

PETITIONER:
CONSOLIDATED COFFEE LTD. AND ANR. ETC.

Vs.

RESPONDENT:
COFFEE BOARD, BANGALORE ETC. ETC.

DATE OF JUDGMENT 15/04/1980

BENCH:
TULZAPURKAR, V.D.
BENCH:
TULZAPURKAR, V.D.
DESAI, D.A.
SEN, A.P. (J)

CITATION:
1980 AIR 1468 1980 SCR (3) 625
1980 SCC (3) 358
CITATOR INFO :
F 1987 SC1343 (1)
R 1988 SC1487 (47)

ACT:
Central Sales Tax Act, 1956, as amended by Amending Act 103 of 1966, Section 5(3) read with section 5(1) and 6(1), interpretation of-Whether Section 5(3) is beyond the power of authority of Article 286(2) of the Constitution and therefore ultra vires.

Words and Phrases-"the agreement or order for or in relation to such export," in Section 5(3) of the Central Sales Tax Act, meaning and interpretation of-Whether the agreement referred to means only the agreement with a foreign buyer or would include any binding or enforceable agreement to export even with a local party to implement which penultimate sale should have taken place.

Sale-Whether the word 'sale' in the phrase "if such last sale or purchase takes place after" in section 5(3) of Central Sales Tax Act 1956, includes "agreement to sell" as defined in Section 4 of the sale of Goods Act 1930.

Sale of Goods Act, 1930 sections 25, 64(2) scope of-Auction sales-When does the property in the Coffee sold at the export auctions conducted by the Coffee Board pass-Clauses 19, 26 and 31 of the Auction conditions.

HEADNOTE:

The Coffee Board, Bangalore is a statutory Corporation incorporated under section 5 of the Coffee Act, 1942, an enactment passed to provide for the development of the Coffee industry under the Control of the Union. The Coffee Board under various sections of the Coffee Act, exercises complete control-almost monopolistic-over the coffee trade in exercises of its statutory powers.

Export of coffee outside India is particularly controlled under the Act and the Rules by the Coffee Board. Coffee can be exported either by the Coffee Board directly to parties outside India or the Coffee Board authorises other exporters to effect such exports. For effecting exports through other exporters the Coffee Board periodically conducts auctions known as 'export auctions' and it follows a procedure in that behalf. To be able to bid

at these auctions, exporters have to get themselves registered with the Board. The Board maintains a list of Registered Exporters and grants to each one of them a permit, which authorises him to take part in the 'export auction'. The conditions which are imposed by the permit require, inter alia, a security deposit and a standing deposit (which may be in cash or in the form of bank guarantee) from the Registered Exporters; such permit is liable to be withdrawn or cancelled by the Chief Coffee Marketing Officer, an executive appointed by the Central Government on the Board, at any time if it is found that a permit-holder has sold or has attempted to sell coffee bought by him at the 'export auction' within the internal market without his written permission or if any of the other permit conditions are contravened. The actual 'export auctions' are conducted on the basis of the "the Terms and Conditions of Sale of Coffee in the course of Export" framed by it and the Registered Exporters participate in such auctions on those terms and conditions. Clause 3 of the "Auction

626

Conditions" declares that all auctions and sales made thereat are subject to (i) the Auction conditions, (ii) the Permit conditions and (iii) such other rules or conditions as may be prescribed by the Chief Coffee Marketing Officer. Under Cl. 4 only dealers who have registered themselves as Exporters of coffee with the Coffee Board and who hold a permit from the Chief Coffee Marketing Officer in that behalf are permitted to participate in the auctions. Under Cl. 11 no one is allowed to retract his bid when once the same has been entered in the Register of Bids. The highest bid is ordinarily accepted but the Sale Conducting Officer may not accept such bid if he has reason to believe that the name is not bona fide or genuine or the same is the outcome of concerted action on the part of the dealers or a section of them for the purpose of controlling or manipulating prices. etc. subject to his recording the reasons for such rejection in the Register of Bids. Clause 19 deals with weighing, delivery and payment of price and contains an over-riding provisions to the effect that the "property in the coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him." Clause 26 declares that it is an essential condition of the auction that the coffee sold thereat shall be exported to the destination stipulated in the catalogue of lots or to any other foreign country outside India as may be approved by the Chief Coffee Marketing Officer within three months or within such extended period as shall not exceed one year from the Notice of Tender issued to the auction buyer (Registered Exporter) and that under no circumstances the coffee purchased at such auction shall be diverted to other destinations or sold or be disposed of or otherwise released in India. Clauses 30 and 31 provide for the consequences of default on the part of the buyer to export the coffee or to produce evidence thereof; he is liable to pay penalty at the rates specified in Cl. 30 and under Cl. 31 Chief Coffee Marketing Officer is entitled to seize and take possession of the unexported coffee and deal with it as if were part and parcel of the Board's coffee in its surplus pool. Under Cl. 32 it is provided that in the event of the buyer committing any default in respect of any of the terms and conditions of the 'export auction' he shall be liable; (i) to be removed from the list of the Registered Exporters, the permit granted to him being cancelled; (ii) to forfeit the

deposit made by him at the time of obtaining the permit and (iii) to forfeit the deposit of any covered by the conditions contained in Cl. 14 (ii).

Prior to the enactment of sub section (3) of section 5 of the Central Sales Tax Act, 1956, which has inserted on September, 7, 1976 with retrospective effect from April 1, 1976 by the Amending Act (103 of 1976), the exemption from liability to tax under the Act in regard to a sale in the course of the export was and continues to be governed by s. 5(1) of the Act. The said provision was examined by the Supreme Court in two leading cases, namely, Coffee Board Bangalore v. Joint Commercial Tax Officer, Madras and Anr. and Mohd. Serajuddin etc. v. State of Orissa, and a certain interpretation had been accorded by this Court to the expression "in the course of export", and, according to these decisions the last sale, immediately preceding the sale occasioning the export of goods out of India, (the penultimate sale), however closely related to the final export, was held not to be in the course of export but only for export and hence liable to tax, it was with a view to remove the difficulties caused by these and other similar decisions that the Parliament enacted the new sub-s. (3) of s. 5 and added a proviso to s. 6(1) by the Amending Act (103 of 1976).

The Coffee Board issued a circular dated February 7, 1977 to the Registered Exporters of Coffee, by which it took the view that in order to avail of the benefit

627
of section 5(3) of the Central Sales Tax as amended by Amendment Act 103 of 1976, in respect of the coffee sold by it at the export auctions the Registered Exporters (bidders) should satisfy three conditions; (a) he must have an export contract (i.e. either agreement or order) from a foreign buyer, (b) he must have it on hand at the time when he participates in the export auction and (c) he should give proof of the export of the coffee purchased at the auction. By way of compliance with the conditions (a) and (b) above the said Circular requires the Registered Exporters to deposit with the Board before the commencement of each auction copies of the export orders or agreements from their foreign buyers. As the Coffee Board could not be certain as to how the Sales Tax Authorities would treat the penultimate sales in the matter of granting exemption the said Circular requires the bidders to make a contingency deposit in cash equivalent to the sale tax liability or furnish bank guarantee in lieu thereof, each of such deposit or guarantee being required to be kept in force for a period of four years. In other words, even in cases where the Registered Exporters (auction bidders) shall have satisfied all the aforesaid conditions, the Coffee Board has insisted upon such Exporters making contingency deposits or furnish bank guarantees for amount equivalent to the sales tax chargeable on such sales inspite of the enactment of s. 5(3) and this has been done ostensibly for the protection of the Coffee Board in the event of Sale Tax Authorities holding that even in such cases the benefit of s. 5(3) would not be available. Since retrospective effect was given to the amendments introduced by Act 103 of 1976 the Coffee Board collected and the Petitioners paid sales tax on these export auctions during the period of the retrospectivity and for few months more and thereafter the Coffee Board has, in terms of the said Circular, obtained from the petitioners bank guarantees to secure payment of sales tax which but for the enactment of sub-s. (3) of s. 5 might have been payable on each such sale.

The petitioners, who are Registered Exporters of Coffee, therefore have filed under Art.32 of the Constitution raising an important question of proper construction of section 5(3), of the Central Sales Tax Act as amended by Amending Act (103 of 1976) and also challenging the constitutional validity of the circular dated February 7, 1977, issued by the Coffee Board, whereby it required the petitioners and other Registered Exporters of Coffee to furnish contingency deposits or bank guarantees equal to the amount of sales tax in respect of the exempted sales under the said section 5(3) of the Central Sales Tax and praying for its cancellation or withdrawal and consequential reliefs.

Allowing the petitions in part, the Court

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HELD 1. Section 5(3) of the Central Sales Tax Act as amended by the Amendment Act 103 of 1976 is not ultra vires Article 286(2) of the Constitution and the said provision neither creates any legal fiction nor is it beyond the power or authority conferred on Parliament by Article 286(2) of the Constitution. [645A-D]

It is true that the word "deemed" has been used in Section 5(3) but the same word has been used not merely in s. 5(1) but also in the other two sections 3 and 4 of Chapter II of the Central Sales Tax Act which has the heading "Formulations of Principles for determining when a sale or purchase of goods takes place in the course of inter-state trade or commerce or outside a State or in the course of export or import", the heading of Chapter II on the face of it suggests that what is done under ss. 3, 4 and 5 including sub-s. (3) is formulation of principles. Secondly

628

the word "deemed" is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail but in each case it would be a question as to with what object the Legislature has made such a deeming provision. When sub-section (3) of the section 5 used the word "deemed" and says that the penultimate sale "shall also be deemed to be in the course of export" what is intended to be conveyed is that the penultimate sale shall also be regarded as being in the course of such export. In other words, no legal fiction is created. Moreover, it was conceded by counsel that the word "deemed" in sections 3, 4 and 5(1) laid down general principles and did not create any fiction; if that be so, it is difficult to accept the contention that in sub-s. (3) the same word should be construed as creating a fiction. Thirdly, sub-section (3) of section 5 formulates a principle in as much as it lays down a general guiding rule applicable to all penultimate sales that satisfy the two conditions specified therein and not any specific direction governing any particular or specific transaction of a penultimate sale. In other words the content of the provision shows that it lays down a principle. [645 EH, 646C-E, G-H]

On a proper construction of section 5(3), it cannot be said that the said provision is applicable only to the export auctions conducted by the Coffee Board and the terms and conditions governing them because it applies to variety of parties including the small manufacturers who seek a foreign market for their goods through private export houses or canalised agencies like State Trading Corporation. [646H,

647A]

St. Aubyn and Ors. v. Attorney General, [1952] A. C. 15 at p. 53; referred to.

2. Section 5(3) of the Central Sales Tax Act has been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i. e. become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export. [647DE]

It is true that the language employed in section 5(3) is a little ambiguous or equivocal and there is no indication in express terms whether the "agreement" mentioned therein necessarily refers to the agreement with a foreign buyer or would include any bidding or enforceable agreement to export with a local party. The material words which prescribe the two conditions on satisfying which the penultimate sale is to be regarded as a sale in the course of export are: "If such last sale or purchase (meaning the penultimate 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". It is true that Parliament has not said "the agreement or order for or in relation to such sale occasioning the export", but has used the phrase "the agreement or order for or in relation to such export". But, two aspects emerge very clearly on a close scrutiny of this phrase which by implication show that the "agreement" spoken of there refers to the agreement with a foreign buyer and not an agreement with a local party containing a covenant to export. [649G, 650B-D]

In the first place, the concerned phrase speaks of two things in disjunctive: "agreement" or order. The word "order" which appears in a statute dealing with sales tax must be understood in a commercial sense, that is, in the sense in

629

which traders and commercial men will understand it. In commercial sense an order means a firm request for supply of definite goods emanating from a buyer an indent placed by a purchaser and, therefore, an order for or in relation to export would mean an indent from a foreign buyer. The word "order" in section 5(3) cannot mean or refer to an order or direction, mandate, command or authorisation to export that may be issued by a statutory body like the Coffee Board for two reasons: first, occurring in a sales tax statute the word must be given its commercial meaning and secondly, while enacting the provision Parliament could not be said to have only statutory bodies, like Coffee board or S.T.C. in mind. If, therefore, an order for export in the concerned phrase means an indent from a foreign buyer, the preceding word "agreement" in the phrase would take colour from the word "order" and would on the principle of noscitur a sociis mean an agreement with a foreign buyer and not the agreement with a local party containing the covenant to export; and

(ii) Secondly and more importantly, the use of the definite article "the" before the word "agreement", is very significant. Parliament has not said "an agreement" or "any agreement" for or in relation to such export and in the context the expression "the agreement" would refer to that agreement which is implicit in the sale occasioning the export. Between the two sales (the penultimate and the final) spoken of in the earlier part of the sub section

ordinarily it is the final sale that would be connected with the export, and, therefore, the expression "the agreement" for export must refer to that agreement which is implicit in the sale that occasions the export. The user of the definite article, "the", therefore, clearly suggests that the agreement spoken of must be the agreement with a foreign buyer. As a matter of pure construction, by necessary implication the expression "the agreement occurring in the relevant phrase means or refers to the agreement with a foreign buyer and not an agreement with a local party containing the covenant to export. [650E-H, 651 A-E]

3. Prior to the enactment of Section 5 (1) there was no legislative guidance as to what transactions of sale or purchase could be said to be "in the course of export" and the said expression occurring in Art. 286 (1) (b) of the Constitution was construed by this Court in what have come to be known as the first and the second Travancore-Cochin cases, namely, *The State of Travancore-Cochin and Ors. v. The Bombay Company Ltd.*, (1952) 3 S.T.C. 434, and *The State of Travancore-Cochin and Ors. v. The Shanmugha Vilas Cashew Nut Factory and Ors.*, (1953) 4 STC 205; to include two types of sales or purchases (a) a sale or purchase which itself occasions, the export and (b) a sale or purchase affected by a transfer of documents of title to the goods after the goods are put in the export stream (i. e. after they have crossed the customs frontiers of India). Then came the Constitution (Sixth Amendment) Act, 1956 introducing a new clause being cl. (2) in Art. 286 whereby Parliament was empowered by law to formulate principles for determining when a sale or purchase took 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 affected by a transfer of documents of title to the goods if the goods have crossed the customs frontiers of India". In other words, this was legislative recognition of what was said by this Court in the two Travancore cases about the true meaning of the expression "in the course of export" occurring in Art. 286 (1) (b). [651G-H, 652A, D-F]

Section 5 (1) was construed by this Court in the context of two sales (though both were closely connected with the ultimate exportation of the goods out of India) rather very strictly in the two case, *Coffee Board, Bangalore, v. Joint Com-*
630

mercial Tax Officer, Madras and Ors., [1970] 3 SCR 147; and *Mohd. Serajuddin etc. v. State of Orissa*, [1975] Supp S.C.R. 169. In the former case, this Court laid down the test that there must be a single sale which itself caused the export and there was no room for two or more sales being "in the course of export". In other words, notwithstanding the compulsion to export arising from clauses 26, 30 and 31 of the Auction Conditions, the penultimate sale was held to be not in the cause of exports. In the latter case, this court took the view that the crucial words in Section 5 (1) showed that only if a sale occasioned the export, it would be in the course of export and that the two sets of contracts were separate and independent and *Mohd. Serajuddin* was under no contractual obligation to the foreign buyer either directly or indirectly and that his rights and obligations were only against the S.T.C. Even when the S.T.C. had with it foreign buyers contracts and *Mohd. Serajuddin's* contracts with S.T.C. had been entered into for the purpose of implementing such foreign buyer's contracts, this Court held that the sales between *Mohd. Serajuddin* and S.T.C. were not sales in the course of export. It was at this stage i.e. when s. 5

(1) was interpreted so by this Court that the Parliament felt the necessity of enacting s. 5 (3) for the purpose of giving relief in respect of penultimate sales that immediately precede the final (export) sales provided the former satisfy the conditions specified therein. [652F-H, 653A-B, E-G]

4. Two things become clear from the Statement of Objects and Reasons in the Amendment Act 103 of 1966; first Mohd. Serajuddin's decision is specifically referred to as necessitating the amendment and secondly penultimate sales made by small and medium scale manufacturers to an export, canalising agency or private export house to enable the latter to export these goods in compliance with existing contracts or orders are regarded as inextricably connected with the export of the goods and hence earmarked for conferral of the benefit of exemption. But the existing contract with whom is not clarified. The Statement being silent on this crucial point whether the existing contract should be with a foreign buyer or will include an agreement with a local party containing a covenant to export, by necessary implication "the agreement" spoken of by section 5 (3) refers to the agreement with a foreign buyer. [654F-H]

It is true that the benefit of the exemption was intended to be extended to small and medium scale manufacturers desirous of exporting their goods but the requirement of the new provision is not that they must procure or have with them a foreign buyer's contract but the requirement is that before they complete the sale of their goods to the canalising agency or the private export house there must be in existence a foreign buyer's contract to implement which they should have sold their goods to such agency or export house. In the nature of things such manufacturers who have no expertise of export trade are not expected to have a foreign buyer's contract with them and it would be sufficient compliance of the provision of the canalising agency or the export house has with it the foreign buyer's contract. It would, therefore, be incorrect to say that the benefit of the exemption depends upon the fortuitous circumstance of a foreign buyer's contract being available with such manufacturer when he sells his product to the agency or the export house. Neither any hardship is involved nor would the small or medium scale manufacturers be deprived of the benefit of the exemption, by the construction of the expression as "the agreement" in Section 5 (3), namely, that it means an agreement with a foreign buyer and not with a local party containing a covenant to export. In fact it is in consonance with the trade practice obtaining in export trade, namely, that normally the export activity commences with securing or

631

obtaining an export contract or a firm order from a foreign buyer as the first step towards the ultimate export. [655A-F]

State of Mysore v. The Mysore Spinning and Manufacturing Co. Ltd. 9 S.T.C. 188@ 189 SC; followed.-

It is difficult to say that the Parliament intended to prefer one and sacrifice the other, among the two public interests involved, namely, promotion of the exports of the country and augmentation of the States' revenues through sales tax, while enacting section 5 (3). In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions display an anxiety not to diminish the States' revenues beyond a certain limit. The

section in any case not giving any indication that one public interest is to be preferred to the other, by necessary implication "the agreement" occurring in section 5(3) refers to the agreement with a foreign buyer. [656A-C]

5. In Ben Gorm Nilgiri Plantations Company, Coonoor and Ors. v. Sales Tax Officer, Special Circle Ernakulam. [1964] 7 S.C.R. 706 at p. 711-12, this Court held that, even in the case of a single sale which ultimately resulted in the export, the sale was not in the course of export, because there was no obligation to export which afforded the inextricably link between the sale and the export. [657A-B]

It is true that if the obligation to export affording the inextricable link between the sale and the export is necessary in the case of a single sale even though it results in export" then all the more such obligation will be necessary in the case of a penultimate sale if such penultimate sale is to constitute a sale "in the course of export" but even if Ben Gorm Nilgiri Plantations Company's case is regarded as laying down a general proposition that what is required is an obligation which inextricably connects the sale with the export and that such obligation may, in the absence of legislative guidance, arise by reason of statute, contract, mutual understanding or the nature of transaction which links the sale to export, still the question would be what type of obligation and arising from what circumstances would be necessary or enough in the case of a penultimate sale must depend upon the language of the statute concerned and, therefore, the question will again be what type of obligation and arising from what circumstances has been prescribed by the Parliament by enacting s. 5 (3) and that would depend upon the proper construction of the phrase "the agreement or order for or in relation to such export" occurring therein. Since on proper construction the expression "the agreement or order" means the agreement with or an order from a foreign buyer, it is clear that the Parliament intended to prescribe that the obligation to export arising only from such agreement or order that would afford the inextricable link so as to constitute the penultimate sale a sale in the course of export. [657B-F]

6. The word 'sale' occurring in the phrase "if such last sale or purchase takes place after" in section 5(3) of the Central Sale Tax Act 1956 does not mean the "agreement to sell" but only sale in the sense of a transfer of property in the goods by one person to another. Section 5(3) cannot be construed otherwise for more than one reason. In the first place the definitions of 'sale' and "agreement to sell" in the sale of Goods Act 1930 would not apply to the expression 'sale' occurring in the Central Sales Tax Act, 1956 wherein the expression 'sale' has been defined in s. 2 (g) for the purpose of that Act and under s. 2 (g) of the Central Sales Tax Act 'sale' means "any transfer of property in goods by one

632

person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods". In other words, wherever the word 'sale' occurs in the Central Sales Tax Act, 1956 it is this definition given in s. 2 (g) that will be applicable and therefore the word 'sale' in s. 5(3) must mean transfer of the goods by one person to another for cash or for deferred payment or for any other valuable considerations; it cannot mean "agreement to sell". Moreover, there is nothing in the context of s. 5 (3) to

suggest that the word 'sale' occurring therein should be understood differently. On the contrary, the context suggests that the word 'sale' in the phrase "if such last sale or purchase takes place after" refer to a completed sale i.e. a sale as defined in section 2(g) of the Act. [658E-H, 659A-C]

Balabhagas Hulaschand v. State of Orissa, [1976] 2 SCR 939; distinguished.

7. Section 64(2) of the Sale of Goods Act, 1930, being in pari materia with Section 58(2) of the English sale of Goods Act, 1893 does not deal with the question of passing of the property at auction sale but merely deals with completion of the contract of sale which takes place at the fall of the hammer or at the announcement of the close of the sale in other customary manner by the auctioneer. If the auction sale of chattels is unconditional and is in respect of specific ascertained goods and nothing remains to be done to the goods for putting them in a condition ready for delivery, the property in the good would pass to the purchaser upon the acceptance of the bid but that would not be because of s. 64 (2) but because of s. 20 and such would not be the case if the goods sold there at are non-specific or unascertained goods or the auction sale is conditional. And, Section 64(2) has nothing to do with the aspect of the passing of the property at an auction sale and it is by virtue of goods being specific and in a deliverable state that under section 20 the property in such good passes to the buyer at the completion of the contract at the fall of the hammer at such sale. [667F-H, 669C-D]

Mc Entire & Anr. v. Crossley Bros Ltd., [1895-99] All. E.R. (Reprint) 829 @ 832, Dennant v. Skinner and Collom, [1948] 2 All. E.R. 29; quoted with approval.

A. V. Thomas & Co. Ltd. v. Deputy Commissioner of Agricultural Income Tax, [1963] Supp. 3 SCR, 608; followed.

8. Section 64 of the Sale of Goods Act could be subject to a contract to the contrary and would be subject to section 62. In the first place section 64 occurs in Chapter VII which contains "Miscellaneous" provisions and s. 62 which occurs in the same Chapter clearly provides that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage. If the usage is such as to bind both the parties to the contract. Ordinarily, the rights, duties and liabilities arising under a contract of sale by implication of law spoken of in s. 62 refer to the rights, duties and obligations referred to in Chapter III containing provisions which lay down rules as to transfer of property as between seller and buyer and transfer of title but there is no reason by s. 62 should not apply to rights, duties and obligations arising under s. 64 in regard to auction sale. Sub section (1) of section 64 provides that where goods are put up for sale in lots then each lot is prima facie deemed to be the subject of a separate contract for sale, which means terms between the parties may provide to the contrary or circumstances may indicate to the contrary. Again sub s. 633

provides that the sale may be notified to be subject to a reserved or up set price which means that the auctioneer may not fix a reserved price; further, it is well settled that if such a reserved price has been fixed then notwithstanding the fact the highest bid has been accepted by the auctioneer and the sale relates to specific or identifiable goods no concluded contract comes into existence if the highest bid so accepted falls short of the reserved price and the

property in the goods will not pass. Sub-ss (3) and (4) if carefully scrutinised also indicate that there could be a contract to the contrary. Moreover, once it is accepted that auction sales to which s. 64 applies could be unconditional or conditional and that the auctioneer can prescribe his own terms and conditions on the basis of which the property is exposed to sale by auction it must be held that the acceptance of any bid as well as the passing of the property in the goods sold thereat would be governed by those terms and conditions. [669D-H, 670A-C]

9. In the instant case:

(a) The export auctions of Coffee conducted by the Coffee Board are admittedly conducted on terms and conditions prescribed by it called "Auction Conditions". In the absence of a suggestion in the case that a statutory body like the Coffee Board while prescribing the auction conditions has acted not in good faith or that the said terms and conditions do not truly govern the rights and obligations of the parties, thereto it is clear that the question at what point of time the property in the Coffee sold thereat passes to the auction purchaser (Registered Exporter) must depend upon the intention of the parties to be derived from the aforesaid terms and conditions. The property in coffee sold thereat does not pass to the buyer at the fall of the hammer under section 64 (2) of the Indian Sale of Goods Act, 1930. All that happens at the fall of the hammer is that a completed contract of sale comes into existence creating a relationship of promisor and promisee between the parties in an executory contract, which is very clear from clause 13 (a) of the Auction conditions. [670C-F]

(b) Clause 19 principally deals with aspects of delivery, weighment and payment of price and towards the end it contains an over-riding provision to the effect that notwithstanding anything contained in these conditions, the property in the Coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him. In other words, it is clear that parties intended that the passing of the property shall not take place till the full price is paid and the coffee sold is weighed and set apart for delivery. Now there is nothing in any of the other provisions of these Auction Conditions which indicates that the property in coffee sold should pass either at the fall of the hammer or at any point of time prior to the payment of price and weighment and setting apart of coffee for delivery to the buyer. [670H, 671A-B]

Mc Entire and Anr. v. Crossley Bros. Ltd., [1895-99] All. E.R. (Reprint) 829 @ 832; distinguished.

(c) It is true that the over-riding provision contained in clause 19 is negative in character, that is to say, the parties are agreed that the property shall not pass to the buyer until after the payment of the price, weighment and setting apart of the coffee for delivery to the buyer. But there are two provisions contained in clause 20 (d) and (f) which show that positively upon payment of price and weighment and setting apart the coffee sold for delivery to the buyer, the property in the coffee sold passes to the buyer at that point of time. Under clause 19, after the payment of full price the buyer has to apply for and take delivery within

634

a certain time but in case he fails to take delivery, as provided in clause 20, the coffee is first stored by the Pool Agent in the Pool Warehouse pending its exportation by the buyer by the 15th May and if it is not exported by that

date the Curer or Depot Manager removes it from the West Coast to inland countries for safe storage during the monsoon season but at the risk and cost of the buyer. Having regard to clauses 19 and 20 of the Auction conditions, therefore, it is clear that in these penultimate sales i. e. sales of coffee at the export auctions conducted by the Coffee Board, to property in coffee sold thereat passes to the buyer upon payments of price, weight and setting apart of the coffee sold for delivery to the buyer. [671C-F, 672C-D]

(d) Passing of the property in such coffee cannot be said to be further postponed till actual shipment by reason of clause 31 of the Auction conditions, for, if the title has already passed under clauses 19 and 20 of the Auction Conditions immediately upon payment of price, weight and setting apart of the coffee for delivery to the buyer, it cannot pass again. [672D-F]

(e) It is not correct to say that in view of clause 31 a reservation of the right of disposal over the goods in favour of the Coffee Board within the meaning of section 25 of the Sale of Goods Act is made. Section 25 (1) provides that where there is a contract for sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled and if he does so, the legal consequence mentioned in the section flows, namely, that in such case notwithstanding the delivery of goods to a buyer or to a carrier or bailee for transaction to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. It is true that Cl. 26 declares that it is an essential condition of the auction that coffee sold thereat shall be exported to stipulated destinations or to any other foreign country outside India as may be approved by the Chief Coffee Marketing Officer within 3 months or within the extended period but such essential condition is applied to the coffee which has already become the property of the buyer under Cls. 19 and 20 of the Auction Conditions and all that Cl. 34 provides is that if default is made by buyer in exporting coffee within the prescribed time or extended time it shall be lawful for the Coffee Board without reference to the buyer to seize the unexported coffee and take possession thereof and deal with it as if it were the part and parcel of the Board's Coffee held by them in their Pool Stock. Far from amounting to a reservation of the right of disposal over the unexported coffee to the Coffee Board, Cl. 31 is in the nature of a defeasance clause in the sense that what is vested in the buyer under the earlier conditions, the same shall revert back to the Coffee Board if the buyer commits a default in fulfilling the essential condition. Such a reading of Cl. 31 would be consistent with a further provision which is to be found in the latter portion of that clause. The latter part of Cl. 31 provides that after the coffee is seized and it becomes part and parcel of Board's Coffee held by it in its pool stock, the Board shall re-sell the same but after such re-sale the Chief Coffee Marketing Officer shall pay to the defaulting buyer only the balance of the sale proceeds after deducting godown charges, insurance premium, selling commission payable to agents and all other expenses of sale together with the penalty due under Cl. 30. In other words the proviso clearly suggests that the seized coffee becomes Coffee Board's property and is resold as such, otherwise the surplus should go to the buyer (Registered Exporter). The fact that the payment to

the defaulting buyer is limited to the actual sale

635

price paid by him and that the surplus if any reverts to the Coffee Board clearly shows that under Cl. 31 upon seizure the property reverts back to the Coffee Board. Clause 31 properly read amounts to a defeasance clause and nothing more, especially when it is clear that property in the coffee sold at auction passes to the buyer under Cls. 19 and 20 immediately upon payment of price, weighment and setting apart of the coffee for delivery to the buyer. Once the property has passed there would be no question of reserving any right of disposal over the same to the Coffee Board within the meaning of s. 25 (1) of the Sale of Goods Act. [662F-H, 673A-H]

(g) In the penultimate sales (sales of coffee effected to Registered Exporters at export auctions conducted by the Coffee Board) the property in the Coffee sold thereat passes to the buyer immediately upon payment of full price, weighment and setting apart of coffee for delivery to the buyer under Cls. 19 and 20 of the Auction Conditions and it would be at this stage i.e. just before this stage is reached that the agreement with or order from a foreign buyer must be available or produced in order to attract s. 5 (3) of the Central Sales Tax Act, 1956. [674C-D]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition Nos. 3130/78, 4238-4239/78, 8/79 and 1458/79.

(Under Article 32 of the Constitution)

Mr. F. S. Nariman, C. N. Murthy, K. P. Kumar, H. K. Dutt, T. Subba Rao and D. N. Gupta for the petitioners in WP No. 3130/78.

A.K. Sen, Dr. Y.S. Chitale, K. P. Kumar, R. Vasudevan, C. N. Murthy, Ajay Mehta and T. Subba Rao for the petitioners in W. P. Nos. 4238-4239/78.

F.S. Nariman, K. P. Kumar, R. Vasudevan, C. N. Murthy, Ajay Mehta and T. Subba Rao for the petitioner in WP 8/79.

Dr. Y.S. Chitale, K. P. Kumar, R. Vasudevan, C.N. Murthy, Ajay Mehta and T. Subba Rao for the petitioner in WP No. 1458/79.

L. M. Sinha, Att. Genl. K. J. Chandran, J.B. Dadachanji, K. J. John and Sri Narain for the Respondent in WP No. 3130/78.

P. G. Nair, K. J. Chandran, J. B. Dadachanji, K. J. John and Sri Narain for RR. 1 in WP Nos. 4238-4239/78.

N. Nettar, for RR. 2 in WP 4238-39/78.

S.T. Desai and A.V. Rangam for RR 3 in WP 4238-39/78.

P. A. Francis, & V. J. Francis for RR 4 in WPs 4238-39/78.

K. K. Venugopal. Addl. Sol. Genl. and N. Nettar for RR. 1 in WP No. 8/79.

S.T. Desai and A. V. Rangam for the RR 2 in WP 8/79.

636

V.J. Francis for RR 3 in WP No. 8/79.

K. J. Chandran, J. B. Dadachanji, K. J. John and Sri Narain for RR 4 in WP No. 8/79.

N. Nettar for RR in WP No. 1458/79.

V.J. Francis for the RR in WP No. 1458/79.

K.J. Chandran, J. B. Dadachanji K. J. John, Sri Narain for the RR in WP No. 1458/79.

The Judgment of the Court was delivered by

TULZAPURKAR, J. These writ petitions filed by Registered Exporters of coffee under Art. 32 of the

Constitution raise an important question of proper construction of s. 5(3), a provision newly inserted in the Central Sales Tax Act 1956 by an Amending Act (103 of 1976) and the petitioners also seek to challenge the constitutional validity of a Circular dated February 7, 1977 issued by the Coffee Board, whereby it requires the Registered Exporters of coffee to furnish contingency deposits or bank guarantees equal to the amount of sales tax in respect of the exempted sales under the said s. 5(3) and pray for its cancellation or withdrawal and consequential reliefs.

The facts giving rise to the writ petitions being common and almost identical may be stated. The Coffee Board, Bangalore is a statutory corporation incorporated under s. 5 of the Coffee Act, 1942, an enactment passed to provide for the development of the Coffee Industry under the control of the Union. Sections 4 to 10 of the Act deal with the setting up of the coffee Board on which all interests are represented and some Members of Parliament and Government officers are nominated. The Board exercises powers and discharges functions assigned to it under the Act and the Coffee Rules framed thereunder. The Act compels the registration of all owners of coffee estates and licensing of curers and dealers and it also imposes control on the sale, export and re-import of coffee into India. In regard to sale it fixes prices for sale of coffee either wholesale or retail by registered owners and licensed curers for the purpose of sale in the Indian Market and the Coffee Board fixes internal sale quota for each estate owner and the owner has to observe this quota and also the price fixed under s. 25 all coffee produced by a registered estate in excess of the quantities specified in the internal sale quota allotted to that estate, or when no internal sale quotas have been allotted to the estates, all the coffee produced by the estate has to be delivered to the Board for inclusion in the surplus pool by the owner of the estate or by the curing

637

establishment receiving the coffee from the estate and under subs. (6) in respect of coffee so delivered for inclusion in the surplus pool the registered owner retains no right except his right to receive payments referred to in s. 34. Section 26(1) enjoins upon the Coffee Board to take all practical measures to market the coffee included in the surplus pool and all sales thereof have to be conducted by or through the Board. These sales include internal sales in India and outside India. We are concerned in these petitions with sales outside India. Under s. 20 of the Act no coffee (barring certain exceptions specified in the proviso) can be exported from India otherwise than by the Board or otherwise than under an authorisation granted by the Board in the prescribed manner and in the prescribed cases, while under s. 21 no coffee which has been exported from India shall be re-imported into India except under and in accordance with a permit granted by the Board. Section 47 provides that all contracts for the sale of coffee in so far as they are at variance with the provisions of this Act shall be void. It will thus appear clear that the Coffee Board exercises complete control-almost monopolistic-over the coffee trade in exercise of its statutory powers.

Export of coffee outside India is particularly controlled under the Act and the Rules by the Coffee Board. As stated earlier coffee can be exported either by the Coffee Board directly to parties outside India or the Coffee Board authorises other exporters to effect such exports. For

effecting exports through other exporters the Coffee Board periodically conducts auctions known as "export auctions" and it follows a procedure in that behalf. To be able to bid at these auctions, exporters have to get themselves registered with the Board. The Board maintains a list of Registered Exporters and grants to each one of them a permit, which authorises him to take part in the "export auction". The conditions which are imposed by the permit (hereinafter called the permit conditions') require, inter alia, a security deposit and a standing deposit (which may be in cash or in the form of bank guarantee) from the Registered Exporters; such permit is liable to be withdrawn or cancelled by the Chief Coffee Marketing Officer, an executive appointed by the Central Government on the Board, at any time if it is found that a permit-holder has sold or has attempted to sell coffee bought by him at the "export auction" within the internal market without his written permission or if any of the other permit conditions are contravened). A specimen of the permit together with the conditions attaching to it has been annexed to each petition. (The actual "export auctions" are conducted on the basis of "the Term and Conditions of Sale

638

of Coffee in the course of Export" framed by it and the Registered Exporters participate in such auctions on those terms and conditions.) A specimen copy of these Auction Conditions has been annexed to each petition. Clause 3 thereof declares that all auctions and sales made thereat are subject to (i) the Auction conditions, (ii) the Permit conditions and (iii) such other rules or conditions as may be prescribed by the Chief Coffee Marketing Officer. Under Cl. 4 only dealers who have registered themselves as Exporters of coffee with the Coffee Board and who hold a permit from the Chief Coffee Marketing Officer in that behalf are permitted to participate in the auctions. Under Cl. 11 no one is allowed to retract his bid when once the same has been entered in the Register of Bids. The highest bid is ordinarily accepted but the sale Conducting Officer may not accept such bid if he has reason to believe that the same is not bona fide or genuine or the same is that outcome of concerted action on the part of the dealers or a section of them for the purpose of controlling or manipulating prices, etc. subject to his recording the reasons for such rejection in the Register of Bids. Clause 19 deals with weighment, delivery and payment of price and contains an over-riding provision the effect that the "property in the coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him". Clause 26 declares that it is an essential condition of the auction that the coffee sold thereat shall be exported to the destination stipulated in the catalogue of lots or to any other foreign country outside India as may be approved by the Chief Coffee Marketing Officer within three months or within such extended period as shall not exceed one year from the Notice of Tender issued to the auction buyer (Registered Exporter) and that under no circumstances the coffee purchased at such auction shall be diverted to other destinations or sold or be disposed of or otherwise released in India. Clauses 30 and 31 provide for the consequences of default on the part of the buyer to export the coffee or to produce evidence thereof; he is liable to pay a penalty at the rate specified in Cl. 30 and what is more under Cl. 31 Chief Coffee Marketing Officer is entitled to seize and take possession of the unexported coffee and deal with it as it were part

and parcel of the Board's coffee in its surplus pool. Under Cl. 32 it is provided that in the event of the buyer committing any default in respect of any of the terms and conditions of the "export auction" he shall be liable (i) to be removed from the list of the Registered Exporters, the permit granted to him being cancelled; (ii) to forfeit the deposit made by him at the time of obtaining the permit and (iii) to forfeit the deposit if any covered by the conditions contained in Cl. 14(ii).

639

According to the petitioners prior to the enactment of sub-s(3) of s. 5 of the Central Sales Tax Act, 1956, which was inserted on September 7, 1976 with retrospective effect from April 1, 1976 by the Amending Act (103 of 1976), the exemption from liability to tax under the Act in regard to a sale in the course of the export was and continues to be governed by s. 5(1) of the Act which runs thus

"5(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".

The aforesaid provision was examined by this Court in two leading cases, namely, Coffee Board Bangalore v. Joint Commercial Tax Officer, Madras & Anr. and Mohd. Serajuddin etc. v. State of Orissa and a certain interpretation had been accorded by this Court to the expression "in the course of export" and according to these decisions the last sale, immediately preceding the sale occasioning the export of goods out of India (hereinafter called the "penultimate sale"), however closely related to the final export, was held not to be the course of export but only for export and hence liable to tax and according to the petitioners it was with a view to remove the difficulties caused by these and other similar decisions that the Parliament enacted the new sub-s. (3) of s.5 and added a proviso to s.6(1) by the Amending Act (103 of 1976). The newly enacted provisions run thus

"5(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."

6"(1).....

Provided that a dealer shall not be liable to pay tax under this Act on any sale of goods which, in accordance with the provisions of sub-section (3) of section 5, is a sale in the course of export of these goods out of the territory of India."

The petitioners have strongly relied upon the Statement of Objects and Reasons appended to the relevant Bill in this behalf. In other words, according to the petitioners under sub-section (3) of s.5 even the 'penultimate sale' is to be regarded as a sale 'in the course of ex-

640

port' and will under the proviso to s.6(1) be entitled to claim exemption from the liability to tax under the Act provided such penultimate sale-(i) took place after, and (ii) was for the purpose of complying with, the agreement or order for or in relation to such export. According to the petitioners the sales of coffee made to the Registered

Exporters at the export auctions conducted by the Coffee Board constitute 'penultimate sales' falling within s.5(3) and qualify for the exemption from the tax liability under the Act in as much as both the conditions mentioned above are satisfied.

The petitioners' case is that notwithstanding the aforesaid position the Coffee Board by its Circular dated February 7, 1977 issued to the Registered Exporters of coffee has taken the view that in order to avail of the benefit of sec. 5(3) (in respect of the coffee sold by it at the export auctions the Registered Exporters (bidders) should satisfy three conditions (a) he must have an export contract (i. e. either agreement or order) from a foreign buyer, (b) he must have it on hand at the time when he participates in the export auction and (c) he should give proof of the export of the coffee purchased at the auction. By way of compliance with the conditions (a) and (b) above the said Circular requires the Registered Exporters to deposit with the Board before the commencement of each auction copies of the export orders or agreements from their foreign buyers). Obviously the Coffee Board proceeds on the basis that s. 5(3) requires an agreement with or an order from a foreign buyer and that too it must exist at the time of participation in the auction inasmuch as in its view the property in the coffee sold at such auction passes and the penultimate sale takes place at the fall of the hammer under s.64(2) of the Sale of Goods Act. Further as the Coffee Board could not be certain as to how the Sales Tax Authorities would treat the penultimate sales in the matter of granting exemption the said Circular requires the bidders to make a contingency deposit in cash equivalent to the sales tax liability or furnish bank guarantee in lieu thereof, each of such deposit or guarantee being required to be kept in force for a period of four years. In other words, according to the petitioners even in cases where the Registered Exporters (auction bidders) shall have satisfied all the aforesaid conditions, the Coffee Board has insisted upon such Exporters making contingency deposits or furnish bank guarantees for amounts equivalent to the sales tax chargeable on such sales in spite of the enactment of s.5(3) and this has been done ostensibly for the protection of the Coffee Board in the event of Sales Tax Authorities holding that even in such cases the benefit of s. 5(3) would not be available.

The petitioners contend that the words "the agreement" for or "in relation to such export" in s. 5(3) do not necessarily refer to the agree

641

ment with a foreign buyer but would include any binding or enforceable agreement to export even with a local party to implement which the penultimate sale must have taken place and since here the penultimate sales (sales of coffee to Registered Exporters by the Coffee Board) take place on the express and essential condition that the said coffee shall be exported and the same shall not be diverted to any other destination or sold or disposed of or released in India (vide Clause 26) and which condition is enforced on pain of imposition of penalty and seizure of the unexported coffee (vide: Clauses 30 and 31) these must be regarded as having been made for the purpose of complying with agreement for or in relation to export and secondly, these penultimate sales invariably take place (i.e. become complete after the agreement to export is entered into inasmuch as the latter comes into existence invariably before the property in the coffee passes to the Registered Exporters (auction

purchasers). Alternatively the petitioners contend that even if the words "the agreement for or in relation to such export" mean only the agreement with a foreign buyer all that is required is that such agreement with the foreign buyer must exist before the penultimate sale becomes complete, i.e. before the property in the coffee sold thereat passes to the auction purchaser and according to the petitioners the property in the coffee sold at such penultimate sales passes to the auction purchaser after the same is shipped or sent to the custom station for shipment because till then the Coffee Board has a right of disposal over the same within the meaning of s.25 of the Sale of Goods Act under Cl. 31 and in any event not until the same is weighed and set apart and price paid therefor under Cl. 19 and hence if the agreement with the foreign buyer is available before that it would be sufficient compliance of s.5(3). The Board's view that the property in the coffee sold at the auctions passes to the bidders at the fall of hammer is clearly unsustainable. The petitioners thus contend that the aforesaid action on the part of the Coffee Board in forcing the Registered Exporters of coffee, including the petitioners, to make contingency deposits or to furnish bank guarantees to secure payment of sales tax on transactions which have been specifically exempted from sales tax by s. 5(3) and the proviso to s. 6(1) of the Central Sales Tax Act, 1956 read with Art. 286(1) of the Constitution of India is without authority of law and the Board's Circular dated February 7, 1977 is unreasonable, arbitrary, illegal, without authority of law and violative of their fundamental rights under Arts. 14, 19 and 31 of the Constitution.

The petitioners, therefore, seek issuance of writs of certiorari and prohibition quashing the said circular and restraining further action thereunder in future. It seems that since retrospective effect was given

642

to the amendments introduced by Act 103 of 1976 the Coffee Board collected and the petitioners paid sales tax on these export auctions during the period of the retrospectivity and for few months more and thereafter the Coffee Board has, in terms of the said Circular, obtained from the petitioners bank guarantees to secure payment of sales tax which but for the enactment of sub-s. (3) of s. 5 might have been payable on each such sale. To obtain appropriate reliefs in this behalf in two of the three writ petitions, the petitioners therein have also impleaded the concerned States, namely, State of Karnataka, State of Tamil Nadu and the State of Kerala as party respondents to their petitions. The petitioners have sought appropriate orders or directions against these State Governments directing them to make refunds to the Coffee Board of the amounts collected by them from the Coffee Board as and by way of sales tax and further restraining them from collecting or threatening to collect from the Coffee Board any amount as and by way of sales tax on the transactions in question or subjecting such transactions to sales tax. The petitioners have also sought the consequential reliefs of directing the Coffee Board to pay over to the petitioners the refunds which it may receive from the State Governments pursuant to the Court's order and further directing the Coffee Board to release the bank guarantees or contingency deposits obtained by it under the impugned Circular.

In the returns filed on behalf of the Coffee Board by way of reply to the writ petitions two or three contentions have been raised. First, by way of preliminary objection it

is contended that no writ would lie against it challenging its Circular dated February 7, 1977 inasmuch as though the Coffee Board is constituted under a Central enactment and has monopolistic control over the coffee trade, when it exposes coffee in export auctions it is merely engaged in a commercial activity in exercise of its power to make contracts and while so engaged it cannot be denied its legitimate right, like any other trader to lay down the terms and conditions for such sales and the Circular dated February 7, 1977 is one such communication addressed to the Registered Exporters containing additional terms or conditions concerning sales tax in the matter of such auctions and neither the auction conditions nor the Circular stem from any statute but are matters falling within the realm of contract and therefore no writ petition challenging the Circular is maintainable. Secondly, the Coffee Board is entitled to protect its interest and since it has an apprehension that exemption provided for by s.5(3) of the Central Sales Tax Act, 1956 may not be made available by the Assessing Authorities under the sales Tax Law, the Coffee Board decided to safeguard its interest by taking contingency deposits or bank guarantees equivalent to the 643

amount of sales tax that would be payable in respect of the export auctions. It is pointed out in this behalf that all kinds of penultimate sales or purchases are not exempt under s.5(3) but the exemption is hedged in with conditions specified therein and only when those conditions are proved to the satisfaction of the Assessing Authority the exemption will arise and until then there is a risk of the Coffee Board being visited with the sales tax and so to protect itself against any possible levy of sales tax it is obliged to insist upon furnishing of contingency deposits or bank guarantees. By doing it the Coffee Board is not exacting any sales tax as such and, therefore, a protective measure of the type adopted by it cannot be said to be illegal or unconstitutional or violative of any of the Petitioners' fundamental rights. Thirdly, on merits it is contended that its interpretation of section 5(3) that what is required thereunder is an agreement with or an order from a foreign buyer is correct as also its conclusion that in the export auctions conducted by it property in the coffee sold thereat passes to the Registered Exporter (bidder) at the fall of hammer and, therefore, the conditions imposed by the Circular on the Registered Exporters before they can claim exemption from the tax liability are justified. The States of Karnataka, Tamil Nadu and Kerala in their respective counter-affidavits have supported the stand taken by the Coffee Board on both the points. It may, however, be stated that all the three States are desirous of having an authoritative pronouncement from this Court on the question of proper construction of the words "the agreement or order for or in relation to such export" occurring in s. 5(3) of the Central Sales Tax Act 1956 but on the second point counsel for States of Karnataka and Tamil Nadu have urged that since the question of passing of property does not depend merely upon proper construction of the auction conditions read in the context of the relevant provisions of the Sale of Goods Act but will need investigation into all the relevant facts and circumstances of each auction sale including the conduct of the parties as also the correctness and true nature of the dealings between them any expression of opinion by this Court on that question would not be proper and may bar such investigation into all the relevant facts at the hands of their Sales Tax Authorities as and

when exemption is claimed in assessment proceedings. Counsel for the State of Kerala was, however, not in agreement with this submission and stated that even that question was a pure question of law depending upon the proper construction of the auction conditions read with the relevant provisions of the Sale of Goods Act on the basis that the auction conditions truly govern the rights and obligations of the parties to such sale. We may also state that during

644

the hearing counsel for the State of Tamil Nadu also raised the question of the vires of s. 5(3), apart from its construction; he contended that the provision itself was ultra vires Art. 286(2) on the ground that instead of formulating any principle for determining when a sale or purchase of goods takes place in the course of export outside the territory of India-for which alone power to make law has been conferred on Parliament-the Parliament has created a legal fiction to the effect that a penultimate sale of purchase, in certain circumstances shall be deemed to be in the course of export when in truth and reality it is not and the creation of such legal fiction is beyond the power or outside the authority conferred by Art. 286(2).

From the rival contentions which have been summarised above it will appear clear that Principally four questions arise for our decision in these Petitions. The first relates to the maintainability of the writ petitions against the Coffee Board; the second is whether the amendment introduced by insertion of sub-s. (3) in s. 5 of the Central Sales Tax Act is ultra vires Art. 286(2) of the Constitution, the third relates to the proper construction of s. 5(3) of the said Act and the fourth is at what point of time the property in the coffee sold at export auctions conducted by the Coffee Board passes to the Registered Exporters (auction purchasers). We may, however, state that during the course of the hearing the learned Attorney General appearing on behalf of the Coffee Board fairly stated that since the question of proper construction of s. 5(3) would affect a large number of dealers in export trade, including the Coffee Board (which was concerned with export trade in coffee), the Board was interested in having an authoritative decision of this Court on the point, that such authoritative decision would also facilitate the issuance of a proper Circular in regard to its future transactions and, therefore, he was not pressing the preliminary objection to the maintainability of the writ petitions against the Coffee Board. We would, therefore, deal with the remaining three questions one after the other.

Dealing first with the question whether s. 5(3) of the Act which has been introduced by the Amending Act 103 of 1976 is ultra vires Art. 286(2) of the Constitution, the precise contention of Mr. S. T. Desai appearing for the State of Tamil Nadu has been that the said provision merely enacts an artificial rule or fiction that a penultimate sale, which in fact is not in the course of the export of goods out of the territory of India, shall be "deemed to be in the course of such export" if it satisfies the conditions specified therein, it does not lay down or

645

formulate any principle for determining when a sale takes place in the course of export of the goods out of the territory of India and, therefore, it is beyond the power or authority conferred on Parliament by Art. 286(2). We pointed out that prior to the Constitution (Sixth Amendment) Act 1956 this Court in its decisions while interpreting the expression "sale in the course of export" occurring in Art.

286 (1) (b) laid down two principles as to when a sale could be said to be a sale in the course of export and it held that two types of sales, viz. (a) sale which occasions the export and (b) sale which is effected by a transfer of documents of title to the goods after the goods have crossed customs frontiers of India, would be sales in the course of export. Section 5(1) which was enacted in Central Sales Tax Act 1956 pursuant to the power conferred on Parliament by Art. 286(2) which was introduced by the Constitution (Sixth Amendment) Act 1956 merely gave legislative recognition to the aforesaid two principles which had been formulated by this Court while interpreting Art. 286(2) (b) but while adding sub-s. (3) to s. 5 of the Act Parliament had created a legal fiction to the effect that a penultimate sale satisfying certain specified conditions shall also be deemed to be a sale in the course of export when in truth and reality it is not. According to him, creation of such fiction is not formulation of any principle and as such the provision is beyond the power or authority conferred on Parliament by Art. 286(2).

It is not possible to accept the aforesaid contention for the reasons we shall presently indicate. It is true that the word "deemed" has been used in s. 5(3) but the same word has been used not merely in s.5(1) but also in the other two sections 3 and 4 of Chapter II of the Central Sales Tax Act which has the heading "Formulations of Principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of export or import", the heading of Chapter II on the face of it suggests that what is done under ss. 3, 4 and 5 including sub-s (3) is formulation of principles. Secondly, the word "deemed" is used a great deal in modern legislation, different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the Legislature has made such a deeming provision. In *St. Aubyn and Ors. v. Attorney General*, Lord Radcliffe observed thus:

646

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is in the ordinary sense impossible."

After making these observations the learned Law Lord went on to hold that it was in the last of the three ways (indicated in the observations) that the deeming provision was made in s. 58(2) of the Finance Act, 1940, which came for interpretation before the House of Lords. Similarly in *Words & Phrases*, Permanent Edition, Vol. 11A at page 181 it is explained that the word "deemed" is also used to mean "regarded as being", it is equivalent to "shall be taken to be" (at page 185). In our view when sub-s. (3) of s. 5 uses the word "deemed" and says that the penultimate sale "shall also be deemed to be in the course of export" what is intended to be conveyed is that the penultimate sale shall also be regarded as being in the course of such export. In

other words, no legal fiction is created. Moreover, it was conceded by counsel that the word "deemed" in sections 3, 4 and 5(1) laid down general principles and did not create any fiction; if that be so, it is difficult to accept the contention that in sub-s. (3) the same word should be construed as creating a fiction. Thirdly, a principle has been explained in Butterworths' Words and Phrases, Second Edition, Vol. 4 at page 177 thus:

"A 'principle' means a general guiding rule, and does not include specific directions, which vary according to the subject matter." (per Shearman J., in *M'Creagh v. Frearson* 1922 W.N. 37)

Similarly in Words and Phrases, Permanent Edition, Vol. 33A at page 327 it is explained that "principle means a general law or rule adopted or professed as a guide to action". In other words, as opposed to any specific direction governing any particular or specific instance, transaction or situation a principle would be a guiding rule applicable generally to cases or class or cases. Looked at from this angle it will be clear that sub-s. (3) of s. 5 formulates a principle inasmuch as it lays down a general guiding rule applicable to all penultimate sales that satisfy the two conditions specified therein and not any specific direction governing any particular or specific transaction of a penultimate sale. In other words the content of the provision shows that it lays down a principle. In fact, while addressing arguments on proper construction of the s. 5(3) counsel for the three States strenuously

647

contended that the said provision should not be construed as being applicable only to the export auctions conducted by the Coffee Board and the terms and conditions governing them because it applies to variety of parties including the small manufacturers who seek a foreign market for their goods through private export houses or canalised agencies like State Trading Corporation. It is thus clear to us that s. 5(3) formulates a principle of general applicability in regard to all penultimate sales provided they satisfy the specified conditions mentioned therein and there is no question of the said provision creating a legal fiction as has been contended for by counsel. The contention, therefore, that s. 5(3) is beyond the power or authority of Art. 286(2) and, therefore, ultra vires, must be rejected.

Turning next to the main issue regarding the proper construction to be placed on the words "the agreement or order for or in relation to such export" occurring in s. 5(3) of the Act, the question is whether the agreement referred to therein means only the agreement with a foreign buyer or would include any binding or enforceable agreement to export even with a local party to implement which penultimate sale should have taken place. Section 5(3), quoted above in extenso, has obviously been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i. e. become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export. Counsel for the petitioners contended that all that the section requires is that before the penultimate sale becomes complete by passing of property in the goods, there must be in existence an agreement for or

in relation to the export of those goods outside India and the language does not suggest that such agreement must necessarily be with a foreign buyer. In other words, the phrase "the agreement for or in relation to such export" is wide enough to include any binding or enforceable agreement to export even with a local party to implement which the penultimate sale should have taken place. According to counsel the words "such export" occurring at the end of the sub-section mean the physical export of the goods outside India and it is significant that Parliament has linked "the agreement or order" with "such export" (meaning the physical export outside India) and not with "the sale occasioning the export". The argument is had Parliament intended that the agreement with or order from a foreigner was essential it would have said "the

648

agreement or order for or in relation to such sale occasioning the export." Further, relying upon the Statement of Objects and Reasons appended to the relevant Bill it is contended that the benefit of this new provision was intended to be extended to even small manufacturers who produce goods for a foreign market but have to depend upon private export houses possessing the requisite expertise of export trade or a statutory canalising agency like the State Trading Corporation for the export of their goods and if while selling his product to such export house or canalising agency the small manufacturer enters into a binding covenant or agreement with the export house or the agency that the latter shall export the product that should be enough to satisfy the condition mentioned in the sub-section and the exemption from tax liability under the Act cannot be made to depend upon the fortuitous circumstance of a foreign buyer's contract or foreign buyer's order being available with him when he sells his product to the export house or the agency. Moreover, counsel contended that according to the decisions of this Court what is required to constitute a sale in the course of export is that the sale should be so inextricably bound with the ultimate export that the link between the two cannot be voluntarily interrupted without a breach of the contract. In other words, an inextricable bond or obligation must subsist between sale on the one hand and the final export on the other and such obligation can arise by reason of statute, contract or mutual understanding between the parties arising from the nature of the transaction and in this behalf strong reliance was placed by counsel for the petitioners on the following observations of Justice Shah in the case of Ben Gorm Nilgiri Plantations Company, Coonoor and Ors. v. Sales Tax Officer, Special Circle, Ernakulam and Ors.

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.. In general where the sale is effected by the seller, and he is not connected with the export which

actually takes

649

place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation 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."

Counsel urged that securing a foreign buyer's contract or a foreign buyer's order is not the only mode in which the requisite obligation to export, affording the inextricable link between the sale and export, can arise; such obligation can arise by reason of a binding or enforceable covenant to export being incorporated in the contract of the penultimate sale entered into with a local party as is the case in the export auctions conducted by the Coffee Board where under Cl. 26 it is obligatory on the part of the Registered Exporters to export the coffee sold to them and perhaps with the Coffee Board possessing statutory powers to enforce the condition on pain of imposition of penalty and seizure of an exported coffee the obligation to export will have greater sanctity than the obligation arising from a foreign buyer's contract or a foreign buyer's order. Counsel, therefore, contended that the penultimate sales herein, namely, the export auctions conducted by the Coffee Board since they satisfy the two conditions specified in s. 5(3) must be regarded as sales in the course of export and insistence on production of an agreement with or order from a foreign buyer in terms of the impugned Circular is clearly uncalled for. It may be stated that though initially the learned Attorney General appearing for the Coffee supported the construction that the words "the agreement or order for or in relation to such export" occurring in s. 5 (3) necessarily referred to the agreement with or an order from a foreign buyer, at a later stage during the course of his submissions he did not stick to that stand but submitted that the construction sought to be placed on those words by counsel for the petitioners would be proper as it would promote the export trade in coffee by making Indian coffee available at competitive rates in the international market, an objective sought to be achieved by enacting the new provision in s. 5 of the Act.

It is true that the language employed in s. 5 (3) is a little ambiguous or equivocal and there is no indication in express terms whether the "agreement" mentioned therein necessarily refers to the agreement with a foreign buyer or would include any binding or enforceable agreement to export with a local party and that is why counsel on either side have heavily relied upon the Statement of Objects and Reasons appended to the relevant Bill to show what was the legal po-

650

sition under s. 5(1) as interpreted by this Court in the Coffee Board's case and Mohd. Serajuddin's case (supra) before the proposed amendment and what was the lacuna or mischief that was sought to be remedied as also the object with which this provision came to be enacted. However, before applying the mischief rule initially enunciated in Heydon's case for arriving at the true construction we propose to examine the new provision rather closely with a view to see whether by implication any indication one way or the other is available from the language thereof. The material words which prescribe the two conditions on satisfying which the penultimate sale is to be regarded as a

sale in the course of export are: "If such last sale or purchase (meaning the penultimate 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." It is true that Parliament has not said "the agreement or order for or in relation to such sale occasioning the export", but has used the phrase "the agreement or order for or in relation to such export." But in our view two aspects emerge very clearly on a close scrutiny of this phrase which by implication show that the "agreement" spoken of there refers to the agreement with a foreign buyer and not an agreement with a local party containing a covenant to export.

In the first place the concerned phrase speaks of two things in disjunctive: 'agreement' or 'order'. The word 'order' which appears in a statute dealing with sales tax must be understood in a commercial sense, that is, in the sense in which traders and commercial men will understand it. In commercial sense an order means a firm request for supply of definite goods emanating from a buyer, an indent placed by a purchaser and, therefore, an order for or in relation to export would mean an indent from a foreign buyer. It is not possible to accept the contention urged by counsel for the petitioners that the word 'order' in this phrase can mean or refer to an order, direction, mandate, command or authorisation to export that may be issued by a statutory body like the Coffee Board for two reasons; first, occurring in a sales tax statute the word must be given its commercial meaning and, secondly, while enacting the provision Parliament could not be said to have only statutory bodies like Coffee Board or S. T. C. in mind. If, therefore, an order for export in the concerned phrase means an indent from a foreign buyer, the preceding word "agreement" in the phrase would take colour from the word "order" and would on the principle of *noscitur a sociis* mean an agreement with a foreign buyer. In Maxwell on the Interpretation of Statutes (at p. 289 12th Edn.) the rule 651

of *noscitur a sociis* is explained thus: "where two or more words, which are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general." Applying this rule of construction it becomes clear that "the agreement" occurring in the phrase must mean the agreement with a foreign buyer and not the agreement with a local party containing a covenant to export. Secondly and more importantly, the user of the definite article "the" before the word "agreement" is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression "the agreement" would refer to that agreement which is implicit in the sale occasioning the export. Between the two sales (the penultimate and the final) spoken of in the earlier part of the sub-section ordinarily it is the final sale that would be connected with the export, and, therefore, the expression "the agreement" for export must refer to that agreement which is implicit in the sale that occasions the export. The user of the definite article "the", therefore, clearly suggests that the agreement spoken of must be the agreement with a foreign buyer. As a matter of pure construction it appears to us clear, therefore, that by necessary implication the expression "the agreement" occurring in the relevant phrase means or refers to the agreement with a foreign buyer and not an agreement or any

agreement with a local party containing the covenant to export.

Coming to the mischief rule, in *Re Mayfair Property Co.*, Lindley M. R. re-enunciated it thus: "In order properly to interpret any statute it is necessary to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief." Looked at from this angle it will be desirable to indicate in brief the position that obtained prior to the enactment of s. 5(1) of the Central Sales Tax Act 1956, how s. 5(1) after its enactment had been interpreted by this Court and why the enactment of the new provision contained in s. 5(3) was felt necessary. Prior to the enactment of s. 5(1) there was no legislative guidance as to what transactions of sale or purchase could be said to be "in the course of export" and the said expression occurring in Art. 286(1) (b) of the Constitution was construed by this Court in what have come to be known as the first and the second Travancore-Cochin cases, namely, *The State of Travancore-Cochin and Ors. v. The Bombay Company Ltd.* and *The*

652
State of Travancore-Cochin and Ors. v. The Shanmugha Vilas Cashew-nut Factory and Ors. to include two types of sales or purchases (a) a sale or purchase which itself occasions the export and (b) a sale or purchase effected by a transfer of documents of title to the goods after the goods are put in the export stream (i.e. after they have crossed the customs frontiers of India). Patanjali Sastri, C.J. observed in the first case that "a sale by export involved a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction". In the second case this Court held that a sale or purchase for the purpose of export, like production or manufacture for export, being merely an act preparatory to export could not be regarded as an act done "in the course of the export of the goods out of the territory of India" because etymologically the expression "in the course of export" denoted an integral relation between the sale and the export. Then came the Constitution (Sixth Amendment) Act, 1956 introducing a new clause being cl. (2) in Art. 286 whereby Parliament was empowered by law to formulate principles for determining when a sale or purchase took place in the course of export and pursuant to this power Parliament enacted s. 5(1) in the Act which provides that 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 if the goods have crossed the customs frontiers of India". In other words, this was legislative recognition of what was said by this Court in the two Travancore cases (supra) about the true meaning of the expression "in the course of export" occurring in Art. 286 (1) (b).

Section 5(1) was construed by this Court in the context of two sales (though both were closely connected with the ultimate exportation of the goods out of India) rather very strictly in two cases, namely, the *Coffee Board's case* (supra) and *Mohd. Serajuddin's case* (supra). In the former case in regard to the very export auctions conducted by the Coffee Board for the avowed purpose of exporting the coffee

through Registered Exporters (which are the subject-matter of the instant writ petitions) this Court negatived the claim that the sales of coffee at such auctions were made "in the course of export" within the meaning of s. 5(1) on the ground there were two sales, one by the Coffee Board to the intermediary (Registered Exporter) and the other by the intermediary to the importer and that the first sale was not

653
"in the course of export" for the export began from the intermediary and ended with the importer and that the introduction of the intermediary (Registered Exporter) between the seller (Coffee Board) and the importing buyer broke the link. This Court laid down the test that there must be a single sale which itself caused the export and there was no room for two or more sales being "in the course of export". In other words, notwithstanding the compulsion to export arising from Cls. 26, 30 and 31 of the Auction Conditions the penultimate sale was held to be not in the course of export. The latter case (Mohd. Serajuddin's case (supra) was stronger than Coffee Board's case (supra) inasmuch as the penultimate sales (two contracts for sale of mineral ore entered into by Mohd. Serajuddin with State Trading Corporation) were so inextricably connected with the final sales (two corresponding contracts for sale of the identical goods entered into by S.T.C. with foreign buyers) that the former were to stand cancelled if the latter for any reason fell through and vice versa and further the penultimate sales were effected to implement the contracts with the foreign buyers and even then following the ratio of Coffee Board's case (supra) this Court held that the penultimate sales (Mohd. Serajuddin's contracts with S.T.C.) were not sales in the course of export. Negating the contention that the contracts between Mohd. Serajuddin and the S. T. C. and the contracts between the S. T. C. and the foreign buyer formed integrated activities in the course of export, this Court took the view that the crucial words in s. 5(1) showed that only if a sale occasioned the export, it would be in the course of export and that the two sets of contracts were separate and independent and Mohd. Serajuddin was under no contractual obligation to the foreign buyer either directly or indirectly and that his rights and obligations were only against the S.T.C. It will thus appear clear that even when the S. T. C. had with it foreign buyer's contracts and Mohd. Serajuddin's contracts with S. T. C. had been entered into for the purpose of implementing such foreign buyer's contracts, this Court held that the sales between Mohd. Serajuddin and S. T. C. were not sales in the course of export. It was at this stage i. e. when s. 5(1) was interpreted by this Court in the aforesaid manner that the Parliament felt the necessity of enacting s. 5(3) for the purpose of giving relief in respect of penultimate sales that immediately precede the final (export) sales provided the former satisfy the conditions specified therein. The Statement of Objects and Reasons in this behalf runs thus:

"According to Section 5(1) of the Central Sales Tax Act, a sale of purchase of goods can qualify as a sale in the course of export of the goods out of the territory of India only if the sale or purchase has either occasioned such export or is by a transfer of docu-

654

ments of title to the goods after goods have crossed the customs frontiers of India. The Supreme Court has held (vide: Mohd. Serajuddin v. State of Orissa, 36 STC

136) that the sale by an Indian exporter from India to the foreign importer alone qualifies as a sale which has occasioned the export of the goods. According to the Export Control Orders, exports of certain goods can be made only by specified agencies such as the State Trading Corporations. In other cases also, manufacturers of goods, particularly in the small scale and medium sectors, have to depend upon some experienced export house for exporting the goods because special expertise is needed for carrying on export trade. A sale of goods made to an export canalising agency such as the State Trading Corporation or to an export house to enable such agency or export house to export those goods in compliance with an existing contract or order is inextricably connected with the export of the goods. Further, if such sales do not qualify as sales in the course of export, they would be liable to State sales tax and there would be a corresponding increase in the price of the goods. This would make our exports uncompetitive in the fiercely competitive international markets. It is, therefore, proposed to amend, with effect from the beginning of the current financial year, Section 5 of the Central Sales Tax Act to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning 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).

Two things become clear from this Statement; first, Mohd. Serajuddin's decision (supra) is specifically referred to as necessitating the amendment and secondly, penultimate sales made by small and medium scale manufacturers to an export canalising agency or private export house to enable the latter to export those goods in compliance with existing contracts or orders are regarded as inextricably connected with the export of the goods and hence ear-marked for conferral of the benefit of the exemption. But here again, 'existing contract' with whom is not clarified. In other words, on this crucial point the Statement is silent and does not throw light on whether the existing contract should be with a foreign buyer or will include any agreement with a local party containing a covenant to export. Therefore, the question will again depend upon proper construction and, as we have said above, in the matter of construction the two aspects discussed earlier show that by necessary implication 'the agreement' spoken of by s. 5(3) refers to the agreement with a foreign buyer.

655

However, in support of his construction counsel for the petitioners pressed into service two aspects arising from the Statement of Objects and Reasons, namely, (a) that the exemption was intended to be extended even to small and medium scale manufacturers who manufacture goods for foreign market but have to depend upon a canalising agency or private export house for the export of their goods and (b) that the object of granting the exemption was to promote our exports in fiercely competitive international markets and, according to counsel, both these objectives would be frustrated if the narrow construction was placed on the expression 'the agreement' as meaning the agreement with a foreign buyer and that the construction suggested by him would carry out the objectives. It is true that the benefit

of the exemption was intended to be extended to small and medium scale manufacturers desirous of exporting their goods but the requirement of the new provision is not that they must procure or have with them a foreign buyer's contract but the requirement is that before they complete the sale of their goods to the canalising agency of the private export house there must be in existence a foreign buyer's contract to implement which they should have sold their goods to such agency or export house. In the nature of things such manufacturers who have no expertise of export trade are not expected to have a foreign buyer's contract with them and it would be sufficient compliance of the provision if the canalising agency or the export house has with it the foreign buyer's contract. It would, therefore, be incorrect to say that the benefit of the exemption depends upon the fortuitous circumstance of a foreign buyer's contract being available with such manufacturer when he sells his product to the agency or the export house. No hardship as is sought to be suggested is involved and we do not agree that by the construction which we are inclined to place on the expression 'the agreement' occurring in s. 5(3) the small or medium scale manufacturers would be deprived of the benefit of the exemption. In fact, the construction which we are inclined to accept would be in consonance with the trade practice obtaining in export trade, namely, that normally the export activity commences with securing or obtaining an export contract or a firm order from a foreign buyer as the first step towards the ultimate export [vide: observations of this Court in *State of Mysore v. The Mysore Spg. and Mfg. Co. Ltd.* where obtaining a firm order from overseas buyer is described the first out of nine steps enumerated in the entire procedure for export]. As regards the other aspect it is clear to us that two public interests are involved; promotion of the exports of the country is one public interest while augmentation of the States' revenues through sales tax is the other and it is obvious

656

that if the liberal construction, as suggested by the counsel for the petitioner, is accepted the former public interest will undoubtedly be served while the latter will greatly suffer and if the narrow construction is accepted the latter public interest will be served and the former will suffer. It is difficult to say that the Parliament intended to prefer one and sacrifice the other. In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions displays an anxiety not to diminish the States' revenues beyond a certain limit. The section in any case gives no indication that one public interest is to be preferred to the other and therefore, in our view, the matter must again depend upon the proper construction of the language employed. On construction we are of the view that by implication the expression 'the agreement' occurring in s. 5(3) refers to the agreement with a foreign buyer.

Counsel for the petitioners lastly urged that the penultimate sales by the Coffee Board to the Registered Exporters include in them a covenant to export and having regard to Cls. 26, 30 and 31 there is a compulsion on the Registered Exporters to export the coffee on pain of imposition of a penalty and seizure of unexported coffee and reliance in that behalf was placed upon the observations of Shah, J., in *Ben Gorm Nilgiri Plantations Company's case* (supra). In our view, the observations (quoted in extenso in

the earlier part of the judgment) will have to be read in the context of the facts which obtained in that case. It has a case of only one sale which had resulted in the export and the question was whether transactions of sale of tea chests by the manufacturer at public auctions held at Port Cochin to the local agents of foreign buyers were exempt from levy of sales tax under Art. 286(1)(b) and though it was common ground that the purchases by the local agents of foreign buyers were with a view to export the goods to their principals abroad and that the goods were in fact exported out of India this Court found nothing in the transactions from which a bond or obligation could be said to spring between the sale and the intended export linking them as part of the same transaction and though the seller (manufacturer) could be said to have knowledge that the tea sold to the local agents of foreign buyers was meant for the export and would be exported, the seller had no concern with the export, that the sale imposed or involved no obligation to export and there was possibility that the goods might be diverted for internal consumption. It was in that context that Shah, J., observed in that case that there must be an intention on the part of both the buyer and the seller to export, that there must be obligation to export, and that there must be an actual export, and further that the obligation may arise by reason

657

of statute, contract between the parties, or mutual understanding or agreement between them or even from the nature of the transaction which links the sale to export. In other words, even in the case of a single sale which ultimately resulted in the export it was held that the sale was not in the course of export because there was no obligation to export which afforded the inextricable link between the sale and the export. It is true that if the obligation to export affording the inextricable link between the sale and the export is necessary in the case of a single sale even though it results in export, then all the more such obligation will be necessary in the case of a penultimate sale if such penultimate sale is to constitute a sale "in the course of export" but even if Ben Gorm Nilgiri Plantations Company's case (supra) is regarded as laying down a general proposition that what is required is an obligation which inextricably connects the sale with the export and that such obligation may, in the absence of legislative guidance, arise by reason of statute, contract, mutual understanding, or the nature of transaction which links the sale to export, still the question would be what type of obligation and arising from what circumstances would be necessary or enough in the case of a penultimate sale must depend upon the language of the statute concerned and, therefore, the question will again be what type of obligation and arising from what circumstances has been prescribed by the Parliament by enacting s.5 (3) and that would depend upon the proper construction of the phrase "the agreement or order for or in relation to such export" occurring therein and, as we have said above, since on proper construction the expression "the agreement or order" means the agreement with or an order from a foreign buyer it must be held that the Parliament intended to prescribe that the obligation to export arising only from such agreement or order that would afford the inextricable link so as to constitute the penultimate sale a sale in the course of export.

Having come to the conclusion that on proper construction the expression "the agreement" occurring in s.5

(3) refers to the agreement with a foreign buyer and does not include any agreement with a local party containing a covenant to export, the next question that arises for our consideration is as to when does the penultimate sale (the sale of coffee at export auctions conducted by the Coffee Board to Registered Exporters) takes place, i.e. becomes complete by the passing of the property in the coffee sold thereat to the Registered Exporters? The determination of the point of time at which the property in the coffee passes to the Registered Exporters becomes necessary because before that the agreement with or order from a foreign buyer in respect of those goods must come into existence to implement which the penultimate sale must have taken place. We have indicated earlier

658

the rival contentions of the parties on this issue. But before addressing ourselves to these rival contentions we shall dispose of a small contention that was put forward by Mr. Venugopal counsel for the State of Karnataka that the word 'sale' occurring in the phrase "if such last sale or purchase takes place after" in s.5 (3) means the agreement to sell and not sale in the sense of a transfer of property in goods by one person to another and the argument has been that since the word 'sale' in the aforesaid phrase means an agreement to sell such agreement to sell in the case of export auctions conducted by the Coffee Board takes place or becomes complete at the fall of the hammer when the bid of the highest bidder gets accepted and the regular contract containing the covenant to export is invariably entered into by the Registered Exporter with the Coffee Board at a later stage and, therefore, even the covenant to export to be found in the contract with the Coffee Board can never be regarded as having come into existence before the agreement to sell becomes complete and consequently the penultimate sale to the Registered Exporter would not qualify for the exemption. In support of the contention that the word 'sale' means an agreement to sell counsel relied upon s.4 of the Sale of Goods Act, 1930 wherein a contract of sale of goods is defined as contract wherein the seller either transfers or agrees to transfer the property in goods to the buyer for a price and also upon a decision of this Court in Balabhagas Hulaschand v. State of Orissa, a case under Central Sales Tax Act, 1956, where this Court has taken the view that for purposes of s. 3, (a) and s. 4(2) (a) and (b) the word 'sale' includes an agreement to sell and, therefore, in s. 5(3) also the word 'sale' should be construed as agreement to sell. It is not possible to accept this contention for more than one reason. In the first place the definitions of 'sale' and 'agreement to sell' in the Sale of Goods Act 1930 would not apply to the expression 'sale' occurring in the Central Sales Tax Act, 1956 wherein the expression 'sale' has been defined in s. 2(g) for the purpose of that Act and under s. 2 (g) of the Central Sales Tax Act 'sale' means "any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods." In other words, wherever the word 'sale' occurs in the Central Sales Tax Act, 1956 it is this definition given in s. 2(g) that will be applicable and therefore the word 'sale' in s. 5(3) must mean transfer of the goods by one person to another for cash or for deferred payment or for any other valuable considerations; it cannot mean "agreement to sell".

659

Moreover, there is nothing in the context of s. 5(3) to suggest that the word 'sale' occurring therein should be understood differently. In Balabhagas Hulaschand's case (supra) this Court in the context of the question as to when a sale could be said to take place in the course of inter State trade or commerce gave an extended meaning to the word 'sale' as defined in s. 2(g) and as used in ss. 3(a) and 4(2) and (b) of Central Sales Tax Act, 1956 and what was said by this Court was that the word 'sale' as used in s. 3 (a) and s. 4 (2) (a) and (b) was wide enough to include not only a concluded contract of sale but also an agreement of sale provided that the latter stipulated that there was a transfer of property or movement of goods; the ratio of that decision will be inapplicable to s. 5(3) which deals with the question as to when a penultimate sale shall also be deemed to be in the course of export and there is nothing therein to suggest that the word 'sale' should have any such extended meaning; on the contrary, the context suggests that the word 'sale' in the phrase "if such last sale or purchase takes place after" refers to a completed sale i. e. a sale as defined in s. 2(g) of the Act. The contention urged by counsel must, therefore, be rejected.

Dealing next with the three stages at which the property in the coffee sold at the export auctions conducted by the Coffee Board is said to pass to the highest bidder (Registered Exporter) three questions arise that need our close examination. Does it pass at the fall of the hammer when his bid is entered in the Register of Bids under his signature under s. 64(2) of the Sale of Goods Act, 1930 as contended for by counsel for the States of Karnataka, Tamil Nadu and Kerala? Does it pass after the coffee sold is weighed and set apart for delivery and price is paid therefor by the auction purchaser in view of Cl. 19 (particularly the over-riding provision contained therein) and other clauses of Auction Conditions (this being the alternative plea of the petitioners)? or Does it pass only after the coffee sold is shipped or is sent to the customs station for shipment because till then the Coffee Board has a right of disposal under Cls. 26 and 31 read with s. 25 of the Sale of Goods Act (this being the principal plea of the petitioners)? It will be desirable to set out the concerned provisions in order to appreciate properly the rival submissions of counsel based thereon. Sub-s. (2) of s. 64 of the Sale of Goods Act, which deals with auction sales, runs thus:

"64. In the case of a sale by auction:-

- (1) x x x x x x
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner;

660

and, until such announcement is made, any bidder may retract his bid."

Clause 19 of the Auction Conditions which deals with weighment, delivery and payment of price contains an over-riding provision to this effect:

"Notwithstanding anything contained in these conditions, the property in the coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him."

Cause 26 declares that it is an essential conditions of the Auction that the coffee sold thereat shall be exported to stipulated destinations in the catalogue of lots or to

such foreign country as may be approved by the Chief Coffee Marketing Officer within three months or such extended time as may be allowed (which extension shall not exceed one year) and the same shall not, under any circumstances, be diverted to any other destination or sold or be disposed of, or otherwise released in India, while this condition is enforced by seizure of the unexported coffee under Cl. 31 which runs thus:

"31. On default by the Buyer to export the coffee aforesaid within the prescribed time or such extension, thereof as may be granted, it shall be lawful for the Chief Coffee Marketing Officer, without reference to the Buyer, to seize the unexported coffee and for that purpose to make entry into any building, godown, or warehouse where the said coffee may be stored, and take possession of the same and deal with it as if, it were part and parcel of Board's coffee held by them in their Pool Stock.

Out of the net sale proceeds of such coffee sold in pursuance of conditions prescribed in Clause 15, the Chief Coffee Marketing Officer shall pay to the defaulting Buyer only the balance of the amount remaining over after deducting therefrom godown charges and Insurance premia, and selling commission payable to the Agents, and all other expenses of sale, together with the penalty due under Clause 30.

Provided however that if such balance is in excess of the sale price by the Buyer, the payment shall be limited to the actual sale price.

Provided further that such payment shall not affect or prejudice the right of the Board to levy the penalties under clause 32 hereunder."

661

According to counsel for the three States s. 64 is a special provision in the sale of Goods Act which deals with Auction Sales and under sub-s.(2) thereof the sale is complete no sooner the auctioneer makes an announcement in that behalf either by fall of the hammer or in other customary manner and, therefore, the property in the goods sold thereat passes at the fall of the hammer or immediately after the announcement of completion is made in other customary manner and since in the instant case the Coffee Board conducts export auctions of coffee in lots which are specified in catalogues supplied to the auction purchasers before-hand, the property in the coffee sold thereat must be regarded as having passed to the buyer at the fall of the hammer when the successful bid is entered in the Register of Bids under the signature of the bidder as per Cls. 10 and 11 of Auction Conditions. As regards Cl. 19 a two-fold argument was urged: in the first place it was contended that s. 64 is not subject to any contract to the contrary and, therefore, s. 64(2) must prevail under which the property will pass at the fall of the hammer or at the close of the sale in the customary manner; secondly, Cl. 19 containing the over-riding provision may bind the parties to the contract but will not have the effect of creating an estoppel against a third party like a State Government or its Sales Tax Authorities from contending or showing that the property at such auctions passes at the fall of the hammer and if under the other terms of the auction it is clear that the property has passed or does pass to the auction purchaser at the fall of the hammer a mere declaration of the intention on the part of the contracting parties deferring or postponing the passing of the property will not affect the question and in that behalf reliance was placed upon observations of Lord

Chancellor Herschell in *Mc Entire And Another v. Crossley Bros., Ltd.* where observations run thus:

"Upon an agreement to sell, it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property shall not pass until the full purchase money is paid. I know no reason to prevent that being a perfectly lawful agreement. If that was really the intention of the parties, I know of no rule or principle of law which prevents it from being given effect to. I quite agree that if, although the parties have inserted a provision to that effect, they have shown in other parts of the agreement, by the language which they have used, or the provisions which they have made, that they intended the property to pass, one must look at the transaction as a whole, and it might be

662

necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall. No doubt any provisions which were inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words."

As regards Cl. 31 Counsel contended that it does not amount to any reservation of the right of disposal over the goods to the Coffee Board within the meaning of s. 25 of the Sale of Goods Act.

On the other hand counsel for the petitioners contended that s. 64(2) of the Sale of Goods Act does not deal with the question of passing of the property at auction sale but merely deals with the completion of the contract of sale, that is to say, upon the fall of hammer or announcement of the close of sale in other customary manner the agreement to sell becomes complete; in other words an executory contract comes into existence between a promisor and a promisee. Secondly, even if the said provision is regarded as one relating to completion of sale in the sense of passing of property from one hand to the other such result will occur only if the auction sale is in respect of specific or ascertained and identifiable goods and unconditional; in other words, it is only in an unconditional sale by auction the property in the goods passes on the fall of hammer. Thirdly, s. 64 is subject to a contract to the contrary and the auctioneer holding the auction could fix the terms and conditions on the basis of which he would be accepting the bids and in the terms and conditions so set forth by him he could provide for passing of the property at a point of time later than the fall of the hammer or the closure of the auction in the customary manner or on fulfilment of certain conditions (like Cl. 19 in the instant case) and such terms would bind the parties and the property will pass in accordance with those terms. As far as the instant case is concerned counsel for the petitioners urged that s. 64(2) was not attracted for two reasons: (a) the export auctions conducted by the Coffee Board are not unconditional but subject to certain conditions, particularly condition expressly relating to the passing of property as contained in Cl. 19 and (b) factually the sale is never in respect of lots of specific or ascertained goods inasmuch as it is abundantly clear from the affidavit of Shri Meenaxi Sunderam, the Chief Coffee Marketing Officer of the Coffee Board dated 20th February, 1980 that every lot put up for auction invariably contains 5% of coffee more than the

quantity indicated in the catalogues and the coffee sold from only particular lot is required to be weighed and set apart and appropriated

663

to the contract before delivery is given. Apart from the factual ground, counsel urged that the position in law that s. 64 is subject to a contract to the contrary is very clear and under Cl.19 the passing of property in the coffee sold at the Export Auctions has been deferred until after the coffee sold is weighed, set apart for delivery and price is paid therefor and according to him Lord Chancellor Herschell's observations cannot avail the States of Karnataka, Tamil Nadu and Kerala for the simple reason that there is nothing contra indicated in other conditions so that the declared intention in Cl. 19 should not prevail. He urged that a statutory body like the Coffee Board must be presumed to act in a bona fide manner and has prescribed terms and conditions of auction genuinely intended to bind the parties to the auction and those terms and conditions must be regarded as truly governing the rights and obligations of the parties and a third party like a State Government or its Sales Tax Authorities must apply their taxing measures by having regard to those terms and conditions. He, therefore, pointed out that if the Court would be inclined to take the view that the property passes to the auction purchaser under Cl.19 then the agreement with or order from a foreign buyer must be available or come into existence just before such passing of the property. However, he contended that Cl. 19 makes a negative provision, namely, that the property shall not pass until after the coffee sold is weighed, set apart for delivery and price is paid therefor which would mean it passes not till then but some time later and, therefore, strong reliance has placed by counsel on Cl. 31 which empowers the Coffee Board to seize the unexported coffee and deal with it as if it were part and parcel of Board's coffee held by it in its pool stock if default is committed by the buyer to export the coffee within the prescribed time or such extension thereof as may be granted and such provision constitutes a reservation of the right of disposal to the Coffee Board within the meaning of s. 25 of the Sale of Goods Act. He, therefore, urged that under Cls. 26 and 31 read with s. 25 of the Sale of Goods Act the property would pass after the coffee is shipped or sent to the customs station for shipment by the auction purchaser and production of the agreement with or order from a foreign buyer before such shipment or despatch to customs station would satisfy the requirement of s. 5(3) of the Central Sales Tax Act, 1956.

In view of the aforesaid rival submissions two questions arise for determination: what is the true import of s. 64(2) and whether s. 64 is subject to a contract to the contrary? On both these we find considerable force in the submissions made by counsel for the petitioners. Regarding s. 64(2) of the Sale of Goods Act it seems to us

664

that provision does not deal with question of the passing of the property in the goods sold at auction sale but instead it deals with the completion of the contract of sale. It is true that sub-s.(2) says that "the sale is complete" when the auctioneer announces its completion by the fall of hammer or in other customary manner, but, the next following provision which says: "and until such announcement is made any bidder may retract his bid" suggests that what is complete at the fall of the hammer or the announcement of closure in other customary manner is that the contract for

sale is complete. It is well known that our Sale of Goods Act 1930 is based upon and is largely a reproduction of the English Sale of Goods Act 1893 and in principle as well as in most details the law of sale of goods in both the countries is now the same and, therefore, English authorities on interpretation of different sections, although not technically binding in India, would have great persuasive value. It will be pertinent to observe that our s. 64 is based upon s. 58 of the English Act, though it is somewhat differently arranged; but sub-s. (2) of s. 64 is particularly in identical terms as s. 58(2) of the English Act. Section 58(2) of the English Act runs as follows:

"58. In the case of a sale by auction-

(1) x x x x x

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid."

In Halsbury's Laws of England (4th Edn., Vol. 2) at page 380 Para 742 runs thus:

"742. Bidding. The method of bidding and the amount of the bids are usually regulated by the conditions of sale (1). Until the property is actually knocked down there is no complete contract of sale. A bid is a mere offer, and can be retracted by the bidder at any time before the auctioneer announces the completion of the sale by the fall of the hammer, for in other customary manner (2)" (Emphasis supplied).

At foot-note (2), s. 58(2) of the Sale of Goods Act 1893 is the provision indicated in support of the aforesaid statement of law and it is further stated: "In an unconditional sale the property in the goods passes on the fall of the hammer" Sale of Goods Act 1893, s. 18 r. 1 [Dennant v. Skinner and Collom. This would show that under s. 58(2) of 665

the English Sale of Goods Act 1893 normally in an auction sale at the fall of the hammer a completion of the contract of sale takes place and until such time the bidder may retract his bid but if the auction sale happens to be an unconditional sale in respect of specific and ascertained goods, the title to the property passes simultaneously at the fall of the hammer not by virtue of s. 58(2) but by reason of the operation of s. 18 r. 1 of the English Act which is equivalent to s. 20 of our Act].

In Dennant v. Skinner and Collom (supra) D, the auctioneer knocked down five vehicles including a Standard motor car to King. After the sales, King said that he would like to pay by cheque, but D replied that it was not his practice to accept cheques from people he did not know. King represented that he was the son of the proprietors of King's Motors of Oxford, a well-known firm and produced counterfoils in his cheque books, according to which he had been paying large amounts to well-known auctioneers. D thus accepted the cheque King signing a form which stated: "I hereby certify that my cheque No... will be met on presentation at my bank. Furthermore, I agree that the ownership of the vehicles will not pass to me until such time as the proceeds of my cheques have been credited to South London Motor Auction account at Lloyds Bank." King was permitted to remove the vehicles and he sold the Standard Car to a third party C, who sold it to the defendant, S. The cheque was dishonoured on presentation and it transpired that King had no connections with King's Motors. D sought from S return of the car or payment of its value. Negativating

the claim, the Court held that the contract for sale was unconditional and, therefore, the property in the car passed on the fall of the hammer under the Sale of Goods Act, 1893, s. 18(1) and D's right under s. 39(1) (b) of that Act to retain the car until payment was made was relinquished when he gave possession to King. On the question of the passing of the property the Court at page 34 observed thus:

"The second point on which the plaintiff relies is that the property in the circumstances of this case did not pass until the price was paid by the cheque being in order or cash substituted for it. A contract of sale is concluded in an auction sale on the fall of the hammer, and indeed, the Sale of Goods Act, 1893, s. 58(2), so provides. Section 18 provides:-Rule 1: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or

666

the time of delivery or both be postponed. Accordingly on the fall of the hammer the property of this car passed to King...." As regards the undertaking obtained from King the Court observed. "Since the property had already passed a document subsequently executed by the bidder acknowledging that the ownership of the vehicle would not pass to him till the cheque was encashed could not have any effect on what had already taken place."

It will thus appear clear that because the auction sale was unconditional and it related to specific goods that it was held that the property in the car had passed to King at the completion of the contract which occurred at the fall of the hammer under s. 58(2) but the property had passed under s. 18(1). This case also shows that to an auction sale normally governed by s. 58 the implied rule pertaining to the passing of property contained in s. 18(1) applied; if so, it stands to reason that the auctioneer could incorporate an express term pertaining to the passing of property, different from the implied rule, in his auction conditions and if he were to do so it will be operative.

In American Jurisprudence 2d, Vol. 7, it is clarified that sale by auction may be conditional or unconditional and what happens when a bid is accepted is explained in Para 20 under the heading "Offer and Acceptance: Bidding" at page 237 thus:

"20. Generally.

A sale at auction, like every other sale, must have the assent, express or implied, of both seller and buyer. An announcement of an auction or the act of putting property up for sale thereat does not constitute an offer to sell capable of acceptance by the making of a bid....It is mere invitation to those attending the sale to make offers by bids. The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer. These common-law principles are adopted by both the Uniform Sales Act and the Uniform Commercial Code.

Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and the bidder until the seller accepts the bid....

Once a bid has been accepted the parties occupy the same relation towards each other as exists between promisor and promise in an executory contract of sale

conventionally made.

667

Again in Para 48 at page 260 on the question of passing of title the following statement of law occurs:

"48. Passing of title; risk of loss of property.

The acceptance of the bid upon the fall of the hammer gives rise to contract rights which may be enforced, but does not necessarily convey or transfer the title to the property. As in the case sales generally, the intention of the parties derived from the terms of the contract and the circumstances of the case primarily determines the question as to when title passes.

Many cases hold that in an auction sale of chattels, when the sale is without condition and where nothing remains to be done to the property before its delivery, either to separate it from other property or to put it in condition ready for delivery, the title, as between the parties, passes to the purchaser upon the acceptance of his bid, without payment of the price, even though the right to possession does not pass until the price is paid or arranged for to the satisfaction of the seller. Under this view, title ordinarily passes to the successful bidder when the auctioneer announces the completion of the sale."

(Emphasis supplied).

Two things appear very clear from what we have stated above. At an auction sale all that happens at the fall of hammer or at the announcement of the closure of the sale in other customary manner is that a contract of sale comes into existence and parties get into the relationship of a promisor and a promisee in an executory contract. Secondly, auction sales could be conditional or unconditional and if it is latter then by virtue of the goods being specific and in a deliverable state the property in the goods knocked down passes at the fall of hammer by reason of the concerned provision relating to the passing of the property.

Section 64(2) of our Sale of Goods Act, being in pari materia with s. 58(2) of the English Sale of Goods Act 1893, will have to be interpreted in the same manner and we are therefore, of the view that it does not deal with the question of passing of the property at auction sale but merely deals with completion of the contract of sale which takes place at the fall of the hammer or at the announcement of the close of the sale in other customary manner by the auctioneer. It would also be correct to say that if the auction sale of chattels is unconditional and is in respect of specific ascertained goods and nothing remains to be done to the goods for putting them in a condition ready for delivery, the property in the goods would pass to the purchaser

668

upon the acceptance of the bid but that would not be because of s. 64(2) but because of s. 20 and such would not be the case if the goods sold thereat are non-specific or unascertained goods or the auction sale is conditional. In this context it will be useful to refer to a decision of this Court in A.V. Thomas & Co. Ltd. v. Deputy Commissioner of Agricultural Income Tax where this Court recognised a distinction between auction sales pertaining to specific or identifiable goods and auction sales in regard to unascertained goods and held that in regard to the former the property in the goods passed when the contract was accepted at the fall of hammer and not in the latter case. That was a case where the teas were stored in the godowns in

the Willingdon Island which was in the State of Travancore Cochin and samples of those teas were taken to Fort Cochin which at the relevant time was in the State of Madras. At Fort Cochin by the samples the teas were sold by public auction in lots, some of the lots were purchased in their entirety and others in parts and after the consideration money was paid at Fort Cochin delivery orders were given to the buyers addressed to the godown keepers at Willingdon Islands and actual delivery of tea was taken there. These teas were then sent out from Willingdon Island in Travancore Cochin for consumption either in other parts of India or were exported out of India. The taxability of the sales of teas in the manner mentioned above under the Travancore Cochin General Sales Tax Act depended upon whether the sales could be held to have taken place at Willingdon Island, i.e., within the territory of Travancore Cochin State and were liable to sales tax under the Act or whether the sales were 'outside sales' and, therefore, not subject to sales tax in the State of Travancore Cochin in view of Article 286(1) (a) read with the Explanation. This Court after referring to s. 64(2) and the definition of 'specific goods' in s. 2(14) of our Sale of Goods Act, took the view that on the fall of the hammer the offer would get accepted and if the goods were specific goods the title would pass to the buyer. The distinction that was made by the Sales Tax Appellate Tribunal between goods which were sold in "full lots" and those which were sold "in portions" and its view that in regard to the former title had passed as soon as the hammer fell and not in regard to the latter was referred to by this Court with approval. At page 612 this Court observed thus:

"In the present case as soon as the hammer fell the title in the goods passed to the buyer as the goods were specific goods i.e. goods which were auctioned in full lots and this event took place at Fort Cochin which was in the State of Madras. But in the

669

case of unascertained goods the title in the goods does not pass to the buyer unless and until the goods are ascertained. It was for this reason that a distinction was drawn by the Sales Tax Appellate Tribunal between goods which were sold in full lots and those which were sold in portions. In regard to the former it was held that the title passed as soon as the hammer fell but not so in regard to the latter and therefore the sale of 'full lots' was held to have taken place outside the State of Travancore Cochin and of portions of lots inside that State."

Approving the distinction this Court ultimately held that the sales of 'full lots' being outside sales were not liable to the levy of sales tax. Thus s. 64(2) has nothing to do with the aspect of the passing of the property at an auction sale and it is by virtue of goods being specific and in a deliverable state that under s. 20 the property in such goods passes to the buyer at the completion of the contract at the fall of hammer at such sale.

On the other question there is no difficulty in coming to the conclusion that s. 64 is subject to a contract to the contrary, especially in light of the above discussion. In the first place s. 64 occurs in Chapter VII which contains "Miscellaneous" provisions and s. 62 which occurs in the same Chapter clearly provides that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or

by usage, if the usage is such as to bind both the parties to the contract. Ordinarily, the rights, duties and liabilities arising under a contract of sale by implication of law spoken of in s. 62 refer to the rights, duties and obligations referred to in Chapter III containing provisions which lay down rules as to transfer of property as between seller and buyer and transfer of title but there is no reason why s. 62 should not apply to rights, duties and obligations arising under s. 64 in regard to auction sales. In other words, s. 64 would be subject to s. 62. Moreover, there is intrinsic material in s. 64 itself which shows that the provisions thereof could be subject to a contract to the contrary. For instance, sub-s. (1) thereof provides that where goods are put up for sale in lots than each lot is prima facie deemed to be the subject of a separate contract for sale, which means terms between the parties may provide to the contrary or circumstances may indicate to the contrary. Again, sub-s. (5) provides that the sale may be notified to be subject to a reserved or up set price which means that the auctioneer may not fix a reserved price; further, it is well settled that if such a reserved price has been fixed than notwithstanding the fact that the highest bid has

670

been accepted by the auctioneer and that the sale relates to specific or identifiable goods no concluded contract comes into existence if the highest, bid so accepted falls short of the reserve price and the property in the goods will not pass. Sub-ss. (3) and (4), if carefully scrutinised, also indicate that there could be a contract to the contrary. Moreover, once it is accepted that auction sales to which s. 64 applies could be unconditional or conditional and that the auctioneer can prescribe his own terms and conditions on the basis of which the property is exposed to sale by auction it must be held that the acceptance of any bid as well as the passing of the property in the goods sold thereat would be governed by those terms and conditions.

Having clarified the legal position as above we shall now deal with the export auctions of coffee conducted by the Coffee Board in the instant case. Such auction sales are admittedly conducted by the Coffee Board on terms and conditions prescribed by it called 'Auction Conditions'. Further, there is no suggestion in the case that a statutory body like the Coffee Board while prescribing the Auction Conditions has acted not in good faith or that the said terms and conditions do not truly govern the rights and obligations of the parties thereto. It will, therefore, be clear that the question at what point of time the property in the coffee sold thereat passes to the auction purchaser (Registered Exporter) must depend upon the intention of the parties to be derived from the aforesaid terms and conditions. The contention that the property in coffee sold thereat passes to the buyer at the fall of the hammer under s. 64(2) of our Sale of Goods Act has simply to be rejected, for, as we have indicated above, all that happens at the fall of the hammer is that a completed contract of sale comes into existence creating a relationship of promisor and promisee between the parties in an executory contract. This is also made clear expressly by Cl. 13(a) of the Auction Conditions which runs thus:

"13(a) After the bidding has come to a close on each lot, the Sale Conducting Officer shall declare the bid accepted by him and make entry accordingly in the Register of Bids. Thereupon the Contract between the Registered Dealer by or on whose behalf the bid was

tendered and the Coffee Board becomes complete." The aforesaid clause suggests that the parties to the auction sale also understood s. 64(2) of the Sale of Goods Act in the manner in which we have interpreted it. On the question of the passing of the property the specific provision is to be found in Cl. 19 of the Auction Conditions. As stated earlier Cl. 19 principally deals with aspects of delivery, weighment and payment of price and towards the end it

671

contains an over-riding provision to the effect that notwithstanding anything contained in these conditions, the property in the coffee sold shall not pass to the buyer until after he has paid the full price and the coffee sold to him is weighed and set apart for delivery to him. In other words, it is clear that parties intended that the passing of the property shall not take place till the full price is paid and the coffee sold is weighed and set apart for delivery. Now there is nothing in any of the other provisions of these Auction Conditions which indicates that the property in coffee sold should pass either at the fall of the hammer or at any point of time prior to the payment of price and weighment and setting apart of coffee for delivery to the buyer. Therefore, the observations of Lord Chancellor Herschell in *Mc Entire And Another v. Crossley Bros. Ltd.* (supra) relied upon by counsel of three States cannot avail them. Further, it is true that the overriding provision contained at the end of Cl. 19 is negative in character, that is to say, the parties are agreed that the property shall not pass to the buyer until after the payment of the price, weighment and setting apart of the coffee for delivery to the buyer. But, does it positively follow that upon payment of price and weighment and setting apart the coffee sold for delivery to the buyer, the property passes to the buyer? On this aspect, in our view, there are two provisions contained in Cl. 20(d) and (f) which show that positively the property in the coffee sold passes to the buyer at that point of time. Under Cl. 19 after the payment of full price the buyer has to apply for and take delivery within a certain time but in case he fails to take delivery what shall happen to the coffee sold is provided for in Cl. 20. On the buyer's failure to take delivery, the coffee is first stored by the Pool Agent in the Pool Warehouse pending its exportation by the buyer by the 15th May and if it is not exported by that date the Curer or Depot Manager removes it from the West Coast to inland centres for safe storage during the monsoon season but at the risk and cost of the buyer. Clause 20(d) provides: "During the interval the coffee so remains with the Board or the Pool Agent, it shall be held at the risk and on account of the Buyer" and Cl. 20(e) provides: "Gain or loss in weight of Coffee, as the case may be, during the period when the coffee (sold, weighed and paid for) remains in the godown of the Pool Agent as above, shall be to the benefit of detriment of the Buyer himself and he shall be at liberty to export the quantity gained in weight." The aforesaid provisions contained in Cl. 20 clearly go to show that after price is fully paid and the coffee sold is weighed and set apart for delivery to the buyer the same lies with the Coffee Board at the risk of the buyer and if during the interval if there be any gain or loss in weight the same will be credited and debited to his account. This provision clearly indicates in positive terms that the property

672

in coffee sold at the export auction passes to the buyer not

before payment of full price, weighment and setting apart thereof for delivery to the buyer but immediately after such payment, weighment and setting apart for delivery. We might refer to another clause, namely, Cl. 23 which contains another special over-riding provision providing for non-liability of the Coffee Board in case damage to the coffee sold or to the warehouse wherein the coffee was stored occurs by fire, flood, strike, riot, civil commotion, etc. etc. and it is provided that notwithstanding anything contained in the Auction Conditions in regard to the payment of prices, insurance/warehouse charges, delivery or other conditions and notwithstanding the provisions of the Sale of Goods Act in regard to passing of property, the Board or its Agents shall not be liable to deliver the coffee in specie, in the event of loss or damage caused to the coffee sold by any of the aforesaid causes. But this clause has no bearing on the question of passing of the property. Having regard to Cls. 19 and 20 of the Auction Conditions, therefore, it is clear to us that in these penultimate sales (i.e. sales of coffee at the export auctions conducted by the Coffee Board) the property in coffee sold there at passes to the buyer upon payment of price, weighment and setting apart of the coffee sold for delivery to the buyer.

If once it is held that the property in coffee sold at such export auctions passes under Cls. 19 and 20 of the Auction Conditions immediately upon payment of price, weighment and setting apart of the coffee for delivery to the buyer, it will be difficult to accept the petitioners' contention that passing of the property in such Coffee is further postponed till actual shipment by reason of Cl. 31 of the Auction Conditions, for, if the title has already passed it cannot pass again, Counsel for the petitioners contended that in view of cl. 31 a reservation of the right of disposal over the goods in favour of the Coffee Board within the meaning of s. 25 of the Sale of Goods Act is made. It is difficult to accept this contention. Section 25(1) which deals with the reservation of the right of disposal provides that where there is a contract for sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled and if he does so, the legal consequence mentioned in the section flows, namely, that in such case notwithstanding the delivery of goods to a buyer or to a carrier or bailee for transaction to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. In the instant case it is true that Cl. 26 declares that it is an essential condition of the auction that the coffee sold thereat shall

673

be exported to stipulated destinations or to any other foreign country outside India as may be approved by the Chief Coffee Marketing officer within 3 months or within the extended period but such essential condition is applied to the coffee which has already become the property of the buyer under Cls. 19 and 20 of the Auction Conditions and all that Cl. 31 provides is that if default is made by Buyer in exporting coffee within the prescribed time or extended time it shall be lawful for the Coffee Board without reference to the buyer to seize the unexported coffee and take possession thereof and deal with it as if it were the part and parcel of the Board's Coffee held by them in their Pool Stock. Far from amounting to a reservation of the right of disposal over the unexported coffee to the Coffee Board, Cl. 31 is in

the nature of a defeasance clause in the sense that what is vested in the buyer under the earlier conditions, the same shall revert back to the Coffee Board if the buyer commits a default in fulfilling the essential condition. Such a reading of Cl. 31 would be consistent with a further provision which is to be found in the latter portion of that clause. The latter part of Cl. 31 provides that after the coffee is seized and it becomes part and parcel of Board's coffee held by it in its pool stock, the Board shall re-sell the same but after such re-sale the Chief Coffee Marketing officer shall pay to the defaulting buyer only the balance of the sale proceeds after deducting godown charges, insurance premium, selling commission payable to agents and all other expenses of sale together with the penalty due under Cl. 30. But under the proviso it is provided thus:

"Provided, however, that if such balance is in excess of the sale price paid by the buyer, the payment shall be limited to the actual sale price."

In other words the proviso clearly suggests that the seized coffee becomes Coffee Board's property and is re-sold as such, otherwise the surplus should go to the buyer (Registered Exporter). The fact that the payment to the defaulting buyer is limited to the actual sale price paid by him and that the surplus if any reverts to the Coffee Board clearly shows that under Cl. 31 upon seizure the property reverts back to the Coffee Board. In our view, Cl. 31 properly read amounts to a defeasance clause and nothing more, especially when it is clear that property in the coffee sold at auction passes to the buyer under Cls. 19 and 20 immediately upon payment of price, weighment and setting apart of the coffee for delivery to the buyer. Once the property has passed there would be no question of reserving any right of disposal over the same to the Coffee Board within the meaning of s. 25(1) of the Sale of Goods Act.

674

It will be noticed that though on the question of the passing of the property factual material in the form of affidavit of the Chief Coffee Marketing Officer (on the point whether the lots exposed at the auctions are specific and ascertained goods or not) and several documents executed by the Registered Exporters in favour of their bankers to obtain packing and other credit facilities was placed before us we have not gone into the factual aspects at all and we have reached our conclusion on the point purely on the basis of construction of the relevant Auction Conditions from which primarily the intention of the parties is to be gathered. It is only when a clear intention in that behalf is not deducible from the terms and conditions that other factors such as the course of dealings and the conduct of the parties assume relevance.

Having regard to the above discussion it is clear to us that in the penultimate sales (sales of coffee effected to Registered Exporters at export auctions conducted by the Coffee Board) the property in the Coffee sold thereat passes to the buyer immediately upon payment of full price, weighment and setting apart of coffee for delivery to the buyer under Cls. 19 and 20 of the Auction Conditions and it would be at this stage i.e. just before this stage is reached that the agreement with or order from a foreign buyer must be available or produced in order to attract s. 5(3) of the Central Sales Tax Act, 1956.

In the result the writ petitions are partly allowed. The impugned Circular dated 7th February, 1977 to the extent to which it insists on production of an agreement with or an order from a foreign buyer from the Registered Exporters

before participating in export auctions is quashed; it is also quashed hereafter to the extent to which it requires Registered Exporters to make contingency deposits or furnish bank guarantees out of abundant caution inasmuch as such requirement would be unnecessary in view of our authoritative pronouncement. The Coffee Board may, if so advised, modify its Circular or issue an appropriate Circular requiring the production of an agreement with or an order from a foreign buyer from the Registered Exporters just before the property in the Coffee sold at such auctions passes under Cls. 19 and 20 of the Auction Conditions.

As regards past dealings and transactions, final assessment, if any, made by the Taxing Authorities as well as recoveries if made thereunder contrary to the view expressed by us above deserve to be set aside and reassessments made and the concerned State Governments will direct their Taxing Authorities to do the needful and further direct the refund of recoveries made to the Coffee Board which in its turn will refund the same to the concerned Registered
675

Exporters. Assessments or recoveries if made in conformity with our judgment need not be disturbed. Similarly contingency deposits or bank guarantees already obtained by the Coffee Board from the Registered Exporters, if they are contrary to our judgment, these will be refunded or released forthwith, as the case may be, by the Coffee Board.

In the circumstances of the case there will be no order as to costs.

WRIT PETITION NO. 1458 OF 1979

TULZAPURKAR, J.-In view of our Judgment just delivered in W.P Nos. 3130/78, 4238-39/78 and 8/79, this Writ Petition will have also to be allowed partly and the same order would follow.

S.R.

Petitions allowed in part.

676