are not entitled to claim exemption or non-liability to sales tax u/s 5(3) of the Central Sales Tax Act.

I agree with my lord the Chief Justice that these two cases are to be dismissed.