The State of Bombay and Another

Vs

The United Motors (India) Ltd. and Others

Union of India, State of Bihar, State of Madras, State of Mysore, State of West Bengal, State of Uttar Pradesh, State of Punjab and State of Travancore-Cochin - Interveners

Civil Appeal No. 204

(CJI M. Patanjali Sastri, B. K. Mukherjea, Vivian Bose, Ghulam Hasan, N. H. Bhagwat JJ)

30.03.1953

JUDGMENT

PATANJALI SASTRI C.J. -

This is an appeal from the judgment and order of the High Court of Judicature at Bombay declaring the Bombay Sales Tax Act, 1952, (Act XXIV of 1952), ultra vires the State Legislature and issuing a writ in the nature of mandamus against the State of Bombay and the Collector of Sales Tax, Bombay, appellants herein, directing them to forbear and desist from enforcing the provisions of the said Act against the respondents who are dealers in motor cars in Bombay.

The Legislature of the State of Bombay enacted the Bombay Sales Tax Act, 1952, (hereinafter referred to as "the Act") and it was brought into force on October 9, 1952, by notification issued under section 1(3) of the Act, except sections 5, 9, 10 and 47 which came into operation on November 1, 1952, as notified under section 2(3). On the same day the rules made by the State Government in exercise of the power conferred by section 45 of the Act also came into force.

On November 3, 1952, the respondents 1 to 6, who are companies incorporated under the Indian Companies Act, 1913, and respondent No. 7, a partnership firm, all of whom are carrying on business in Bombay of buying and selling motor cars, presented a petition to the High Court under article 226 of the Constitution challenging the validity of the Act on the ground that it is ultra vires the State Legislature, inasmuch as it purported to tax sales and purchases of goods regardless of the restrictions imposed on State legislative power by article 286 of the Constitution. It was also alleged that the provisions of the Act were discriminatory in their effect and, therefore, void under article 14 read with article 13 of the Constitution. The respondents accordingly prayed for the issue of a writ in the nature of mandamus against the appellants preventing them from enforcing the provisions of the Act against the respondents. A further ground of attack was added by amendment of the petition to the effect that the Act being wholly ultra vires and void, the provisions requiring dealers to apply for registration in some cases and to obtain a licence in some others as a condition of carrying on their business, infringed the fundamental rights of the respondents under article 19(1)(g) of the Constitution.

In the affidavit filed in answer the appellants traversed the allegations in the petition and contended, inter alia, that the Act was a complete code and provided for special machinery for dealing with all questions arising under it, including questions of constitutionality, and, therefore, the petition was

not maintainable, that the present case was not an appropriate one for the issue of a writ under article 226 as the validity of the imposition of a tax was questioned, that no assessment proceedings having been initiated against the respondents and no demand notice having been issued, the respondents had no cause of action, and that, properly construed, the Act and the Rules did not contravene article 286 or any other provisions of the Constitution and did not infringe any fundamental right of the respondents.

The petition was heard by a Division Bench of the High Court consisting of Chagla C.J. and Dixit J. Chagla C.J., who delivered the judgment, Dixit J. concurring, overruled the preliminary objection distinguishing the decisions cited in support thereof by pointing out that the principle that a court would not issue a prerogative writ when an adequate alternative remedy was available could not apply where, as here, a party came to the court with an allegation that his fundamental rights had been infringed and sought relief under article 226. The learned Judges however thought, in view of the conclusion they had come to on the question of competency of the State Legislature to pass the Act, it was "not necessary to consider the challenge that has been made to the Act under articles 14 and 19" and expressed no opinion the alleged infringement of the respondents' fundamental rights.

On the merits, the learned Judges held that the definition of "sale" in the Act was so wide as to include the three categories of sale exempted by article 286 from the imposition of sales tax by the States, and, as the definition governed the charging sections 5 and 10, the Act must be taken to impose the tax on such sales also in contravention of article 286. The Act must, therefore, be declared wholly void, it being impossible to sever any specific offending provision so as to save the rest of the Act, as "the definition pervades the whole Act and the whole scheme of the Act is bound up with the definition of sale". The learned Judges rejected the argument that the Act and the Rules must be read together to see whether the State has made a law imposing a tax in contravention of article 286, remarking that "if the Act itself is bad, the rules, made under it cannot have any greater efficacy". Nor was the Government, which was authorised to make rules for carrying out the purpose of the Act, under an obligation to exclude the exempted sales. The rules, too, did not exclude all the three categories of exempted sales but only two of them, and even such exclusion was hedged.

In view of the importance of the issues involved, notice of the appeal was issued to the Advocates-General of States under Order XLI, Rule 1, and many of them intervened and appeared before us. The Attorney-General of India, to whom notice was also sent, intervened on behalf of the Union of India. We have thus had the assistance of a full argument dealing with all aspects of the case.

The Advocate-General of Bombay, appearing on behalf of the appellants, took strong exception to the manner in which the learned Judges below disposed of the objection to the maintainability of the petition. He complained that, having entertained the petition on the ground that infringement of fundamental rights was alleged, and that the remedy under article 226 was, therefore, appropriate, the learned Judges issued a writ without finding that any fundamental right had in fact been infringed. Learned counsel for the State of West Bengal also represented that parties in that State frequently got petitions under article 226 admitted by alleging violation of some fundamental right, and the court sometimes issued the writ asked for without insisting on the allegation being substantiated. We are of opinion that it is always desirable, when relief under article 226 is sought on allegations of infringement of fundamental rights, that the court should satisfy itself that such allegations are well founded before proceeding further with the matter. In the present case, however, the appellants can have no grievance, as the respondents' allegation of infringement of their fundamental right under article 19(1)(g) was based on their contention that the Act was ultra vires

the State Legislature, and that contention having been accepted by the Court below, there would clearly be an unauthorised restriction on the respondents' right to carry on their trade, registration and licence being required only to facilitate collection of the tax imposed. As Mr. Seervai for the respondents rightly submitted, the fact that the Court below left the question undecided, though the point was concluded by the decision of this Court in Mohammad Yasin v. The Town Area Committee, Jalalabad [[1952] S.C.R. 572.], which was brought to the notice of the learned Judges, was not the fault of the respondents and gave no real cause for complaint.

Before considering whether the appellant State has made a law imposing, or authorising the imposition of, a tax on sales or purchases of goods in disregard of constitutional restrictions on its legislative power in that behalf, it is necessary to ascertain the scope of such power and the nature and extent of the restrictions placed upon it by article 286. The power is conferred by article 246(3) read with entry 54 of List II of the Seventh Schedule to the Constitution. The Legislature of any State has, under these provisions, the exclusive power to make laws "for such State or any part thereof" with respect to "taxes on the sale or purchase of goods other than newspapers". The expression "for such State or any part thereof" cannot, in our view, be taken to import into entry 54 the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State. As pointed out by the Privy Council in the Wallace Brothers case [[1948] S.C.R. 1.] in dealing with the competency of the Indian Legislature to impose tax on the income arising abroad to a non-resident foreign company, the constitutional validity of the relevant statutory provisions did not turn on the possession by the legislature of extra-territorial powers but on the existence of a sufficient territorial connection between the taxing State and what it seeks to tax. In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed.

In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer. At the same time they were evidently anxious to maintain the State power of imposing non-discriminatory taxes on goods imported from other States, while upholding the economic unity of India by providing for the freedom of inter-State trade and commerce. In their attempt to harmonise and achieve these somewhat conflicting objectives they enacted articles 286, 301 and 304. These articles read as

follows :

286. (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation. - For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

304. Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law -

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest :

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

It will be seen that the principle of freedom of inter-State trade and commerce declared in article 301 is expressly subordinated to the State power of taxing goods imported from sister States, provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc. not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State-power of imposing "any" non-discriminatory tax on goods imported from sister States.

Having thus provided for the freedom of inter-State trade and commerce subject to the important qualification mentioned above, the authors of the Constitution had to devise a formula of restrictions to be imposed on the State-power of taxing sales or purchases involving inter-State elements which would avoid the doubts and difficulties arising out of the imposition of sales-tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution. This they did by enacting clause (1)(a) with the Explanation and clause (2) of article 286. Clause (1)(a) prohibits the taxation of all sales or purchases which take place outside the State, but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. How, then, is it to be determined whether a particular sale or purchase took place within or outside the State ? It is difficult to say that any one of the ingredients mentioned above is more essential to a sale or purchase than the others. To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. Why an "outside" sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test : Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein ? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided.

It is, however, argued on behalf of Bombay that the Explanation does not say that the State of delivery is the only State in which the sale or purchase shall be deemed to have taken place. If that was the intention, it would have been easy to say so. On the other hand, the non-obstante clause in the Explanation is said to indicate that, apart from cases covered by the legal fiction, the passing of property in the goods is to determine the place of sale. Thus, both the State of delivery and the State in the which the property in the goods sold passes are, it is claimed, empowered to tax. We are unable to accept this view. It is really not necessary in the context to use the word "only" in the way suggested, for, when the Explanation says that a sale or purchase shall be deemed to have taken place in a particular State, it follows that it shall be deemed also to have taken place outside the other States. Nor can the non-obstante clause be understood as implying that, under the general law relating to the sale of goods, the passing of the property in the goods is the determining factor in locating a sale or purchase. Neither the Sale of Goods Act nor the common law relating to the sale of goods has anything to say as to what the situs of a sale is, though certain rules have been laid

down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer. That question often raises ticklish problems for lawyers and courts, and to make to passing of title the determining factor in the location of a sale or purchase would be to replace old uncertainties and difficulties connected with the nexus basis with new ones. Nor would the hardship of multiple taxation be obviated if two States were still free to impose tax on the same transaction. In our opinion, the non-obstante clause was inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it was immaterial where the property in the goods passed, as it might otherwise be regarded as indicative of the place of sale.

It is also to be noted in this connection that, on the construction suggested by the Advocate-General of Bombay, namely, that the Explanation was not intended to deprive the State in which the property in the goods passed on its taxing power, but only to exclude the sales or purchases of the kind described in the Explanation from the operation of clause (1)(a) which prohibits taxation of outside sales or purchases, the Explanation would operate, not as an explanation, but as an exception or a proviso to that clause. It may be that the description of a provision cannot be decisive of its true meaning or interpretation which must depend on the words used therein, but, when two interpretations are sought to be put upon a provision, that which fits the description which the legislature has chosen to apply to it is, according to sound canons of construction, to be adopted provided, of course, it is consistent with the language employed, in preference to the one which attributes to the provision a different effect from what it should have according to its description by the legislature.

It was then said that the formula of delivery for consumption within a State could only cover the comparatively few cases of sales or purchases taking place directly between the consumers in the delivery State and dealers on other States, and inter-State sales of purchases between dealers in either State, which must be larger in number and volume, would still be outside the scope of the Explanation, which could not, therefore, have been intended to empower only one State, namely, the delivery State, to tax all inter-State sales or purchases. We see no force in this objection. It is to be noted that the Explanation does not say that the consumption should be by the purchaser himself. Nor do the words "as a direct result" have reference to consumption. They qualify "actual delivery". The expression "for the purpose of consumption in that State" must, in our opinion, be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions. It should be remembered here that the Explanation deals only with inter-State sales or purchases and not with purely local or domestic transactions. That these are subject to the taxing power of the State has never been questioned.

We are therefore of opinion that article 286(1)(a) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under article 246(3) read with entry 54 of List II.

We will now consider the effect of article 286(2) on the taxability of inter-State sales or purchases of the kind envisaged by the Explanation to clause (1)(a). As both the Explanation and clause (2) deal only with inter-State transactions, it may appear at first blush that whatever taxing power the

Explanation may have reserved to the State of delivery is nullified by clause (2), at any rate until Parliament chooses to lift the ban under the power reserved to it by the opening words of clause (2). As one way of avoiding this result it was suggested by the Advocate-General of Bombay that the expression "inter-State trade and commerce" in clause (2) may be construed as meaning dealings between a trader in one State and a trader in another, so that the clause would be applicable only to sales or purchases in the course of dealings between such traders. The ban under clause (2) could not, in that view, affect the taxability of a sale by a trader in one State to a consumer or user in another. We cannot agree with this restrictive interpretation of the expression "inter-State trade and commerce". The sale by a trader in one State to a user in another would be a sale "in the course of inter-State trade" according to the natural meaning of those words, and we can see no reason for importing the restriction that the transaction should be one between two traders only. This is, however, not to say that the ban under clause (2) extends to the taxing power which the delivery State is left free, under the Explanation, to exercise. We are of opinion that the operation of clause (2) stands excluded as a result of the legal fiction enacted in the explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to inter-State dealings is, in our view, to invest what, in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and clause (2) can, therefore, have no application. It is true that the legal fiction is to operate "for the purposes of sub-clause (a) of clause (1)", but that means merely that the Explanation is designed to explain the meaning of the expression "outside the State" in clause (1)(a). When once, however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the taxing State, it follows, as a corollary, that the transaction loses its inter-State character and falls outside the purview of clause (2), not because the definition in the Explanation is used for the purpose of clause (2), but because such sale or purchase becomes in the eye of the law a purely local transaction. It is said that even though all the essential ingredients of a sale took place within one State and the sale was, in that sense, a purely intra-State transaction, it might involve transport of the goods across the State-boundary, and that would be sufficient to bring it within the scope of clause (2). We find it difficult to appreciate this argument. As already stated, the Explanation envisages sales or purchases under which out-of-State goods are imported into the State. That is the essential element which makes such a transaction inter-State in character, and if it is turned into an intra-State transaction by the operation of the legal fiction which blots out from view the inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its inter-State character. The statutory fiction completely masks the inter-State character of the sale or purchase which, as a collateral result of such making, falls outside the scope of clause (2).

It is said that, on this view, clause (2) would become practically redundant, as clause (1)(a) read with the explanation as construed by us would itself preclude taxation by other States of inter-State sales or purchases of the kind referred to in the explanation. As we have already pointed out, the Explanation does not cover cases of inter-State sales or purchases under which the goods are imported into the State for re-export to other States and possibly other categories of sales of purchases which do not satisfy all the requirements of the explanation. Whether such transactions are sufficiently numerous for the Constitution to take note of is a matter of opinion and it cannot have much bearing on the question of construction.

On the other hand there are, in our judgment, cogent considerations which tend to support the view we have expressed above that clause (2) was not intended to affect the power of the delivery State to tax inter-State sales or purchases of the kind mentioned in the Explanation. As we have seen, in our Constitution the principle of freedom of inter-State trade and commerce is made to give way before

the State-power of imposing non-discriminatory taxes on goods imported from other States. Now, article 286(2) is but one phase of the protection accorded to inter-State trade and commerce from the fettering power of State taxation. As article 286 deals with restrictions on the power of the States to impose tax on the sale or purchase of goods, the Constitution makers evidently thought that it should contain also a specific provision safeguarding sales or purchases of an inter-State character against the taxing power of the States.

It is, however, reasonable to suppose that this particular form of protection to inter-State trade and commerce provided in article 286(2) was not intended to have a wider operation than what is contemplated in Part XIII which declares the general principle of freedom of inter-State commerce and defines the measure of constitutional protection it should enjoy. If such protection is intended to give way before the State-power of taxing goods imported from sister States, subject only to the condition against discrimination, it is legitimate to suppose that the ban under article 286(2) should not operate so as to nullify that power. True, article 304(a) deals with the restrictions as to imposition of tax on goods, while article 286 deals with the restrictions as to imposition of tax on sales or purchases of goods. But this distinction loses its practical importance in the case of sales-tax imposed by the delivery State under the conditions mentioned in the Explanation, for, if we look behind the labels at the substance of the matter, it becomes clear that a tax on sales or purchases imposed by the State in which the goods are delivered for consumption, in the sense already explained, is, in economic effect practically indistinguishable from a tax on the consumption or use of the goods. The words "in which the goods have actually been delivered" ensure that the goods have come into the State, and the expression "for the purpose of consumption in the State" shows that, though the tax is formally laid on sales, its incidence is aimed at the consumers in the State. Discussing the true nature of a duty of excise and a tax on the sale of goods, Gwyer C.J. observed in the Central Provinces and Berar Sales Tax case [[1939] F.C.R. 18, 42.] : "It is common ground that the Court is entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says, in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities". Therefore, sales-tax, the incidence of which is really directed against the consumer, is, in substance, a tax on the goods imposed, no doubt, on the occasion of the sale as a taxable event. It will now be seen why the Explanation insists on actual delivery of the goods in the State and their consumption in the State, and why as "outside" sale or purchase is explained by defining what is an inside sale. The object clearly is to assimilate the conditions, under which the delivery State is left free to tax inter-State sales or purchases, to those under which a State is empowered to impose tax on goods imported into the State from other States under article 304(a). If then, a non-discriminatory use or consumption tax imposed under article 304 on goods imported from other States does not infringe the freedom of inter-State commerce declared by article 301, parity of reason and policy requires that a tax on sales or purchases imposed by the State in which the goods are actually delivered for consumption in the State should not be regarded as violative of the ban under article 286(2), and that is what the statutory fiction enacted in the Explanation was, in our judgment, designed to achieve by divesting the sale or purchase of the kind referred to in the Explanation of its inter-State character in relation to the State of delivery.

There is another important consideration which strongly supports the view we have indicated above, namely article 286(2) does not affect the taxation of such sale or purchase by the State of delivery. If both the exporting State and the delivery State were entitled, notwithstanding article 286(2), to tax the inter-State sale or purchase, as suggested by the Advocate-General of Bombay, it would mean that the transaction is subjected to double taxation as compared with a sale by a local dealer which

pays only one tax. It is precisely this type of discriminatory burden which the principle of freedom of inter-State commerce seeks to avoid, for, it places inter-State trade at a disadvantage in competition with local trade. On the other hand, if neither State could tax such sale or purchase as is referred to in the explanation, until Parliament lifted the ban, as the Advocate-General of Madras was incline to think, the result would be that consumers could get out-of-State goods more cheaply than local goods, and local dealers would suffer competitive disadvantage as compared with outside dealers. Does the principle of freedom of inter-State commerce require that a State should foster such commerce to the detriment of domestic trade ? It is one thing to avoid impeding inte-State commerce by imposing discriminatory burdens upon it which internal trade does not have to bear, but quite another to place local products and local business at a disadvantage in competition with outside goods and dealers. It would be a curious perversion of the principle of freedom of inter-State commerce to drive local custom across the border to outside dealers, and that, in our opinion, could not have been contemplated.

The view which we have expressed above avoids either anomaly and would place local trade and inter-State trade on an equal footing. The delivery State would tax both local and out-of-State goods equally without discrimination against either and that, we think, is the only measure of protection which article 286 could reasonably be supposed to accord to inter-State sales or purchases, when it is construed in the light of article 301 and 304.

The question next arises as to whether the Act contravenes all or any of the restrictions imposed by article 286. It is the respondents' case that the sales and purchases made by them in Bombay, in the course of their business, include all the three categories excluded from the scope of State-taxation by article 286, and the Act seeking to bring all of them within its scheme of taxation is bad. It is, therefore, necessary to make a brief survey of the main provision of the Act and of the rules made, thereunder, in order to see whether the respondents' complaint is well-founded, and, if so, whether the whole or any part of the Act is to be declared unconstitutional and void.

The Act provides for levy for of two kinds of taxes, called the "general tax" and the "special tax", by the two charging sections 5 and 10 respectively. "Dealer" is defined in section 2(7) as a person who carries on the business of selling goods in the State of Bombay whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells goods to its members. The Explanation (2) to this definition provides that the manager or agent of a dealer who reides outside the State of Bombay and carries on the business of selling goods in the State of Bombay shall, in respect of such business, be deemed to be dealer for the purpose of the Act. "Sale" is defined by section 2(14) with all its grammatical variations and cognate expressions as meaning any transfer of property in goods for cash or deferred payment or other valuable consideration and includes any supply by a society, a club, or an association to its members on payment of price or of fees or subscriptions but does not include a mortgage, hypothecation, charge or pledge. The words "buy" and "purchase" are to be construed accordingly. There are two Explanations attached to this definition of which the second, which is obviously based on the Explanation to clause (1)(a) of article 286, provides that the sale of any goods which have actually been delivered in the State of Bombay as a direct result of such sale for the purpose of consumption in the said State, shall be deemed, for the purposes of this Act, to have taken place in the said State, irrespective of the fact that the property in the goods, has, by reason of such sale, passed in another State. "Turnover" is defined by section 2(21) as the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount, if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the prescribed period. Section

5 imposes the general tax on every dealer whose turnover in respect of sales within the State of Bombay during any of the three consecutive years immediately preceding the first day of April, 1952, has exceeded Rs. 30,000 or whose turnover in the respect of such sales exceeds the said limit during the year commencing on the first day of April, 1952. The tax is to be levied on his taxable turnover in respect of sales of goods made on or after the appointed day, i.e., 1st November, 1952, at the rate of 3 pies in the rupee (section 6). By section 7 the taxable turnover is to be determined by first deducting from the turnover of the dealer in respect of all his sale of goods during any period of his liability to pay the general tax, his turnover during that period, in respect in respect of (a) sales of any goods declared from time to time as tax-free under section 8 and (b) "such other sales as may be prescribed." No dealer liable to pay the general tax shall carry on business as a dealer unless he has applied for registration (section 9). A more or less similar scheme is provided for the levy of a special tax on the sale of certain special goods specified in Schedule II. By section 10 every dealer whose turnover in respect of sale of special goods made with the State of Bombay has exceeded Rs. 5,000 during the year ended 31st March, 1952, or exceeds the said limit during the year commencing from 1st April, 1952, is charged with a special tax at the rate specified in Schedule II on his taxable turnover in respect of the sales of special goods made on or after the appointed day, i.e., 1st November, 1952. By section 11 the taxable turnover is to be determined by first deducting, from the turnover of the dealer in respect of his sales of special goods during any period of his liability, his turnover in respect of (a) sales of special goods purchased by him on or after the appointed day at a place in the State of Bombay from a dealer holding a licence under section 12 and (b) "such other sales as may be prescribed." Every dealer liable to pay the special tax is required to obtain a licence as a condition of his carrying on his business (section 12). Then follow certain provision for returns, assessment, payment and recovery of tax. Section 18 imposes a purchase tax at the rate of 3 pies in the rupee on the purchases of such goods as may be notified by the State Government from time to time which have been dispatched or brought from any place in India outside the State of Bombay or are delivered as a direct result of a sale to a buyer in the State of Bombay for consumption therein, and also an additional tax if the goods are special goods. Section 21(2) prohibits any person selling goods from collecting from the purchaser any amount by way to tax unless he is a registered dealer or a licensed dealer and is liable to pay the tax under this Act in respect of such sale. Chapter VI contains provisions for production of accounts, supply of information and cancellation of registration or licence. Chapter VII deals with proceedings including appeals and revision and the determination of certain questions of law by reference to the High Court. Section 45 empowers the State Government to make rules "for carrying out the purposes of this Act." In particular, such rules may prescribe, amount other things, "the other sales, turnover in respect of which may be deducted from a dealer's turnover in computing his taxable turnover as defined in section 7 and in section 11" [sub-section (2)(e)].

In exercise of the powers conferred by this section, the State Government made and published rules called the Bombay Sales Tax Rules, 1952, which were brought into force on the same day on which the charging sections 5 and 10 of the Act were also brought into force, namely, November 1, 1952. Of these, Rules 5(1) and 6(1) are important, and they provide for the deduction of the following sales in calculating taxable turnover under section 7 (general tax) and section 11 (special tax) : (i) sales which take place (a) in the course of the import of the goods into or export of the goods out of the territory of India or (b) in the course of inter-State trade or commerce. It is to be noted that these are the excluded categories of sales or purchases under article 286(1)(b) and (2) respectively. Rule 5(2)(i) requires, as a condition of the aforesaid deductions, that the goods should be consigned by certain specified modes of transport. Clause (v) lays down a rule of presumption to be acted upon in the absence of evidence of actual consignment of the goods within three months of the sale, that the

sale has not taken place in the course of export or of inter-State trade as the case may be. It is not necessary to refer to the provisions of the other rules.

Now, it will be seen from the provisions summarised above that the Act does not in terms exclude from its purview the sales or purchases taking place outside the State of Bombay while it does include, by Explanation (2) to the definition of "sale", the sales or purchases under which the delivery and consumption take place in Bombay which, by virtue of the Explanation to article 286(1)(a), are to be regarded as local sales are purchases. On the construction we have placed upon that Explanation, sales or purchases effected in Bombay in respect of goods in Bombay but delivered for consumption outside Bombay are not taxable in Bombay. Now, the respondents complain that the latter category of sales or purchases thus held not to be taxable are not expressly excluded by the Act which, therefore, contravenes article 286(1)(a). No doubt, there is no provision in the Act excluding in express terms sales of the kind referred to above, but neither is there any provision purporting to impose tax on such sales or purchases. On the other hand, the two charging sections of the Act, section 5 and section 10, purport, in express terms, to impose the tax on all sales made "within the State of Bombay", and section 18, which lays the tax on purchases, is limited in its operation to purchases of goods delivered to a buyer in the State of Bombay for consumption therein, that is to say, to purchases which unquestionably are taxable by Bombay according to both parties. The charging sections cannot, therefore, be taken to cover the class of sales of purchases which, on our construction of the Explanation, are to be regarded as taking place outside the Stating of Bombay. We see no force, therefore, in the argument that the Act contravenes the provisions of article 286(1)(a) by purporting to charge sales or purchases excluded by that article from State-taxation.

As regards the other two categories of sales or purchases excluded by article 286(1)(b) and (2), it is true that the Act taken by itself does not provide for their exclusion. But, as pointed out already, rules 5 and 6, which deal respectively with deduction of certain sales in calculating the taxable turnover under sections 7 and 11 exclude these two categories in express terms, and these rules were brought into force simultaneously with the charging sections 5 and 19 on November 1, 1952. The position, therefore, was that, on the date when the general tax and the special tax become leviable under the Act, sales or purchases of the kind described under article 286(1)(b) and (2) stood in fact excluded from taxation, and the State of Bombay cannot be considered to have made a "law imposing or authorising the imposition of a tax" on sales or purchases excluded under the aforesaid clauses or article 286. The Act and the rules having been brought into operation simultaneously, there is no obvious reason why the rules framed in exercise of the power delegated by the Legislature should not be regarded as part of the "law" made by the State. [See observations at page 862 in the Delhi Laws Act case [[1951] S.C.R. 747.]]. The position might be different if the rules had come into operation sometime later than the charging sections of the Act, for, in that case, it is arguable that if the legislation, without excluding the two classes of sales or purchases, was beyond the competence of the Legislature at the date when it was passed, the exclusion subsequently effected by the rules cannot validate such legislation. But, as already stated, that is not the position here, and the learned Judges below fell into an error by overlooking this crucial fact when they say "If the Legislature had no competence on the date the law was passed, the rules subsequently framed cannot confer competence on the Legislature".

Even so, it was contended, the exclusion of the sales covered by clause (1)(b) and clause (2) of article 286 was hedged round with conditions and qualifications which neither the Legislature nor the rule-making authority was competent to impose on the exclusion and, therefore, such rules, even if read as part of the Act, could not cure the constitutional transgression. The conditions and

qualifications complained of are mostly found to relate to mere matters of proof, e.g., rule 5(2), Explanation (2), which insists on the production of a certificate from an appropriate authority, before a motor vehicle, dispatched to a place outside the State of Bombay by road and driven by its own power, could be exempted as an article sold in the course of inter-State trade. No objection can reasonably be raised if the taxing authority insists on certain models of proof being adduced before a claim to exclusion can be allowed. Objection was also taken to clause (i) of sub-rule (2) of rule 5 as imposing an unauthorised limitation upon the exemption of sales and purchases allowed by rule 5(1), that is to say, while rule 5(1)(i) allows the deduction of the sales covered by clause (1)(b) and (2) of article 286 in calculating taxable turnover, sub-rule (2)(i) of the same rule provides that, in order to claim such deduction the goods shall be consigned only through a railway, shipping or aircraft company or country boat registered for carrying cargo or public motor transport service or by registered post. It is said that there is not reason why sales of goods despatched by other modes of transport should not also be deducted from the taxable turnover, because article 286(2) in exempting sales in the course of inter-State trade, makes no distinction between modes of transport by which the goods are dispatched. This limitation, it was claimed, was beyond the competence of the rule-making authority. The argument is not without force, and it must be held that rule 5(2)(i) is ultra vires the rule-making authority and therefore void. But it is clearly severable from rule 5(1)(i). The restriction regarding the mode of transport of the goods sold or purchased in the course of inter-State trade, to which alone sub-rule (2)(i) relates, can be ignored and the exemption under rule 5(1)(i) may well be allowed to stand.

Finally, Mr. Seervai attempted to make out that the provisions of the charging section 5 and 10 fixing Rs. 30,000 and Rs. 5,000 as the minimum taxable turnover for general tax and special tax respectively were discriminatory and void under article 14 read with article 13 of the Constitution, and he gave us several tables of figures showing how the imposition of the tax actually works out in practice in hypothetical cases. It is unnecessary to go into the details of these cases which have been worked out in figures, for it must be conceded that the general effect of fixing these minimum limits must necessarily be to enable traders whose taxable turnover is below those limits to sell their goods at lower prices to their customers than dealers whose turnover exceeded those limits, for the latter have to add the sales-tax to the prices of their goods. But no discrimination is involved in this classification which is perfectly reasonable when it is borne in mind that the State may not consider it administratively worthwhile to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impost to tax. It is idle to suggest that any discrimination is involved in such classification.

Apart from the considerations set forth above which tend to support the constitutional validity of the Act, it was broadly contended before us that taxing statutes imposing tax on subjects divisible in their nature which do not exclude in express terms subjects exempted by the Constitution, should not, for that reason, be declared wholly ultra vires and void, for, in such cases, it is always feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In such cases, it is claimed, the statute itself should be allowed to stand, the taxing authority being prevented by injunction from imposing the tax on subjects exempted by the Constitution. Our attention was called to certain American cases where this principle has been consistently followed : (see Bowman v. Continental Company [256 U.S. 642; 65 L.Ed. 1130.], where all the previous cases are collected). In the present case the tax is imposed, in ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period, and it is therefore possible to separate at the assessment the receipts derived from

exempted sales or purchases and allow the State to enforce the statute with respect to the constitutionally taxable subjects, it being assumed that the State intends naturally to keep what it could lawfully tax, even where it purports to authorize the taxation of what is constitutionally exempt. The principle, as it is tersely put in the American case, is that severability in such cases includes separability in enforcement.

Our attention was drawn to the decision of the Privy Council in Punjab Province v. Daulat Singh and Others [[1946] F.C.R. 1.] as condemnatory of this principle. The case is however, clearly distinguishable. Their Lordships were dealing with a Provincial enactment providing for the avoidance of benami transactions as therein specified and the question was whether it was ultra vires the Legislature as contravening section 298(1) of the Government of India Act, 1935, which forbade the prohibition, inter alia, of disposition of property by an Indian subject on certain grounds which included "descent". It was found that in some cases the impugned enactment would operate as a prohibition on the ground of descent alone. The Federal Court [[1942] F.C.R. 67.] by majority expressed the view that the Act could not, for that reason, be invalidated as a whole but that the circumstances in which its provisions would be inoperative must be limited to cases where the statute actually operated in contravention of the constitutional inhibition. Disagreeing with this view their Lordships made the following observations which were strongly relied on before us :

> "The majority of the Federal Court appear to have contemplated another form of severability, namely, by a classification of the particular cases on which the impugned Act may happen to operate, involving an inquiry into the circumstances of each individual case. There are no words in the Act capable of being so construed, and such a course would in effect involve an amendment of the Act by the court, a course which is beyond the competency of the court, as has long been well established."

The subject of the constitutional prohibition was single and indivisible, namely, disposition of property on grounds only of (among other things) descent and if, in its actual operation, the impugned statute was found to transgress the constitutional mandate, the whole Act had to be held void as the words used covered both what was constitutionally permissible and what was not. The same principle was applied by this court in the Cross Roads case [[1950] S.C.R. 594.]. It was, indeed, applied also in Bowman's case [256 U.S. 642.] with respect to the licence tax imposed generally on the entire business conducted including inter-State commerce as well as domestic business, but was not applied, as stated above, with respect to excise tax which was laid on every gallon of gasolene sold and was thus divisible in its nature. It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country,

We accordingly set aside the declaration made by the court below and quash the writ issued by it except in regard to rule 5(2)(i). An injunction shall, however, issue restraining the appellants from imposing or authorising the imposition of a tax on sales and purchases which are exempted from taxation by article 286 as interpreted above.

Each party will bear its own costs throughout.

BOSE J.

I have had the advantage of reading the judgments of my Lord the Chief Justice and my learned

brother Bhagwati. I regret I am unable to agree with either. The range of disagreement is not large but unfortunately it vitally affects the result.

I agree with the construction which my Lord has placed upon entry No. 54 of List II. I also agree that the object of the Explanation is to fix the locus of a sale or purchase by means of a fiction, but with respect I cannot agree with my brother Bhagwati that the non-obstante clause enunciates the general law on this point. I know of no general law which fixes the situs of a sale, not even the Sale of Goods Act. What the general law does is to determine the place where the property passes in the absence of a special agreement, but the place where the property passes is not necessarily the place where the sale takes place, nor has that ever been regarded as the determining factor. What, in may opinion, happened was this.

Before the passing of the Constitution, different States (of Provinces as they then were) claimed the right to tax the same transaction for a variety of reasons which have been pointed out by my Lord the Chief Justice. The result was that the price of certain commodities became inordinately high. Take, for example, the case of steel rails manufactured by the Tata Iron and Steel Works at Tatanagar and purchased by the Government of India for its railways. The Central Government found itself called upon to pay a sale or purchase tax to different States on a single transaction of purchase. I am not sure how many times over it has to pay but on the notions then current it was open to Bihar to claim the right to tax because the goods were manufactured there, to Bengal because the transaction of sale took place at Calcutta where the head offices of the company were, to a third Province because the goods were delivered there and to a fourth because they were "found" there. It hardly matters whether all or any to this would have stood scrutiny in a court of law because the fact remains that various States were actually taxing the one transaction of sale on the nexus theory and a real danger existed of more and more of them coming in to claim a share of the spoils. It seems to me that the Constitution makers considered this detrimental to the development and exercise of trade and commerce and so determined to put a stop to the practice but at the same time left Parliament a discretion to restore a part of the status quo if and when it should think it safe and desirable to do so.

The narrowing of the powers was accomplished by stating in article 286 that no State can impose a tax on a sale or purchase which takes place outside the State, by stating that it cannot tax a sale or purchase in the course of import or export and by prohibiting taxes on sales and purchases which take place in the course of inter-State trade or commerce unless Parliament chooses to lift the ban. Reading these together in a simple and straightforward way it seems clear to me that the idea was to permit States to tax only what I might call intra-State sales and purchases, at any rate, to begin with.

But in legal enactments simplicity of language seldom evokes clarity of thought. So long as the ban imposed by clause (2) remains, there is no difficulty because when parts of a sale take place in different States the transaction is inter-State and no tax can be imposed. On the other hand, when all the ingredients are intra-State clause (2) is not attracted. Complications only arise when the ban is lifted. The Constitution makers had before them the existing practice of the States based on the nexus theory, and so it became necessary to define just where a sale takes place in order to carry out the main theme that only intra-State sales can be taxed.

The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the the sense that if any one of them is missing there is no sale. The following are some of them : (1) the existence of goods which form the subject-matter of the sale, (2) the bargain or

contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title. When all take place in one State, there is no difficulty. The situs of the sale is the place in which all the ingredients are brought into being. But when one or more ingredients take place in different States, what criterion is one to employ ? It is impossible to say that any of these ingredients is more essential than any other because the result is always the same the moment you take one away. There is then no sale. Therefore, one either has to adopt the ultra logical view and hold that the only State which can tax is the one in which all the ingredients take place and that no State can tax when a single ingredient takes place elsewhere, or resort to the old view and hold that every State in which any single ingredient takes place can tax. The only alternative to these extremes is to make an arbitrary selection or to introduce a fiction. The Constitution chose the latter course and enacted the Explanation.

I have deemed it proper to refer to the then existing practice regarding taxation because in construing a statute it is legitimate to take into account existing laws and the manner in which they were acted upon and enforced. [See Gwyer C.J. in In re The Central Provinces and Berar Act No. XIV of 1938 [[1939] F.C.R. 18 at 53.] and Croft v. Dunphy [[1933] A.C. 156 at 165.]]. I think this rule is even more appropriate in the case of the Constitution because the Constitution itself continues in force all laws which were in existence at the date when it came into being except those which are inconsistent with itself.

I am with respect unable to agree that article 286(2) is to be interpreted in the light of article 304(a). In my opinion, the two articles deal with different things. Article 286 is concerned with sales and purchases, while article 304 relates to goods imported from other States. The stress in the one case is on the transaction of sale or purchase; in the other, on the goods themselves and on the act of import. Article 286 is related to Entry No. 54 of List II and to Entries 41 and 42 in List I. Article 304(a) to Entries 26 and 27 of List II read with Entry 33 in List III and to Entries 51, 52 and 56 of List II. The distinction is, I think, clear when it is realised that (apart from the Explanation) a sale or a purchase can be taxed even though the goods are never actually delivered and even if they never reach the taxing State, for the right is to tax the sale or purchase and that is something quite independent of actual delivery. The goods might be destroyed by flood or fire before there is any chance of actual delivery. They might, as in the case of the steel rails purchased by the Government of India, be delivered in a totally different State, but the tax could still be levied if there was no Explanation to stop it. I find it difficult to see how article 286(2) could ever come into effective play if article 304 is applied to sales and purchases which take place in the course of inter-State trade or commerce. I do not think the change in language, "a tax on the sale or purchase of any goods" in the one case and a tax on "goods imported from other States" was accidental, nor do I think we will be justified in ignoring the fact that the two are placed in different parts of the Constitution. I therefore prefer to hold that articles 286 and 304 deal with different things and to construe article 286 without reference to 304. In this I agree with my brother Bhagwati.

Coming back to the Explanation, its object is, I think, to resolve the difficulty regarding the situs of a sale. The Constitution having decided that the only State which can tax a sale or a purchase is the State in which the transaction takes place, and having before it the conflict of views regarding nexus and situs, resolved the problem by introducing the fiction embodied in the Explanation. The purpose of the Explanation is, in my view, to explain what is not outside the State and therefore what is inside. With respect I cannot agree that the Explanation is really an exception, and I do not think the non-obstante clause means that under the general law the place where the property passes was regarded as the place where the sale takes place, for that in itself would be a fiction. There is no

such law. In my opinion, all it means is that there was a school of thought which regarded that as the crucial element on the nexus view and that the Constitution has negatived that idea.

I am also unable to agree that the Explanation governs clause (2) of article 286, for it limits itself in express terms to sub-clause (a) of clause (1). It says that is an Explanation "for the purposes of sub-clause (a)". In view of that I do not feel justified in carrying it over to clause (2) and holding that it governs there as well. In my judgment, the only purpose of the Explanation is to explain where the situs of a sale is. Clause (2) has a different object. Its purpose is to prohibit taxation on sales and purchases which take place in the course of inter-State trade or commerce.

If the Explanation is carried over to clause (2) it must, in my judgment, be equally applicable to sub-clause (b) of clause (1). As I understand the argument, the reasoning is this. The Explanation turns an inter-State sale into an intra-State sale by means of a fiction. Having served its purpose it follows as a corollary that there is no inter-State transaction left and so clause (2) is not called into play. In my opinion, by parity of reasoning, if the sale is intra-State and cannot now be regarded as external to the State, it equally cannot be said to take place in the course of export or import in a case of that kind, for export and import predicate the movement of goods across a boundary just as surely as inter-State trade and commerce. But such a contention would militate against our decision in The State of Travancore-Cochin & Others v. The Bombay Co. Ltd. [[1952] S.C.R. 1112.]

This line of reasoning does not appeal to me for another reason also. It concentrates on the situs of the sale and does not give sufficient weight to the words "in the course of". When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now, even when the situs of a sale is in truth and in fact inside a State, with no essential ingredient taking place outside nevertheless if it takes place in the course of inter-State trade and commerce, it will be hit by clause (2) just as surely as it is hit by sub-clause (b) when it takes place in the course of export or import. When we examine clause (2) and sub-clause (b), it is not enough, in my judgment, to see where the sale took place. We have also to see whether it was in the course of inter-State trade and commerce in the one case, or in the course of export or import in the other, for the stream of inter-State trade and commerce, as also that of export and import, will catch up in its vortex all sales which take place in its course wherever the situs of the sale may be. All that the Explanation does is to shift the situs from point A or B or C in the stream to a point X, also in the stream. It does not lift the sale out of the stream in those cases where it forms part of the stream.

I have also another criticism to meet. The Explanation can only come into play when the transaction is in truth and in fact inter-State, and the argument runs that if clause (2) is to ban taxation in every such case, the Explanation becomes useless. The answer to that is two-fold. Clause (2) has a proviso. Under it the President is empowered to direct the continuation for a period of a tax which was being lawfully levied at the date of the Constitution even though the transaction is of an inter-State character; and we find that in some of the cases which have come before us that was done the moment the Constitution came into force. Therefore, the Explanation operated from the start on that kind of case. But of course that means that the empowering can only be in favour of the State in which the goods are actually delivered for the purpose of consumption in that State as a direct result of a purchase or sale effected for that purpose. It will be noticed that the proviso is limited to cases in which the imposition of the tax would be "contrary to this clause", that is clause (2) and not to the Explanation to clause (1)(a).

In the second place, Parliament is empowered to life the ban imposed by clause (2). So long as the ban exists there is no need for the Explanation, for the explanation only covers sales or purchases which are inter-State. But the moment the ban is lifted, the difficulties I have mentioned above arise and have to be met. I am clear that the Constitution makers envisaged this and resolved the doubts in the manner I have indicated; nor can I see anything inconsistent or illogical in this. The basic idea is to prohibit taxation in the case of inter-State trade and commerce unless and until the ban under clause (2) is lifted, and always in the case of exports and imports; and when the ban is lifted, the Explanation is there to settle a matter of considerable controversy regarding the situs of a sale. It is true it makes an arbitrary selection but then almost any selection would have to be arbitrary and this is as good as any other.

The question however arises what is to happen to clause (1)(a) while the ban lasts if the Explanation is to be ignored during that period ? How is the situs of a sale to be determined in the difficult class of cases which arose before the Constitution and which, in my view, occasioned the ban. My answer is that that class of case can only arise in the course of inter-State trade and commerce, for the moment any one of the essential ingredients of a sale occurs in a State different from the taxing State and the goods are contracted to move across a boundary, you get a sale in the course of inter-State trade and commerce. Therefore, the problem about situs does not arise. Sales and purchases which are in truth and in fact intra-State (and the bulk of sales and purchases in the States are of that character) can of course be taxed. The ban does not apply and there is no need to call in aid the Explanation, for I repeat that the Explanation is limited to cases which in truth and in fact take place in the course of inter-State trade and commerce. On the view I take the need for the Explanation only arises when the ban is lifted.

I now come to matters of greater detail. What do the words "for the purpose of consumption" mean ? This is best understood by reference to a concrete case : A, a dealer in Bombay, actually delivers goods to B, a dealer in Madras, for the purpose of sale by B, the Madras dealer, to purchasers C, D and E in Madras. Can either the sale by A to B or the purchase by B from A be taxed ? In my view, it cannot, for B is in my judgment, as much a consumer as C, D and E. It is true the word can be used in a wide as well as a narrow sense but I see no reason to restrict its meaning in the present case. What after all does "consumption" mean ? In its economic sense it is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for preservation in a national museum does not destroy it nor does he use it himself except for the purposes of presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and therefore "consumes" them even though he does not keep them himself. This of course means that a dealer who purchases from another dealer outside the State is a "consumer" and can be taxed if the ban is lifted even if he purchases for re-export outside the State. But when he re-exports, his sale to the outside consumer cannot be taxed if the Explanation is attracted.

I cannot agree that goods cannot be "consumed" more than once. It all depends on how you view the matter. Little fishes swallow smaller fishes and are in turn eaten by fishes larger than themselves. In the end, the smallest of the series is consumed by the biggest. Consider the case of a curio dealer who collects antiques for the purposes of sale. The older they are and the more they have been used, the more valuable they become, but that would not prevent them from being "consumed" over again when a "collector" buys them for display in his house. Broadly speaking, the object here is to stop multiple taxation on any single act of sale or purchase made in the course of inter-State trade and

commerce. I would therefore construe "consumption" to mean the usual use made of an article for the purposes of trade and commerce. When dealer buys from dealer that is "consumption" for the purposes of the purchaser dealer's trade; when an ultimate purchaser buys from a retailer, that is also "consumption" for his purposes. Therefore, in my judgment, neither the sale by A to B in the illustration put nor the purchase by B from A can be taxed so long as the ban under clause (2) remains. But the sales by B to C, D and E can each be taxed by the State of Madras as they are intra-State sales. If this is found to work hardship on the States in practice, then Parliament, which has been given the power to regulate inter-State trade and commerce under Entry 42 of List I, can step in and lift the ban. In that event, the Explanation comes into play and Madras can tax both transactions but Bombay cannot.

On the other hand, if A, the Bombay dealer, sells direct to the consumers C, D and E in Madras and actually delivers the goods to them for the purpose of consumption in Madras, neither State can tax unless the ban is lifted, and then Madras alone will be able to tax.

Next, what do the words "actually been delivered" mean ? In the normal course, a dealer in Bombay, who sends goods either to a dealer or consumer in Madras, would put them on a train or send them by a public or a private carrier. The cases in which a dealer would take them himself to Madras and hand them over in person or send one of his own men there would be exceptional. In the former class of case, the carrier would normally be regarded as the agent of the Madras purchaser and the result would be that delivery would in that event be deemed to be delivery in Bombay and that would give Bombay the right to tax and not Madras. See Badische Anilin Und Soda Fabrik v. Basle Chemical Works, Bindschedler [[1898] A.C. 200.], Badische Anilin Und Soda Fabrik v. Hickson [[1906] A.C. 419.]. But such a construction would make the Explanation useless. I think that is the reason why the words "actually" and "consumption" have been used. If the normal rule were to apply, there would be no need for the word "actual", as delivery to the carrier in Bombay would of course be actual in the sense that it would be physical and not notional. I think therefore that the words "actually delivered" and "as a direct result" of the sale or purchase "for the purpose of consumption in the State" have been used to signify that in such a case the carrier must be regarded as the agent of the Bombay seller.

So far as the words "in the course of" in clause (2) are concerned, the "course" we have to consider is the course of the inter-State trade and commerce. In my opinion, the inter-State character of the course ends when the goods reach the first consumer in the taxing State. When he in turn sells to the ultimate consumer in that State, a different course begins, namely the course of intra-State trade. It is necessary to draw this distinction because inter-State trade and commerce is a matter for the Centre, intra-State for that of the States. We have therefore to determine where the inter-State course ends and the intra-State course begins. I think the point at which I have drawn the line is logical and convenient. I do not think the same considerations will apply in the next set of cases where we are dealing with the Travancore-Cochin law relating to export and import. But it is not necessary to explain why in this case.

It was contended in argument that the view I take of the ban on inter-State trade and commerce imposed by clause (2) would place the local dealer at a disadvantage. But that would only arise in one class of case and I cannot see how inequality of this kind can be avoided in every case even on my Lord the Chief Justice's view. There are bound to be some inequalities, whichever view is taken.

Consider these concrete cases. We have A, a dealer in Bombay, B, a dealer in Madras, and C, a consumer also in Madras. If A sells directly to C in such a way as to satisfy the Explanation, then,

assuming always that the ban is still in existence, this sale is not taxable on my view. But if B in Madras sells to C in Madras, it is. Of course, B is then at a disadvantage vis-a-vis A. But so is A vis-a-vis B with regard to consumers in Bombay. Consequently the tendency of the consumer in one State to buy from a cheaper market in the other evens up in the long run. But that apart, what happens on my Lord the Chief Justice's view ?

A very large volume of the feasibly taxable trade in this country, if not the bulk of it, at any rate in most States, is in the hands of retail dealers resident in the various States. They obtain their wares from wholesale importers or large dealers in other States. In the illustration I have put above, if B in Madras gets his goods from A in Bombay, then, on the learned Chief Justice's view, B pays a purchase tax on his purchase from A and again a sales tax on his sale to the consumer C. The consumer is therefore saddled with a double tax. But if C, still in Madras, purchases direct from A in Bombay, there is only one tax in the transaction on my Lord's view. That still gives A an advantage over B. Therefore, there is a large class of cases in which the local dealer is at a disadvantage even on the other view.

The only class of case in which the local dealer is not at a disadvantage on my Lord's view, and is on mine, is when the goods are manufactured locally. In that event, B, the manufacturer in Madras, pays no initial sales tax. He only pays when he sells to the consumer C in Madras. If the goods can also be manufactured locally in Bombay, then the dealer A in Bombay does have a theoretical advantage over the dealer B in Madras. But if the goods cannot also be manufactured in Bombay, the advantage disappears, for A then pays an initial tax on his purchase from the outside State.

I do not think considerations of this kind should influence the construction of these articles because, in the first place, some inequalities are inevitable and, in the next, the disadvantage is more theoretical than practical. For example, a wholesale importer, who also chooses to sell retail in the State of import, has a theoretical advantage over retailers who have to buy through him. But that did not prevent this Court from holding in The State of Travancore-Cochin & Others v. The Bombay Co. Ltd. [[1952] S.C.R. 1112.] that the sale which occasioned his import is free of tax. So here. I do not think this consideration should weigh.

But apart from this, the matter is, I think, largely theoretical save perhaps in a few exceptional cases. In this class of case, the trade usually adjusts its own differences by allowing the local dealer a discount; in fact, in the case of many commodities, local dealers have to give an undertaking not to sell below a certain price in order to maintain a steady price level over the local market and avoid cut throat competition. That is how most of the large motor agencies work, and the same applies to radios and petrol and kerosene oil. The price the ultimate consumer pays is the same wherever he purchases in a given area. Also the type of consumer who will take the trouble to buy in a cheaper foreign market with all the annoyances of delay, transport, octroi and other import restrictions, is small. Most people prefer to pay the extra price and save themselves endless trouble.

I now come to the impugned legislation - the Bombay Sales Tax Act (No. XXIV of 1952). As mine is a dissenting view which will not affect the result, I will content myself with very briefly indicating why I consider the Act, or at any rate the relevant provisions in it, ultra vires, and to begin with I will ignore the rules altogether and consider what would happen if the rules were not there at all or had been brought into existence after the Act.

The taxing sections 5 and 10 empower a levy of tax on all sales made within the State of Bombay when the turnover reaches a certain figure. This would include sales made in the course of inter-

State trade and commerce, sales made in the course of export and import and sales falling within the Explanation made to consumers in outside States. As I have explained above, the mere fact that a sale is made in the State of Bombay will not prevent it from being a sale effected in the course of inter-State trade or commerce or in the course of export or import. Even when the whole transaction of sale is constituted in Bombay in the sense that every essential ingredient necessary to constitute a sale takes place there, (that is to say, even when the Explanation is not called into play), the sale would, given other considerations, be in the course of export or import or in the course of inter-State trade or commerce. An illustration will make my point clear.

A, a Bombay dealer, sells goods to B, a dealer in Madras, for consumption in Madras. I will assume that delivery is made to B himself in Bombay and that he carries the goods across in person. If that is the normal way in which trade and commerce in that particular line of goods flows across the boundary, then that would, in my opinion, be a sale in the course of inter-State trade and commerce despite the facts, including delivery, mentioned above. Ordinarily, goods of this nature are delivered to a carrier but that makes my point all the stronger. So long as the ban imposed by clause (2) remains the situs of the sale and the place of delivery are not material provided the sale is caught up in the vortex of inter-State trade and commerce. Similar considerations apply in the case of exports and imports.

On this view, the preamble to the Act and the short title which limit the ambit of the law to the levy of tax on sales and purchases of goods in the State of Bombay, do not serve to save the Act, nor do the definitions of the words "sale", "dealer" and "turnover". Actually, Explanation (2) to the definition of "sale" directly offends clause (2) of article 286. It embodies almost word for word every provision of the Explanation to article 286(1)(a). That would be unobjectionable if the ban imposed by clause (2) had been lifted by Parliament. But as it has not been lifted, the provision is ultra vires on the view which I take of the Constitution.

The Act came into force on 9th October, 1952, with the exception of the taxing sections. The rules were published in the Gazette on 29th October, 1952, and they, together with the taxing sections, came into effect simultaneously on 1st November, 1952. It was argued that the rules save the Act in the following way. Under sections 7 and 11 a dealer is entitled to deduct from his taxable turnover sales which are from time to time declared to be tax-free under section 8 and "such other sales as may be prescribed." It is said that the rules have excluded all sales which offend the Constitution, therefore under the "law" (by which is meant the Act and the rules read together), which came into being on 1st November, 1952, no sale exempted by the Constitution can be taxed. It follows that the "law" which is sought to be impugned is intra vires.

I need not examine the rules for this purpose. I will assume without deciding that they do exclude all sales which are exempt under the Constitution, nevertheless I am not prepared to agree that rules can save an Act. Rules are made by a subordinate authority which is not the Legislature and I cannot agree that the validity of an Act of a competent Legislature can be made to depend upon what some subordinate authority chooses to do or not to do. The rules were not passed by the Legislature and in theory the particular shape they took was not even in contemplation. Say the rules were to be amended tomorrow by striking out these saving clauses, which would be ultra vires, the Act or the rules ? It would be impossible to hold that the rules are ultra vires the Act, for they would not in the event I am contemplating travel one whit beyond the Act. It is the Act which would be bad. And if the Act is held to be ultra vires in an event like that, would it be competent to the rule-making authority to come to the rescue of the Legislature and rehabilitate the Act by re-enacting the rules which it had deleted a few days before ? It would, in my judgment, be no more competent for a

rule-making authority to do that than it would have been competent for it to validate this Act if the rules had been brought into being even one day after sections 5 and 10 came into force.

I can understand this court saying to a petitioner :

> "You are not yet hurt by this Act nor is there any immediate likelihood of your being hurt and until that happens we are not going to entertain your petition, for we are not here to examine hypothetical situations which may never arise." But that sort of objection cannot lie in this case for the reasons my Lord the Chief Justice has given. We are therefore called upon to determine the validity of the Act and in doing so we must, in my opinion, ignore the rules.

I have now to consider two more points. One is about severability and the other is whether a taxing statute is to be treated differently from other laws.

On the question of severability, I cannot see how the good can be separated from the bad in this case even if the Explanation to section 2(14) be expunged unless the Constitution be read as part of the Act and we are to read into the Act some such provision as follows :

> "Notwithstanding anything which is said in any part of this Act, all sales which the State is prohibited to tax under the Constitution are excluded from the scope of this Act."

But, in my opinion, judges are not entitled to rewrite an Act. Offending provisions can be struck out but if we do that the whole Act goes because the defect here is that all sales are permitted to be taxed provided they are within the State of Bombay, and the rule-making authority is not restricted to taxation which is constitutionally permissible. On the contrary, section 45 says that the Government may make rules for carrying out the purposes of the Act and one of the purposes is to tax all sales which the State Government wishes to tax.

The other matter is based on the American view which treats taxing statutes differently from others and holds that in a taxing statute one looks to the individual item of taxation and not to the generality of the powers. With all respect to the American Judges who hold that view, I would prefer not to make exceptions. When the question is whether an Act of the Legislature is ultra vires, the same principles should govern throughout. I would therefore hold that the Bombay Sales Tax Act, 1952 (Bombay Act No. XXIV of 1952) is ultra vires the Constitution of India.

BHAGWATI J. -

I had the benefit of reading the judgment just delivered by my Lord the Chief Justice. While agreeing in the main with the conclusions reached therein I am however unable to subscribe to the reasoning as also the construction put upon the Explanation to article 286(1)(a). I wish to place on record therefore my points of disagreement and the reasons for the same.

The power given to a State Legislature to tax the sales or purchases of goods is derived from article 246(3) read with Entry 54 of List II of the Seventh Schedule of the Constitution. That power has got to be widely construed and it would embrace the power to tax the sales or purchases of goods by reason of a sufficient territorial connection between the taxing State and what it seeks to tax.

This was also the position which obtained before the Constitution and was responsible for double or

multiple taxation of the same transaction by different States. The Constitution makers therefore thought it fit to impose restrictions on the imposition by the States of taxes on the sales or purchases of goods by enacting article 286. These restrictions were three-fold :- (1) no tax could be imposed on the sale or purchase of goods where such sale or purchase took place outside the State, (2) no tax could be imposed on the sale or purchase of goods where such sale or purchase took place in the course of the import of goods into or the export of the goods out of the territory of India, and (3) no tax could be imposed on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as Parliament might by law otherwise provide. These were the three categories of sales or purchases which came within the ban imposed by article 286. The phraseology used in the article laid particular stress on the fact that the sale or purchase should "take place" so as to fall within one or the other of these categories. The intention was that the sale or purchase should take place, i.e., should be completed either outside the State or in the course of import or export or in the course of inter-State trade or commerce. Whereas before the Constitution the taxing power could be exercised by reason of a sufficient territorial connection involving either one or more of the ingredients of a sale in the shape of agreement to sell, the payment of price, transfer of ownership, delivery of goods etc. the completion of a transaction of sale or purchase by the transfer of ownership or the passing of the property in the goods was enacted to be the sole criterion for taxability in article 286. The sales or purchases could be divided into two broad categories - (1) sales or purchases which take place inside the State and (2) sales or purchases which take place outside the State and those which took place outside the State were certainly outside the taxing powers of the State. In regard to the sales or purchases which took place inside the State, the sales or purchases which took place in the course of import or export and in the course of inter-State trade or commerce were also brought within the ban leaving the taxing power of the State unfettered in regard to the other sales or purchases which took place inside the State. The restrictions which were thus imposed on the taxing power of the State confined themselves to sales or purchases which took place outside the State and those sales or purchases which took place inside the State but took place in the course of import or export and in the course of inter-State trade or commerce. Once the transfer of ownership or the passing of the property in the goods was accepted as the sole criterion of taxability it was not necessary at all to define what was a sale or purchase which took place inside the State. Whether a sale or purchase took place inside the State could be determined by applying the general law relating to the sale of goods and ascertaining where the transfer of ownership took place or the property in the goods passed. It was only when the transfer of ownership took place or the property in the goods passed that the sale or purchase was completed and the sale or purchase took place and the situs or the location of the sale or purchase was in the place where the transfer of ownership took place or the property in the goods passed under the general law relating to the sale of goods. [See Badische Aniline Und Soda Fabrick v. Basle Chemical Works, Bind Schedler [[1898] A.C. 200.] and Badische Aniline Und Soda Fabrick v. Hickson [[1906] A.C. 419.].] The situs or location of the sale or purchase therefore assumed an importance under article 286 and the Constitution makers had before them not only the legislative practice prevailing in the various States before the Constitution but also the concept of sale as defined in the Indian Sale of Goods Act. They therefore incorporated in article 286 the notion of a sale or purchase taking place, i.e., being completed by the transfer of ownership or the passing of property in the goods under the general law relating to sale of goods and enacted that those sales or purchases which took place outside the State or which even though they took place inside the State took place in the course of the import or export or in the course of inter-State trade or commerce should come within the ban imposed therein.

The Constitution makers however took count of the fact that even though the property in the goods

by reason of the sale or purchase passed in a particular State the goods might as a direct result of such sale or purchase be delivered in another State for the purpose of consumption in that State. They wanted to give the delivery State in that event the power to tax such sale or purchase and therefore introduced by the Explanation to article 286(1)(a) a legal fiction by which the sale or purchase in that event was deemed to have taken place in the delivery State. What otherwise would have been a sale or purchase which took place outside the State within the meaning of article 286(1)(a) was thus by legal fiction deemed to have taken place inside the delivery State, thus assimilating the position to a sale or purchase which took place inside the delivery State enabling the delivery State to tax the sale or purchase in question. This legal fiction was thus introduced not for defining what was a sale or purchase which took place inside the State as distinct from a sale or purchase which took place outside the State. The purpose of the enactment of the Explanation was not to provide a definition of a sale or purchase which took place inside the State. That was determined under the general law relating to the sale of goods by ascertaining where the transfer of ownership took place or the property in the goods passed, which was in another State and not the delivery State. What was a sale or purchase which took place outside the State was by reason of the Explanation and the legal fiction enacted therein deemed to be a sale or purchase which took place inside the State so as to enable the delivery State to tax the sale or purchase in question.

The sale or purchase transactions which are covered by the Explanation are moreover of a limited character, viz., those in which as a direct result of such sale or purchase the goods have actually been delivered in the delivery State for the purposes of consumption in that State. They do not comprise all the transactions of sale or purchase which take place inside the State because besides those there are a large number of transactions of sale or purchase which take place inside the State and in which no element of inter-State trade or commerce enters the transaction. The transactions of sale or purchase which take place between dealers and dealers and dealers and customers all within the State are really comprised in the category of transactions of sale or purchase which take place inside the State and these transactions do not at all fall within the purview of the Explanation. It would be surprising to find a definition of a transaction of sale or purchase which takes place inside the State given in the manner in which it is alleged to have been done in the Explanation covering only those transactions of sale or purchase in which the goods have actually been delivered in the delivery State as a direct result of such sale or purchase for the purpose of consumption in that State. A definition, if at all it has any significance, should cover all the transactions which come within that particular category and cannot be enacted in the form of a legal fiction in the manner it has been done in the Explanation. It is no definition at all. It has no reference to facts but it merely enacts a legal fiction under which a sale which under the general law relating to sale of goods is completed outside the State by the transfer of ownership or the passing of the property in the goods in another State is deemed to have taken place inside the delivery State because of the goods having been actually delivered as a direct result of such sale or purchase for the purpose of consumption in the delivery State. What is otherwise a sale or purchase which takes place outside the State is thus deemed to have taken place inside the delivery State and that is the only purpose of the enactment of the Explanation. The contention of the Attorney-General and Shri Seervai that the purpose of the enactment of the Explanation was to define what was a sale or purchase which took place inside the State is therefore unsound.

The non-obstante clause really takes count of the fact that under the general law relating to the sale of goods the property in the goods by reason of such sale or purchase would pass in another State and that the situs or location of the sale would accordingly be therefore in another State. Notwithstanding that fact the Explanation enacts the legal fiction that the particular transaction of sale or purchase is deemed to have taken place within the delivery State. The non-obstante clause

has not been incorporated in the Explanation with a view to emphasise the particular aspect of the passing of property in the goods and negativing the same because that was one of the ingredients which had been considered as important territorial connection between the taxing State and what it sought to tax. Besides this ingredient there were various other ingredients which had been similarly considered sufficient territorial connections and to consider that the ingredient of the passing of property in the goods was the only ingredient which was considered important to be mentioned in the non-obstante clause is to ignore the facts and do violence to the whole conception under-lying the incorporation of the non-obstante clause in the Explanation. It would be a more natural way of reading the non-obstante clause to read into it an intention to state what according to the Constitution makers was the basic idea of fixing the situs or the location of the sale or purchase in the place where the transfer of ownership took place or the property in the goods passed and to indicate that notwithstanding that fact a sale or purchase which fell within the category mentioned in the Explanation was none, the, less to be deemed to have taken place inside the delivery State.

If the Explanation to article 286(1)(a) is construed in the manner indicated above it follows that notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State the sale shall be deemed to have taken place in the delivery State and the delivery State would be entitled to tax the sale or purchase. That does not however mean that it is only the delivery State which will be entitled to tax the sale or purchase. Under the general law relating to the sale of goods the property in the goods having by reason of such sale or purchase passed in another State that State will no doubt be entitled to tax the sale or purchase as having taken place inside the State. That position will continue to obtain in spite of the fact that by the enactment of the legal fiction in the Explanation such sale or purchase will be deemed to have taken place inside the delivery State. The object of the Explanation is not and could not be to take away the right which the State in which the property in the goods passed had to tax the sale or purchase which took place inside that State. The object and purpose of the Explanation could only to be to deem such purchase or sale by reason of the legal fiction to have taken place in the delivery State so as to enable the delivery State also to tax the sale or purchase in question. The object of article 286 is to impose restrictions on the imposition of tax on sale or purchase of goods and the only restriction which has been imposed in connection with the sales or purchases which take place in this manner is that a State shall not impose a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. That is a general ban which has been imposed by article 286(1)(a) and what the Explanation seeks to do is to lift the ban to the extent of the transactions of sale or purchase covered by the Explanation and enable the delivery State also to tax such purchases or sales.

It is no doubt true that in the Explanation the word 'only' has not been used nor has the word 'also' been used and we have to gather the purpose of the enactment of the Explanation from the words of the Explanation itself. In order to arrive at a conclusion whether the object and purpose of the Explanation was to enable the delivery State to tax such sales or purchases either in addition to the State in which the property in the goods had passed or in substitution thereof one has got to bear in mind the basic idea that a State would normally be entitled to tax a sale or purchase where such sale or purchase took place inside the State except in cases covered by article 286(1)(b) and article 286(2). If that power of the State to tax the sale or purchase where such sale or purchase took place inside the State was in any manner whatever sought to be taken away it could only be taken away by an express enactment in that behalf as in article 286(1)(b) and article 286(2) and not by the backdoor as it were by enacting a legal fiction as it has been done in the Explanation. The two book cases illustration which was submitted before the court by Shri Seervai in the course of his arguments is a very specious one. Merely because a book is by a legal fiction deemed to be in the

book case 'B' it does not necessarily cease to exist in the book case 'A'. As a matter of physical fact it is in the book case 'A'. It continues in the book case 'A' and the physical fact of its existence in the book case 'A' can never be obliterated. The legal fiction only operates to treat it as if it were in the book case 'B' and to involve all the consequences of its being in the book case 'B'. The two positions are not mutually exclusive. They can co-exist side by side and the legal consequences of the actual fact of the book being in the book case 'A' can be worked out simultaneously with the legal consequences of the notional existence of the book in the book case 'B' by reason of the operation of the legal fiction. If this position is borne in mind it is clear that not only would the State in which the property in the goods passed continue to be entitled to tax the sale or purchase because of such sale or purchase having taken place inside the State, but the delivery State would also be entitled to tax such sale or purchase by reason of the operation of the legal fiction in so far as the goods have actually been delivered as a direct result of such sale or purchase in the delivery State for the purpose of consumption in that State. According to the position as discussed above both the States would thus be entitled to tax such sales or purchases.

Before I proceed to discuss the effect of article 286(2) on the taxing powers of both the States it is necessary to consider what is the exact type of sale or purchase which is covered by the Explanation. That sale or purchase has to be one as a direct result of which the goods have actually been delivered in the delivery State for the purpose of consumption in that State. It is not every transaction which results in the goods being delivered across the border that comes within this category. It is only a transaction of sale or purchase which directly results in the delivery of goods for the purpose of consumption in the delivery State that comes within the category of transactions covered by the Explanation. A dealer in the delivery State purchasing from a dealer in the State where the propoerty in the goods passes by reason of such sale or purchase cannot be said to have purchased the goods for the purpose of consumption in the delivery State because the obvious purpose for which he purchases the goods is for dealing with those goods in the ordinary course of trade and not for consuming the same. A dealer who deals with the goods after purchasing the same does not consume the goods. He deals with or disposes of the same in the ordinary course of trade and he is a dealer or a trader in those goods. He is not a consumer of those goods. The word "consumption" has been thus defined in Webster's New International Dictionary, Vol. I, page 483:-

> "Consumption. - (3) Economics. - The use of (economic) goods resulting in the diminution or destruction of their utilities; opposed to production. Consumption may consist in the active use of goods in such a manner as to accomplish their direct and immediate destruction, as in eating food, wearing clothes, or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery. Generally, it may be said that consumption means using things, and production means adapting them for use."

In the Oxford New English Dictionary, Vol. II, page 888, consumption is defined as :

> "(1) The action or fact of consuming or destroying; destruction ..... (7) Pol. Econ. The destructive employment or utilisation of the products of industry."

Delivery of goods for the purpose of consumption in the delivery State therefore means the delivery for the purpose of using by the consumer and it has no application to the case of a dealer purchasing the goods across the border for dealing with or disposing of the same in the ordinary course of trade. The Explanation therefore covers only those cases where as a direct result of the sale or purchase

goods are delivered for consumption in the delivery State by the consumer and it is only that limited class of transactions which are covered by the Explanation and which are liable to tax by the delivery State. I do not accept the contention that the words "for the purpose of consumption" must be understood in a comprehensive sense as having reference both to immediate and ultimate consumption within the State and excluding only resale out of the State. In my opinion they have reference only to immediate consumption within the State and no further.

If the matters stood thus and there was no further provision to be considered the position would be that in a transaction of sale or purchase covered by the Explanation construed as above both the State in which the property in the goods passed and the delivery State would be entitled to tax such sale or purchase, the former by reason of the property in the goods having passed inside that State and the latter by reason of the goods having been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. We have however got to take count of article 286(2). The transaction of such sale or purchase even though it be as between a dealer in the one State and the consumer in the delivery State is none-the-less a transaction in the course of inter-State trade or commerce. I do not agree with the contention of the Advocate-General of Bombay that article 286(2) should be interpreted as applying to the cases of transactions of sale or purchase taking place between dealers and dealers only and not as applying to the cases of transactions of sale or purchase taking place between dealers on the one hand and consumers on the other. Whether a transaction of sale or purchase takes place between a dealer on the one hand and a dealer on the other or between a dealer on the one hand and a consumer on the other in the respective States all these transactions are in the course of inter-State trade or commerce and therefore hit by article 286(2) and the transactions which are covered by the Explanation to article 286(1)(a) would also be accordingly hit by the ban imposed under article 286(2).

So far as the State in which the property in the goods has passed is concerned it could certainly not tax the sale or purchase in question because the transaction of sale or purchase so far as the particular State is concerned takes place in the course of inter-State trade or commerce and could not be subjected to the imposition of tax except in so far as Parliament might by law otherwise provide. So far however as the delivery State is concerned the Explanation empowers the delivery State to tax such transaction and if article 286(2) be construed as imposing a ban on the taxation of such sale or purchase it will be tantamount to the giving of the right to tax by one hand and the taking away of it by another.

It was contended and rightly so by the Advocate-General of Bombay that if the transactions which are covered by the Explanation to article 286(1)(a) were thus hit by article 286(2) in the absence of a provision otherwise enacted by Parliament the Explanation to article 286(1)(a) would be rendered nugatory and the Constitution makers could not be held to have contemplated such a possibility at the very inception of the Constitution leaving it to the Parliament by having recourse to the provision contained in article 286(2) to remedy such a state of affairs. Such a possibility could not be contemplated and an effort should therefore be made in so far as it was reasonably possible to do so to reconcile the provisions of the Explanation to article 286(1)(a) and article 286(2).

It is well-known rule of the interpretation of statutes that a "particular enactment is not repealed by a general enactment in the same statute". (Beal on the Cardinal Rules of Legal Interpretation, 3rd Edition, Part VII, Section IX, page 516). Reliance is placed in support of the above proposition on the following observations of Best C.J. in Churchill v. Crease [(1828) 5 Bing. 177 at p. 180.].

"The rule is, that where a general intention is expressed, and the Act

> expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception".

To the same effect also are the observations of Quain J. in Dryden v. Overseers of Putney [(1876) 1 Ex. D. 232 at p. 426.] quoted at page 426 of the same work :-

> "It may be laid down as a rule for the construction of statutes, that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision."

(See also Craies on Statute Law, 5th Edition (1952) at p. 205; Maxwell on the Interpretation of Statutes 9th Edition (1946) at p. 176 and Crawford on the Construction of Statutes (Interpretation of Laws) 1940 Edition, Ch. XVIII 'Construction of Statutes' at p. 265 section 167). It therefore follows that the general provision which is enacted in article 286(2) against the imposition of tax on the sale or purchase of goods in the course of inter-State trade or commerce should give way to the special provision which is enacted in the Explanation to article 286(1)(a) enabling the delivery State to tax such sale or purchase in the limited class of cases covered by the Explanation, transactions covered by the Explanation being thus lifted out of the category of transactions, in the course of inter-State trade or commerce covered by article 286(2) and assimilated to transactions of sale or purchase which take place inside the State thus acquiring an intra-State character so far as the delivery State is concerned.

It was suggested that this result could also be achieved by having resort to the principles which have been enunciated in articles 301 and 304 of the Constitution which are included in Part XIII under the caption - Trade, commerce and intercourse within the territory of India. Even though these provisions of the Constitution may by analogy support the conclusion that a transaction in the course of inter-State trade or commerce is thus lifted out of that category and assimilated to a transaction of sale or purchase which takes place inside the State the analogy must stop there and cannot be worked any further. One cannot construe the provisions of article 286 with reference to the provisions of article 304(a) as is sought to be done. Article 286 and article 304(a) refer to different states of affairs. Whereas article 286 provides restrictions on the imposition of taxes on purchase or sale of goods, article 304(a) gives the State Legislature power to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject so however as not to discriminate between goods so imported and goods so manufactured or produced. Whereas article 286 refers to taxes on sales or purchases of goods, article 304(a) refers to tax on imported goods. The two concepts are thus entirely different. The only argument which was addressed before us on article 301 and 304 of the Constitution was by the Government Pleader of Patna who referred to these provisions in order to substantiate his point that only one State, viz., the delivery State, should tax the sales or purchases covered by the Explanation and argued what the results would be if it was held that both the States could tax or neither of them could tax such sale or purchase. This aspect was however not stressed or presented during the course of the arguments and 1 would prefer not to express any opinion on the scope or meaning of article 304.

I would therefore base my construction of the Explanation of article 286(1)(a) and article 286(2) on the rule as to the interpretation of statutes which I have referred to above, lifting the transaction of sale or purchase covered by the Explanation to article 286(1)(a) out of the category of the transactions in the course of inter-State trade or commerce and assimilating it to a transaction of sale

or purchase which takes place inside the delivery State thus investing it with the character of an inter-State sale qua the delivery State.

The result therefore is that the delivery State only would be entitled to tax the transaction of sale of purchase covered by the Explanation. Such transaction would be a transaction of sale or purchase where as a direct result of such sale or purchase the goods are delivered in the delivery State for the purpose of consumption in that State, i.e., where the transaction is between a dealer in the State in which the property in the goods passes and a consumer in the delivery State. The State in which the property in the goods passes would not be able to tax such sale or purchase in the absence of a provision enacted by law by Parliament within the meaning of article 286(2). Once that ban is lifted by the appropriate legislation enacted by the Parliament the State in which the property in the goods passes would also be entitled to tax such sale or purchase but not otherwise.

Save as above, I agree with the conclusions reached by my Lord the Chief Justice in the judgment just delivered. I agree that the Bombay Sales Tax Act, 1952, and the rules made, thereunder except Rule 5(2)(i) do not contravene the provisions of article 286, that Rule 5(2)(i) is clearly severable and can be ignored, that there is no substance in the contention of Shri Seervai that there is a violation of the fundamental rights guaranteed under article 14 and that the taxation statutes should be construed in a manner so as to allow the statute itself to stand, the taxing authority being prevented by injunction from imposing the tax on subjects excluded by the Constitution from the purview of taxation by the State.

In the result the declaration made by the court below will be set aside, the writ issued by it will be quashed and the State of Bombay will be prohibited from imposing or authorising the imposition of a tax on sales or purchases which according to the interpretation put above on article 286 are excluded from the purview of taxation by the State od Bombay. Each party will bear and pay its own costs throughout.

Appeal allowed.

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