The State of Madras

Vs

Gannon Dunkerley & Co. (Madras) Ltd.

Civil Appeal No. 210 of 1956

(CJI S. R. Dass, Vivian Bose, T. L. Venkatarama Ayyar, S. K. Das, A. K. Sarkar JJ)

01.04.1958

JUDGMENT

VENKATARAMA AIYAR J. -

This appeal arises out of proceedings for assessment of sales-tax payable by the respondents for the year 1949-1950, and it raises a question of considerable importance on the construction of Entry 48 in List II of Sch. VII to the Government of India Act, 1935, "Taxes on the sale of goods."

The respondents are a private limited company registered under the provisions of the Indian Companies Act, doing business in the construction of buildings, roads and other works and in the sale of sanitary wares and other sundry goods. Before the sales-tax authorities, the disputes ranged over a number of items, but we are concerned in this appeal with only two of them. One is with reference to a sum of Rs. 29,51,528-7-4 representing the value of the materials used by the respondents in the execution of their works contracts, calculated in accordance with the statutory provisions applicable thereto, and the other relates to a sum of Rs. 1,98,929-0-3 being the price of foodgrains supplied by the respondents to their workmen.

It will be convenient at this stage to refer to the provisions of the Madras General Sales Tax Act, 1939 (Mad. IX of 1939), in so far as they are relevant for the purpose of the present appeal. Section 2(h) of the Act, as it stood when it was enacted, defined "sale" as meaning "every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration". In 1947, the Legislature of Madras enacted the Madras General Sales Tax (Amendment) Act No. XXV of 1947 introducing several new provisions in the Act, and it is necessary to refer to them so far as they are relevant for the purpose of the present appeal. Section 2(c) of the Act had defined "goods" as meaning "all kinds of movable property other than actionable claims, stocks and shares and securities and as including all materials, commodities and articles", and it was amended so as to include materials "used in the construction, fitting out, improvement or repair of immovable property or in the fitting out, improvement or repair of movable property". The definition of "sale" in section 2(h) was enlarged so as to include "a transfer of property in goods involved in the execution of works contract". In the definition of "turnover" in section 2(i), the following Explanation (1)(i) was added :

> "Subject to such conditions and restrictions, if any, as may be prescribed in this behalf -

the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed

of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract."

A new provision was inserted in section 2(ii) defining "works contract" as meaning "any agreement for carrying out for cash or for deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property". Pursuant to the Explanation (1) (i) in section 2(i), a new rule, r. 4(3), was enacted that "the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the deals for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue, from time to time of different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages.....", and then follows a scale varying with the nature of the contracts.

It is on the authority of these provisions that the appellant seeks to include in the turnover of the respondents the sum of Rs. 29,51,528-7-4 being the value of the materials used in the construction works as determined under r. 4(3). The respondents contest this claim on the ground that the power of the Madras Legislature to impose a tax on sales under Entry 48 in List II in Sch. VII of the Government of India Act, does not extend to imposing a tax on the value of materials used in works, as there is no transaction of sale in respect of those goods, and that the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, authorising the imposition of such tax are ultra vires. As regards the sum of Rs. 1,98,929-0-3, the contention of the respondents was that they were not doing business in the sale of foodgrains, that they had supplied them to the workmen when they were engaged in construction works in out of the way places, adjusting the price therefor in the wages due to them and that the amounts so adjusted were not liable to be included in the turnover. The Sales Tax Appellate Tribunal rejected both these contentions, and held that the amounts in question were liable to be included in the taxable turnover of the respondents.

Against this decision, the respondents preferred Civil Revision Petition No. 2292 of 1952 to the High Court of Madras. That was heard by Satyanarayana Rao and Rajagopalan JJ. who decided both the points in their favour. They held that the expression "sale of goods" had the same meaning in Entry 48 which it has in the Indian Sale of Goods Act (III of 1930), that the construction contracts of the respondents were agreements to execute works to be paid for according to measurements at the rates specified in the schedule thereto, and were not contracts for sale of the materials used therein, and that further, they were entire and indivisible and could not be broken up into a contract for sale of materials and a contract for payment for work done. In the result, they held that the impugned provisions introduced by the Amendment Act No. XXV of 1947, were ultra vires the powers of the Provincial Legislature, and that the claim based on those provisions to include Rs. 29,51,528-7-4 in the taxable turnover of the respondents could not be maintained. As regards the item of Rs. 1,98,929-0-3 they held that the sale of foodgrains to the workmen was not in the course of any business of buying or selling those goods, that there was no profit motive behind it, that the respondents were not dealers as defined in section 2(d) of the Act, and that, therefore, the amount in question was not liable to be taxed under the Act. In the result, both the amounts were directed to be excluded from the taxable turnover of the respondents. Against this decision, the State of Madras has preferred the present appeal on a certificate granted by the High Court under Art. 133(1) of the Constitution.

Before us, the learned Advocate-General of Madras did not press the appeal in so far as it relates to

the sum of Rs. 1,98,929-0-3, and the only question, therefore, that survives for our decision is as to whether the provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947 and set out above are ultra vires the powers of the Provincial Legislature under Entry 48 in List II. As provisions similar to those in the Madras Act now under challenge are to be found in the sales-tax laws of other States, some of those States, Bihar, Punjab, Mysore, Kerala and Andhra Pradesh, applied for and obtained leave to intervene in this appeal, and we have heard learned counsel on their behalf. Some of the contractors who are interested in the decision of this question, Gurbax Singh, Messrs. Uttam Singh Duggal and United Engineering Company, were also granted leave to intervene, and learned counsel representing them have also addressed us on the points raised.

The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are ultra vires, in so far as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor, and the answer to it must depend on the meaning to be given to the words "sale of goods" in Entry 48 in List II of Sch. VII to the Government of India Act, 1935. Now, it is to be noted that while section 311(2) of the Act defines "goods" as including "all materials, commodities and articles", it contains no definition of the expression "sale of goods". It was suggested that the word "materials" in the definition of "goods" is sufficient to take in materials used in a works contract. That is so; but the question still remains whether there is a sale of those materials within the meaning of that word in Entry 48. On that, there has been sharp conflict of opinion among the several High Courts. In Pandit Banarsi Das v. State of Madhya Pradesh ([1955] 6 S.T.C. 93), a Bench of the Nagpur High Court held, differing from the view taken by the Madras High Court in the judgment now under appeal, that the provisions of the Act imposing a tax on the value of the materials used in a construction on the footing of a sale thereof were valid, but that they were bad in so far as they enacted an artificial rule for determination of that value by deducting out of the total receipts a fixed percentage on account of labour charges, inasmuch as the tax might, according to that computation, conceivably fall on a portion of the labour charges and that would be ultra vires Entry 48. A similar decision was given by the High Court of Rajasthan in Bhuramal v. State of Rajasthan (A.I.R. 1957 Raj. 104). In Mohammed Khasim v. State of Mysore (A.I.R. 1955 Mys. 41) the Mysore High Court has held that the provisions of the Act imposing a tax on construction of works are valid, and has further upheld the determination of the value of the materials on a percentage basis under the rules. In Gannon Dunkerley & Co. v. Sales Tax Officer (A.I.R. 1957 Ker. 146), the Kerala High Court has likewise affirmed the validity of both the provisions imposing tax on construction works and the rules providing for apportionment of value on a percentage basis. In Jubilee Engineering Co., Ltd. v. Sales Tax Officer (A.I.R. 1956 Hyd. 79), the Hyderabad High Court has followed the decision of the Madras High Court, and held that the taxing provisions in the Act are ultra vires. The entire controversy, it will be seen, hinges on the meaning of the words "sale of goods" in Entry 48, and the point which we have now to decide is as to the correct interpretation to be put on them.

The contention of the appellant and of the States which have intervened is that the provisions of a Constitution which confer legislative powers should receive a liberal construction, and that, accordingly, the expression "sale of goods" in Entry 48 should be interpreted not in the narrow and technical sense in which it is used in the Indian Sale of Goods Act, 1930, but in a broad sense. We shall briefly refer to some of the authorities cited in support of this position. In British Coal Corporation v. King ([1935] A.C. 500, 518), the question was whether section 17 of the Canadian Statute, 22 & 24, Geo. V, c. 53, which abolished the right of appeal to the Privy Council from any judgment or order of any court in any criminal case, was intra vires its powers under the Constitution Act of 1867. In answering it in the affirmative, Viscount Sankey L.C. observed :

> "Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in Edwards v. A. G. for Canada ([1930] A.C. 124, 136)".

In James v. Commonwealth of Australia ([1936] A.C. 578, 614), Lord Wright observed that a Constitution must not be construed in any narrow and pedantic sense. In In re the Central Provinces and Berar Act No. XIV of 1938 ([1939] F.C.R. 18, 37), discussing the principles of interpretation of a constitutional provision, Sir Maurice Gwyer C.J. observed :

> "I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of a Government is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat."

The authority most strongly relied on for the appellant is the decision of this Court in Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City ([1955] 1 S.C.R. 829, 833, 836), in which the question was as to the meaning of the word "income" in Entry 54 of List I. The contention was that in the legislative practice of both England and India, that word had been understood as not including accretion in value to capital, and that it should therefore bear the same meaning in Entry 54. In rejecting this contention, this Court observed that the so-called "legislative practice was nothing but judicial interpretation of the word 'income' as appearing in the fiscal statues", that in "constraining an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein", and that the cardinal rule of interpretation was "that words should be read in their ordinary, natural and grammatical meaning, subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

The learned Advocate-General of Madras also urged in further support of the above conclusion that the provisions of a Constitution Act conferring powers of taxation should be interpreted in a wide sense, and relied on certain observations in Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W. ([1912] 15 C.L.R. 661, 666) and Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.) ([1937] 56 C.L.R. 337, 379) in support of his contention. In Morgan v. Deputy Federal Commissioner of Land Tax, N.S.W. ([1912] 15 C.L.R. 661, 666), the question was as to the validity of a law which had enacted that lands belonging to a company were deemed to be held by its shareholders as joint owners and imposed a land tax on them in respect of their share therein. In upholding the Act, Griffith C.J. observed :

> "In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them in rerum natura, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it."

In Broken Hill South Ltd. v. Commissioner of Taxation, N.S.W. ([1937] 56 C.L.R. 337, 379), the

observations relied on are the following :

> "In any investigation of the constitutional powers of these great Dominion legislatures, it is not proper that a court should deny to such a legislature the right of solving taxation problems unfettered by a priori legal categories which often derive from the exercise of legislative power in the same constitutional unit."

On these authorities, the contention of the appellant is well-founded that as the words "sale of goods" in Entry 48 occur in a Constitution Act and confer legislative powers on the State Legislature in respect of a topic relating to taxation, they must be interpreted not in a restricted but broad sense. And that opens up questions as to what that sense is, whether popular or legal, and what it connotation is either in the one sense or the other. Learned counsel appearing for the States and for the assessees have relied in support of their respective contentions on the meaning given to the word "sale" in authoritative text-books, and they will now be referred to. According to Blackstone, "sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value." This passage has, however, to be read distributively and so read, sale would mean transfer of property for price. That is also the definition of "sale" in Benjamin on Sale, 1950 Edn., p. 2. In Halsbury's laws of England, Second Edn., Vol. 29, p. 5, para. I, we have the following :

> "Sale is the transfer of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods, or some other valuable consideration, not being money, the transaction is called exchange or barter; but in certain circumstances it may be treated as one of sale.

The law relating to contracts of exchange or barter is undeveloped, but the courts seem inclined to follow the maxim of civil law, permutatio vicina est emptioni, and to deal with such contracts as analogous to contracts of sale. It is clear, however, that statutes relating to sale would have no application to transactions by way of barter."

In Chalmer's Sale of Goods Act, 12th Edn., it is stated at p. 3 that "the essence of sale is the transfer of the property in a thing from one person to another for a price", and at p. 6 it is pointed out that "where the consideration for the transfer.... consists of the delivery of goods, the contract is not a contract of sale but is a contract of exchange or barter". In corpus Juris, Vol. 55, p. 36, the law is thus stated :

> "Sale" in legal nomenclature, is a term of precise legal import, both at law and an equity, and has a well defined "legal signification, and has been said to mean, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."

It is added that the word "sale" as used by the authorities "is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning, according to the context." In Williston on Sales, 1948 Edn., "sale of goods" is defined as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price" (p. 2). At p. 443, the learned author observes that "it has doubtless been generally said that the price must be payable in money", but expresses his opinion that it may be any personal property. In the Concise Oxford dictionary, "sale" is defined as "exchange of a commodity for money or other valuable consideration, selling".

It will be seen from the foregoing that there is practical unanimity of opinion as to the import of the word "sale" in its legal sense, there being only some difference of opinion in America as to whether price should be in money or in money's worth, and the dictionary meaning is also to the same effect. Now, it is argued by Mr. Sikri, the learned Advocate-General of Punjab, that the word "sale" is, in its popular sense, of wider import than in its legal sense, and that is the meaning which should be given to that word in Entry 48, and he relies in support of this position on the observations in Nevile Reid and Company Ltd. v. The Commissioners of Inland Revenue ([1922] 12 Tax Cas. 545). There, an agreement was entered into on April 12, 1918, for the sale of the trading stock in a brewery business and the transaction was actually completed on June 24, 1918. In between the two dates, the Finance Act, 1918, had imposed excess profits tax, and the question was whether the agreement dated April 12, 1918, amounted to a sale in which case the transaction would fall outside the operation of the Act. The Commissioners had held that as title to the goods passed only on June 24, 1918, the agreement dated April 12, 1918, was only an agreement to sell and not the sale which must be held to have taken place on June 24, 1918, and was therefore liable to be taxed. Sankey J. agreed with this decision, but rested it on the ground that as the agreement left some matters still to be determined and was, in certain respects, modified later, it could not be held to be a sale for the purpose of the Act. In the course of the judgment, he observed that "sale" in the Finance Act should not be construed in the light of the provisions of the Sale of Goods Act, but must be understood in a commercial or business sense.

Now, in its popular sense, a sale is said to take place when the bargain is settled between the parties, though property in the goods may not pass at that stage, as where the contract relates to future or unascertained goods, and it is that sense that the learned Judge would appear to have had in his mind when he spoke of a commercial or business sense. But apart from the fact that these observations were obiter, this Court has consistently held that though the word "sale" in its popular sense is not restricted to passing of title, and has a wider connotation as meaning the transaction of sale, and that in that sense an agreement to sell would, as one of the essential ingredients of sale, furnish sufficient nexus for a State to impose a tax, such levy could, nevertheless, be made only when the transaction is one of sale, and it would be a sale only when it has resulted in the passing of property in the goods to the purchaser. Vide Poppatlal Shah v. The State of Madras ([1953] S.C.R. 677, 683) and The State of Bombay v. The United Motors (India) Ltd. ([1953] S.C.R. 1069, 1078). It has also been held in the Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash ([1955] 1 S.C.R. 243) that the sale contemplated by Entry 48 of the Government of India Act was a transaction in which title to the goods passes and a mere executory agreement was not a sale within that Entry. We must accordingly hold that the expression "sale of goods" in Entry 48 cannot be construed in its popular sense, and that it must be interpreted in its legal sense. What its connotation in that sense is, must now be ascertained. For a correct determination thereof, it is necessary to digress somewhat into the evolution of the law relating to sale of goods.

The concept of sale, as it now obtains in our jurisprudence has its roots in the Roman law. Under that law, sale, emptio venditio, is an agreement by which one person agrees to transfer to another the exclusive possession (vacuam possessionem tradere) of something (merx) for consideration. In the earlier stages of its development, the law was unsettled whether the consideration for sale should be money or anything valuable. By a rescript of the Emperors Diocletian and Maximian of the year 294 A.D., it was finally decided that it should be money, and this law is embodied in the Institutes of Justinian, vide Title XXIII. Emptio venditio is, it may be noted, what is known in Roman law as a consensual contract. That is to say, the contract is complete when the parties agree to it, even without delivery as in contracts re or the observance of any formalities as in contracts verbis and litteris. The common law of England relating to sales developed very much on the lines of the

Roman law in insisting on agreement between parties and price as essential elements of a contract of sale of goods. In his work on "Sale", Benjamin observes :

> "Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.,
>
> (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." (Vide 8th Edn., p. 2).

In 1893 the Sale of Goods Act, 56 & 57 Vict. c. 71 codified the law on the subject, and section 1 of the Act which embodies the rules of the common law runs as follows :

> 1. - (1) "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Coming to the Indian law on the subject, section 77 of the Indian Contract Act, 1872, defined "sale" as "the exchange of property for a price involving the transfer of ownership of the thing sold from the seller to the buyer". It was suggested that under this section it was sufficient to constitute a sale that there was a transfer of ownership in the thing for a price and that a bargain between the parties was not an essential element. But the scheme of the Indian Contract Act is that it enacts in sections 1 to 75 provisions applicable in general to all contracts, and then deals separately with particular kinds of contract such as sale, guarantee, bailment, agency and partnership, and the scheme necessarily posits that all these transactions are based on agreements. We then come to the Indian Sale of Goods Act, 1930, which repealed Ch. VII of the Indian Contract Act relating to sale of goods, and section 4 thereof is practically in the same terms as section 1 of the English Act. Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale.

Now, it is the contention of the respondents that as the expression "sale of goods" was at the time when the Government of India Act was enacted, a term of well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic both in

England and in India, it must be interpreted in Entry 48 as having the same meaning as in the Indian Sale of Goods Act, 1930, and a number of authorities were relied on in support of this contention. In United States v. Wong Kim Ark ([1898] 169 U.S. 649, 654; 42 L.Ed. 890, 893), it was observed :

> "In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law."

In South Carolina v. United States ([1905] 199 U.S. 437; 50 L.Ed. 262, 265), Brewer J. observed :

> "To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

A more recent pronouncement is that of Taft C.J. who said :

> "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Conventions of thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary". Ex parte Grossman ([1925] 267 U.S. 87, 69; L.Ed. 527, 530).

In answer to the above line of authorities, the appellant relies on the following observations in Continental Illinois National Bank and Trust Company of Chicago v. Chicago Rock Island & Pacific Railway Company ([1935] 294 U.S. 648, 669; 79 L.Ed. 1110, 1124) :

> "Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question. Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power (Waring v. Clarke ([1847] 5 How. 441; 12 L.Ed. 226), though they do, at least in some instances, operate restrictively in respect of clauses of the Constitution which guarantee and safeguard the fundamental rights and liberties of the individual, the best examples of which, perhaps, are the Sixth and Seventh Amendments, which guarantee the right of trial by jury."

It should, however, be stated that the law is stated in Weaver on Constitutional Law, 1946 Edn., p. 77 and Crawford on Statutory Construction, p. 258 in the same terms as in South Corolina v. United States ([1905] 199 U.S. 437; 50 L.Ed. 262, 265). But it is unnecessary to examine minutely the precise scope of this rule of interpretation in American law, as the law on the subject has been stated clearly and authoritatively by the Privy Council in construing the scope of the provisions of the British North America Act, 1867. In L'Union St. Jacques De Montreal v. Be Lisle ([1874] L.R. 6 P.C. 31, 36), the question was whether a laws of Quebec providing for relief to a society in a state of financial embarrassment was one with respect to "bankruptcy and insolvency". In deciding that it should be determined on a consideration of what was understood as included in those words in their legal sense, Lord Selborne observed :

> "The words describe in their known legal sense provisions made by law for the

> administration of the estates of person who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation."

On this test, it was held that the law in question was not one relating to bankruptcy. In Royal Bank of Canada v. Larue ([1928] A.C. 187), the question was whether section 11, sub-section (10), of the Bankruptcy Act of Canada under which a charge created by a judgment on the real assets of a debtor was postponed to an assignment made by the debtor of his properties for the benefit of his creditors was intra vires the powers of the Dominion Legislature, as being one in respect of "bankruptcy and insolvency" within section 91, sub-cl. (21), of the British North America Act. Viscount Cave L.C. applying the test laid down in L'Union St. Jacques De Montreal v. Be Lisle ([1874] L.R. 6 P.C. 31, 36), held that the impugned provision was one in respect of bankruptcy.

In The Labour Relations Board of Saskatachewan v. John East iron Works Ltd. ([1949] A.C. 134), the question arose under section 96 of the British North America Act, 1867, under which the Governor-General of the Dominion had power to appoint judges of the superior district and country courts. The Province of Saskatachewan enacted the Trade Union Act, 1944, authorising the Governor of the Province to constitute the Labour Relations Board for the determination of labour disputes. The question was whether this provision was invalid as contravening section 96 of the British North America Act. In holding that it was not, Lord Simonds observed that the courts contemplated by section 96 of the Act were those which were generally understood to be courts at the time when the Constitution Act was enacted, that labour courts were then unknown, and that, therefore, the reference to judges and courts in section 96 could not be interpreted as comprehending a tribunal of the character of the Labour Relations Board. In Halsbury's Laws of England, Vol. 11, para 157, p. 93, the position is thus summed up :

> "The existing state of English law in 1867 is relevant for consideration in determining the meaning of the terms used in conferring power and the extent of that power, e.g. as to customs legislation."

Turning next to the question as to the weight to be attached to legislative practice in interpreting words in the Constitution, in Croft v. Dunphy ([1933] A.C. 156, 165), the question was as to the validity of certain provisions in a Canadian statute providing for the search of vessels beyond territorial waters. These provisions occurred in a customs statute, and were intended to prevent evasion of its provisions by smugglers. In affirming the validity of these provisions, Lord Macmillan referred to the legislative practice relating to customs, and observed :

> "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power."

In Wallace Brothers and Co. Ltd. v. Commissioner of Income-tax, Bombay City and Bombay Suburban District ([1948] L.R. 75 I.A. 86, 99), Lord Uthwatt observed :

> "Where Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the

> legislative practice of the United Kingdom. The point of the reference is emphatically not to seek a pattern to which a due exercise of the power must conform. The object is to ascertain the general conception involved in the words in the enabling Act."

In In re The Central Provinces and Berar Act No. XIV of 1938 ([1939] F.C.R. 18, 37), in considering whether a tax on the sale of goods was a duty of excise within the meaning of Entry 45 in List I of Sch. VII, Sir Maurice Gwyer C.J. observed at p. 53 :

> "Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties; for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

In The State of Bombay v. F. N. Balsara ([1951] S.C.R. 682), in determining the meaning of the word 'intoxicating liquor' in Entry 31 of List II of Sch. VII to the Government of India Act, 1935, this Court referred to the legislative practice with reference to that topic in India as throwing light on the true scope of the entry. (Vide pp. 704 to 706).

On the basis of the authorities, the respondents contend that the true interpretation to be put on the expression "sale of goods" in Entry 48 is what it means in the Indian Sale of Goods Act, 1930, and what it has always meant in the general law relating to sale of goods. It is contended by the appellant - and quite rightly - that in interpreting the words of a Constitution the legislative practice relative thereto is not conclusive. But it is certainly valuable and might prove determinative unless there are good reasons for disregarding it, and in The Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash ([1955] 1 S.C.R. 243), it was relied on for ascertaining the meaning and true scope of the very words which are now under consideration. There, in deciding that an agreement to sell is not a sale within Entry 48, this Court referred to the provisions of the English Sale of Goods Act, 1893, the Indian Contract Act, 1872, and the Indian Sale of Goods Act, 1930, for construing the word "sale" in that Entry and observed :

> "Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell, it would be proper to interpret the expression "sale of goods" in entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title."

This decision, though not decisive of the present controversy, goes far to support the contention of the respondents that the words "sale of goods" in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act, 1930.

The appellant and the intervening States resist this conclusion on the following grounds :

> (1) The provisions of the Government of India Act, read as a whole, show that the words "sale of goods" in Entry 48 are not to be interpreted in the sense which they have in the Indian Sale of Goods Act, 1930;

(2) The legislative practice relating to the topic of sales tax does not support the narrow construction sought to be put on the language of Entry 48;

(3) The expression "sale of goods" has in law a wider meaning than what it bears in the Indian Sale of Goods Act, 1930, and that is the meaning which must be put on it in Entry 48; and

(4) the language of Entry 48 should be construed liberally so as to take in new concepts of sales-tax.

We shall examine these contentions seriatim.

(1) As regards the first contention, the argument is that in the Government of India Act, 1935, there are other provisions which give a clear indication that the expression "sale of goods" in Entry 48 is not to be interpreted in the sense which it bears in the Indian Sale of Goods Act, 1930. That is an argument open to the appellant, because rules of interpretation are only aids for ascertaining the true legislative intent and must yield to the context, where the contrary clearly appears. Now, what are the indications contra ? Section 311(2) of the Government of India Act defines "agricultural income" as meaning "agricultural income as defined for the purposes of the enactments relating to Indian income-tax". It is said that if the words "sale of goods" in Entry 48 were meant to have the same meaning as those words in the Indian Sale of goods Act, that would have been expressly mentioned as in the case of definition of agricultural income, and that therefore that is not the meaning which should be put on them in that Entry.

In our opinion, that is not the inference to be drawn from the absence of words linking up the meaning of the word "sale" with what it might bear in the Indian Sale of Goods Act. We think that the true legislative intent is that the expression "sale of goods" in Entry 48 should bear the precise and definite meaning it has in law, and that meaning should not be left to fluctuate with the definition of "sale" in laws relating to sale of goods which might be in force for the time being. It was then said that in some of the Entries, for example, Entries 31 and 49, List II, the word "sale" was used in a wider sense than in the Indian Sale of Goods Act, 1930. Entry 31 is "Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs..". The argument is that "sale" in the Entry must be interpreted as including barter, as the policy of the law cannot be to prohibit transfers of liquor only when there is money consideration therefor. But this argument proceeds on a misapprehension of the principles on which the Entries are drafted. The scheme of the drafting is that there is in the beginning of the Entry words of general import, and they are followed by words having reference to particular aspects thereof. The operation of the general words, however, is not cut down by reason of the fact that there are sub-heads dealing with specific aspects. In Manikkasundara v. R. S. Nayudu ([1946] F.C.R. 67, 84) occur the following observations pertinent to the present question :

"The subsequent words and phrases are not intended to limit the ambit of the opening general term or phrase but rather to illustrate the scope and objects of the legislation envisaged as comprised in the opening term or phrase."

A law therefore prohibiting any dealing in intoxicating liquor, whether by way of sale or barter of

gift, will be intra vires the powers conferred by the opening words without resort to the words "sale and purchase". Entry 49 in List II is "Cesses on the entry of goods into a local area for consumption, use or sale therein". It is argued that the word "sale" here cannot be limited to transfers for money or for even consideration. The answer to this is that the words "for consumption, use or sale therein" are a composite expression meaning octroi duties, and have a precise legal connotation and the use of the word "sale therein" can throw no light on the meaning of that word in Entry 48. We are of opinion that the provisions in the Government of India Act, 1935, relied on for the appellant are too inconclusive to support the inference that "sale" in Entry 48 was intended to be used in a sense different from that in the Indian Sale of Goods Act.

> (2) It is next urged that for determining the true meaning of the expression "Taxes on the sale of goods" in Entry 48 it would not be very material to refer to the legislative practice relating to the law in respect of sale of goods. It is argued that "sale of goods" and "taxes on sale of goods" are distinct matters, each having its own incidents, that the scope and object of legislation in respect of the two topics are different, that while the purpose of a law relating to sale of goods is to define the rights of parties to a contract, that of a law relating to tax on sale of goods is to bring money into the coffers of the State, and that, accordingly, legislative practice with reference to either topic cannot be of much assistance with reference to the other. Now, it is true that the object and scope of the two laws are different, and if there was any difference in the legislative practice with reference to these two topics, we should, in deciding the question that is now before us, refer more appropriately to that relating to sales-tax legislation rather than that relating to sale of goods. But there was, at the time when the Government of India Act was enacted, no law relating to sales-tax either in England or in India. The first sales-tax law to be enacted in India is the Madras General Sales Tax Act, 1939, and that was in exercise of the power conferred by Entry 48. In England, a purchase tax was introduced for the first time only by the Finance Act No. 2 of 1940. The position, therefore, is that Entry 48 introduces a topic of legislation with respect to which there was no legislative practice.

In the absence of legislative practice with reference to sales-tax in this country or in England, counsel for the appellant and the States sought support for their contention in the legislative practice of Australia and America relating to that topic. In 1930, the Commonwealth Sales Tax Act was enacted in Australia imposing a tax on retail sales. A question arose whether a contractor who supplied materials in execution of a works contract could be taxed as on a sale of the materials. In Sydney Hydraulic and General Engineering Co. v. Blackwood & Son (8 N.S.W.S.R. 10), the Supreme Court of New South Wales held that the agreement between the parties was one to do certain work and to supply certain materials and not an agreement for sale or delivery of the goods. Vide Irving's Commonwealth Sales Tax Law and Practice, 1950 Edn., p. 77. In 1932, the Legislature intervened and enacted in the Statute of 1930, a new provision, section 3(4), in the following terms :

> "For the purpose of this Act, a person shall be deemed to have sold goods if, in the person shall be deemed to have sold goods if, in the performance of any contract (not being a contract for the sale of goods) under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person."

After this, the question arose in M. R. Hornibrook (Pty.) Ltd. v. Federal Commissioner of Taxation ([1939] 62 C.L.R. 272) whether a contractor who fabricated piles and used them in constructing a bridge was liable to pay sales-tax on the value of he piles. The majority of the Court held that he was. Latham C.J. put his decision on the ground that though there was, in fact, no sale of the piles, in law there was one by reason of section 3(4) of the Act. Now, the judgment of the learned Chief Justice is really adverse to the appellant in that it decides that under the general law and apart from section 3(4) there was no sale of the materials and that it was only by reason of the deeming provision of section 3(4) that it became a taxable sale. The point to be noted is that under the Australian Constitution the power to legislate on the items mentioned in section 51 of the Constitution Act is vested exclusively in the Commonwealth Parliament. Item (ii) in section 51 is "Taxation; but so as not to discriminate between States or parts of States". Subject to this condition, the power of Parliament is plenary and absolute, and in exercise of such a power it could impose a tax on the value of the materials used by a contractor in his works contracts; and it could do that whether the transaction amounts in fact to a sale or not. It is no doubt brought under the Sales Tax Act, it being deemed to be a sale; but that is only as a matter of convenience. In fact, two of the learned Judges in M. R. Hornibrook (Pty.) Ltd. v. Federal Commissioner of Taxation ([1939] 62 C.L.R. 272) rested their decision on the ground that the use of materials in the construction was itself taxable under the Act. But under the Government of India Act, the Provincial Legislature is competent to enact laws in respect of the matters enumerated in Lists II and III, and though the entries therein are to be construed liberally and in their widest amplitude, the law must, nevertheless, be one with respect to those matters. A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be intra vires, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales.

The position in the American law appears to be the same as in Australia. In Blome Co. v. Ames ([1937] 111 A.L.R. 940), the Supreme Court of Illinois held that a sales-tax was leviable on the value of materials used by a contractor in the construction of a building or a fixture treating the transaction as one of sale of those materials. But this decision was overruled by a later decision of the same Court in Herlihy Mid-Continent Co. v. Nudelman ([1937] 115 A.L.R. 485), wherein it was held that there was no transfer of title to the materials used in construction work as goods, and that the provisions of the Sales Tax Act had accordingly no application. This is in accordance with the generally accepted notion of sale of goods. This, of course, does not preclude the States in exercise of their sovereign power from imposing tax on construction works in respect of materials used therein. Thus, the position is that in 1935 there was no legislative practice relating to sales-tax either in England or India, and that in America and Australia, tax on the supply of materials in construction works was imposed but that was in exercise of the sovereign powers of the legislature by treating the supply as a sale. But apart from such legislation, the expression "sale of goods" has been construed as having the meaning which it has in the common law of England relating to sale of goods, and it has been held that in that sense the use of materials in construction works is not a sale. This rather supports the conclusion that "sale" in Entry 48 must be construed as having the same meaning which it has in the Indian Sale of Goods Act, 1930.

> (3) It is next contended by Mr. Sikri that though the word "sale" has a definite sense in the Indian Sale of Goods Act, 1930, it has a wider sense in law other than that relating to sale of goods, and that, on the principle that words conferring legislative powers should be construed in their broadest amplitude, it would be proper to attribute that sense to it in Entry 48. It is argued that in its wider sense the expression "sale of goods" means all transactions resulting in the transfer of title to goods from

> one person to another, that a bargain between the parties was not an essential element thereof, and that even involuntary sales would fall within its connotation. He relied in support of this position on various dicta in Ex Parte Drake In re Ware ([1877] 5 Ch.D. 866), Great Western Railway Co. v. Commissioners of Inland Revenue ([1894] 1 Q.B. 507, 512, 515), The Commissioners of Inland Revenue v. Newcastle Breweries Ltd. ([1927] 12 Tax Cas. 927), Kirkness v. John Hudson & Co. Ltd. ([1955] A.C. 696) and Nalukuya v. Director of Lands, Native Land Trust Board of Fiji ([1957] A.C. 325). In Ex Parte Drake In re Ware ([1877] 5 Ch.D. 866), the question was whether an unsatisfied decree passed in an action on detinue extinguished the title of the decree-holder to the thing detained. In answering it in the negative, Jessel M.R. observed :
>
> "The judgments in Brinsmead v. Harrison ([1872] L.R. 7 C.P. 547), and especially that of Mr. Justice Willes, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the Plaintiff's goods to the Defendant."

He went on to state that such sale took place when the value of the goods is paid to the owner. In Great Western Railway Co. v. Commissioner of Inland Revenue ([1894] 1 Q.B. 507, 512, 515), an Act of Parliament had provided for the dissolution of two companies under a scheme of amalgamation with a third company under which the shareholders were to be given in exchange for their shares in the dissolved companies, in the case of one company, stock in the third company in certain specified proportions, and in the other, discharge of debentures on shares already held by them in the third company. The question was whether a copy of the Act had to be stamped ad valorem as on conveyance on sale under the first schedule to the Stamp Act, 1891. The contention of the company was that there was no sale by the shareholders of their shares to it, and that the provision in question had accordingly no application. In rejecting this contention, Esher M.R. observed :

> "Turning to the Stamp Act, the words used are 'a conveyance on sale'. Does that expression mean a conveyance where there is a definite contract of purchase and sale preceding it ? Is that the way to construe the Stamp Act, or does it mean a conveyance the same as if it were upon a contract of purchase and sale ? The latter seems to me to be the meaning of the phrase as there used."

Kay L.J. said :

> "And we must remember that the Stamp Act has nothing to do with contracts or negotiations; it stamps a conveyance upon a sale, which is the instrument by which the property is transferred upon a sale."

This is a decision on the interpretation of the particular provision of the Stamp Act, and is not relevant in determining the meaning of sale under the general law. And, if anything, the observations above quoted emphasise the contrast between the concept of sale under the general law and that which is embodied in the particular provision of the Stamp Act.

In The Commissioner of Inland Revenue v. Newcastle Breweries Ltd. ([1927] 12 Tax Cas. 927), the point for decision was whether payments made by the Admiralty to the respondent company which was carrying on business as brewers, on account of stocks of rum taken over by it compulsorily

under the Defence of Realm Regulations were liable to be assessed as trade receipts to excess profits duty. The contention of the company was that the acquisition by the Admiralty was not a sale, that the payments made were not price of goods sold but compensation for interference with the carrying on of business by it, and that accordingly the amounts could not be held to have been received in the course of trade or business. In rejecting this contention, Viscount Cave L.C. observed :

> "If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the Appellant's profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle."

In Kirkness v. John Hudson & Co. Ltd. ([1955] A.C. 696), the facts were that railway wagons belonging to the respondent company were taken over by the Transport Commission compulsorily in exercise of the powers conferred by section 29 of the Transport Act, 1947, and compensation was paid therefor. The question was whether this amount was liable to income-tax on the footing of sale of the wagons by the company. The contention on behalf of the Revenue was that compulsory acquisition being treated as sale under the English law, the taking over of the wagons and payment of compensation therefor must also be regarded as sale for purpose of income-tax. Lord Morton in agreeing with this contention observed :

> "........ the question whether it is a correct use of the English language to describe as a 'sale' a transaction from which the element of mutual assent is missing is no doubt an interesting one. I think, however, that this question loses its importance for the purpose of the decision of this appeal when it is realized that for the last 100 years transactions by which the property of A has been transferred to B, on payment of compensation to the owner but without the consent of the owner, have been referred to many times, in Acts of Parliament, in opinions delivered in this House, in judgments of the Court of Appeal and the High Court of Justice, and in textbooks as a 'sale' - generally as a 'compulsory sale'........
>
> "The case of Newcastle Breweries Ld. v. Inland Revenue Commissioners ([1927] 96 L.J.K.B. 735), referred to later, affords a striking modern instance of the use of the word 'sale' as applied to compulsory taking of goods..........."
>
> "In these circumstances, whether this use of the word 'sale' was originally correct or incorrect, I find it impossible to say that the only construction which can fairly be given to the word 'sold' in section 17(1)(a) of the Income Tax Act, 1945, is to limit it to a transaction in which the element of mutual assent is present."

But the majority of the House came to a different conclusion, and held that the element of bargain was essential to constitute a sale, and to describe compulsory taking over of property as a sale was a misuse of that word.

In Nalukuya v. Director of Lands, Native Land Trust Board of Fiji, Intervener ([1957] A.C. 325), it was held by the Privy Council that compensation money payable on the compulsory acquisition of land was covered by the words "the purchase money received in respect of a sale or other disposition of native land" in section 15 of the Native Land Trust Ordinance, c. 86 of 1945, Fiji. The decision, however, proceeded on the particular terms of the statute, and does not affect the decision in Kirkness v. John Hudson & Co. Ltd. ([1955] A.C. 696) that mutual assent is an element of a transaction of sale.

It should be noted that the main ground on which the decision of Lord Morton rests is that compulsory acquisition of property had been described in the legislative practice of Great Britain as compulsory sales. The legislative practice of this country, however, has been different. The Land Acquisition Act, 1894, refers to the compulsory taking over of immoveable property as acquisition. In List II of the Government of India Act, this topic is described in Entry 9 as "compulsory acquisition of land." In the Constitution, Entry 42 in List III is "acquisition and requisition of property." The ratio on which the opinion of Lord Morton is based has no place in the construction of Entry 48, and the law as laid down by the majority is in consonance with the view taken by this Court that bargain is an essential element in a transaction of sale. Vide Poppatlal Shah v. The State of Madras ([1953] S.C.R. 677, 683) and The State of Bombay v. The United Motors (India) Ltd. ([1953] S.C.R. 1069, 1078). It is unnecessary to discuss the other English cases cited above at any length, as the present question did not directly arise for decision therein, and the decision in Kirkness v. John Hudson & Co. Ltd. ([1955] A.C. 696) must be held to conclude the matter.

Another contention presented from the same point of view but more limited in its sweep is that urged by the learned Solicitor-General of India, the Advocate-General of Madras and the other counsel appearing for the States, that even in the view that an agreement between the parties was necessary to constitute a sale, that agreement need not relate to the goods as such, and that it would be sufficient if there is an agreement between the parties and in the carrying out of that agreement there is transfer of title in movables belonging to one person to another for consideration. It is argued that Entry 48 only requires that there should be a sale, and that means transfer of title in the goods, and that to attract the operation of that Entry it is not necessary that there should also be an agreement to sell those goods. To hold that there should be an agreement to sell the goods as such is, it is contended, to add to the Entry, words which are not there.

We are unable to agree with this contention. If the words "sale of goods" have to be interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. It has been already stated that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law.

(4) It was finally contended that the words of a Constitution conferring legislative

power should be construed in such manner as to make it flexible and elastic so as to enable that power to be exercised in respect of matters which might be unknown at the time it was enacted but might come into existence with the march of time and progress in science, and that on this principle the expression "sale of goods" in Entry 48 should include not only what was understood as sales at the time of the Government of India Act, 1935, but also whatever might be regarded as sale in the times to come. The decisions in Attorney-General v. Edison Telephone Company, London ([1880] L.R. 6 Q.B.D. 244), Toronto Corporation v. Bell Telephone Company of Canada ([1905] A.C. 52), The Regulation and Control of Radio communication in Canada, In re ([1932] A.C. 304) and The King v. Brislan : Ex Parte Williams ([1935] 54 C.L.R. 262) were quoted as precedents for adopting such a construction. In Attorney-General v. Edison Telephone Company of London ([1880] L.R. 6 Q.B.D. 244), the question was whether the Edison Telephone Company, London, had infringed the exclusive privilege of transmitting telegrams granted to the Postmaster-General under an Act of 1869 by installation of telephones. The decision turned on the construction of the definition of the word "telegraph" in the Acts of 1863 and 1869. It was contended for the Company that telephones were unknown at the time when those Acts were passed and therefore could not fall within the definition of "telegraph". The Court negatived this contention on the ground that the language of the definition was wide enough to include telephones. Toronto Corporation v. Bell Telephone Company of Canada ([1905] A.C. 52) is a decision on section 92(10)(a) of the British North America Act, 1867, under which the Dominion Parliament had the exclusive competence to pass laws in respect of "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province". The question was whether a law incorporating a telephone company and conferring on it powers to enter upon streets and highways vested in a municipal corporation was intra vires the powers of the Dominion Parliament under the above provision, and whether in consequence a provision in an Ontario Act requiring the consent of the municipal authorities for the carrying out of those operations was ultra vires. It was held by the Privy Council that the Parliament of Canada was competent to enact the impugned law under section 92(10)(a) and that, therefore, it prevailed over the Provincial Act. This decision, however, would seem to have been reached on the words "other works and undertakings" in the section.

In The Regulation and Control of Radio Communication in Canada, In re ([1932] A.C. 304), the question was whether broadcasting was covered by the expression "telegraph and other works and undertakings" in section 92(10)(a) of the Constitution Act, 1867. The Privy Council answered it in the affirmative on the grounds, firstly, that broadcasting was an "undertaking connecting the province with other provinces and extending beyond the limits of the province", and, secondly, that it fell within the description of "telegraph". In The King v. Brislan : Ex Parte Williams ([1935] 54 C.L.R. 262), the question was whether a law of the Commonwealth Parliament with respect to radio broadcasting was one with respect to "Postal, telegraphic, telephonic and other like services" under section 51(5) of the Australian Commonwealth Act, and it was answered in the affirmative.

The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In

that situation, "it is not", as observed by Lord Wright in James v. Commonwealth of Australia ([1936] A.C. 578, 614), "that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning". The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts. Clearly, this principle has no application to the present case. Sales-tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry 48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression "sale of goods" must be construed in the sense which it has in the Indian Sale of Goods Act.

A contention was also urged on behalf of the respondents that even assuming that the expression "sale of goods" in Entry 48 could be construed as having the wider sense sought to be given to it by the appellant and that the provisions of the Madras General Sales Tax Act imposing a tax on construction contracts could be sustained as within that entry in that sense, the impugned provisions would still be bad under section 107 of the Government of India Act, and the decision in D. Sarkar & Bros. v. Commercial Tax Officer (A.I.R. 1957 Cal. 283) was relied on in support of this contention. Section 107, so far as is material, runs as follows :

> 107 - (1) "If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.
>
> (2) Where a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General had received the assent of the Governor-General, the provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

Now, the argument is that the definition of "sale" given in the Madras General Sales Tax Act is in conflict with that given in the Indian Sale of Goods Act, 1930, that the sale of goods is a matter falling within Entry 10 of the Concurrent List, and that, in consequence, as the Madras General Sales Tax (Amendment) Act, 1947, under which the impugned provisions had been enacted, had not been reserved for the assent of the Governor-General as provided in section 107(2), its provisions are bad to the extent that they are repugnant to the definition of "sale" in the Indian Sale of Goods Act, 1930. The short answer to this contention is that the Madras General Sales Tax Act is a law relating not to sale of goods, but to tax on sale of goods, and that it is not one of the matters enumerated in the Concurrent List or over which the Dominion Legislature is competent to enact a law, but is a matter within the exclusive competence of the Province under Entry 48 in List II. The only question that can arise with reference to such a law is whether it is within the purview of that Entry. If it is, no question of repugnancy under section 107 can arise. The decision in D. Sarkar & Bros. v. Commercial Tax Officer (A.I.R. 1957 Cal. 283) on this point cannot be accepted as sound.

It now remains to deal with the contention pressed on us by the States that even if the supply of materials under a building contract cannot be regarded as a sale under the Indian Sale of Goods Act, that contract is nevertheless a composite agreement under which the contractor undertakes to supply materials, contribute labour and produce the construction, and that it is open to the State in execution of its tax laws to split up that agreement into its constituent parts, single out that which relates to the supply of materials and to impose a tax thereon treating it as a sale. It is said that this is a power ancillary to the exercise of the substantive power to tax sales, and reliance is placed on the observations in The United Province v. Atiqa Begum ([1940] F.C.R. 110, 134) and Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City ([1955] 1 S.C.R. 829, 833, 836) at p. 836. The respondents contend that even if the agreement between the parties could be split up in the manner suggested for the appellant, the resultant will not be a sale in the sense of the Indian Sale of Goods Act, as there is in a works contract neither an agreement to sell materials as such, nor does property in theme pass as movables.

The nature and incidents of works contracts have been the subject of consideration in numerous decisions of the English courts, and there is a detailed consideration of the points now under discussion, in so far as building contracts, are concerned, in Hudson on Building Contracts, 7th Ed., pp. 386-389 and as regards chattels, in Benjamin on Sale, 8th Ed., pp. 156-168 and 352-355. It is therefore sufficient to refer to the more important of the cases cited before us. In Tripp v. Armitage ([1839] 4 M & W. 687; 150 E.R. 1597), one Bennett, a builder, had entered into an agreement with certain trustees to build a hotel. The agreement provided inter alia that the articles which were to be used for the structure had to be approved by the trustees. Subsequently, Bennett became bankrupt, and the dispute was between his assignees in bankruptcy, and trustees as regards title to certain wooden sash-frames which had been approved on behalf of the trustees but had not yet been fitted in the building. The trustees claimed them on the ground that property therein, had passed to them when once they had approved the same. In negativing this contention, Lord Abinger C.B. observed :

> "...... this is not a contract for the sale and purchase of goods as movable chattels; it is a contract to make up materials, and to fix them; and until they are fixed, by the nature of the contract, the property will not pass."

Parke B. observed :

> "...... but in this case, there is no contract at all with respect to these particular chattels - it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house, subject to the approbation of a surveyor; and it was never intended by this contract, that the articles so to be fixed should become the property of the defendants, until they were fixed to the freehold."

In Clark v. Bulmer ([1843] 11 M & W 243; 152 E.R. 793), the plaintiff entered into a contract with the defendant "to build an engine of 100 horse power for the sum of Pounds 2,500, to be completed and fixed by the middle or end of December". Different parts of the engine were constructed at the plaintiff's manufactory and sent in parts to the defendant's colliery where they were fixed piecemeal and were made into an engine. The suit was for the recovery of a sum of Pound 3,000 as price for "a main engine and other goods sold and delivered". The contention of the defendant was that there was no contract of sale, and that the action should have been one for work and labour and materials used in the course of that work and not for price of goods sold and delivered. In upholding this contention, Parke B. observed :

> "The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold; there was no sale of it, as an entire chattel, and delivery in that character; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be deemed goods sold and delivered, for there was no contract for the sale of them as moveable goods; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine."

In Seath v. Moore ([1886] 11 App. Cas. 350), the facts were similar to those in Tripp v. Armitage ([1839] 4 M & W. 687; 150 E.R. 1597). A firm of engineers, A. Campbell & Son, had entered into five agreements with the appellants, T. B. Seath and Co., who were ship-builders to supply engines, boilers and machinery required for vessels to be built by them. Before the completion of the contracts, A. Campbell & Son became bankrupt, and the dispute was as regards the title to machinery and other articles which were in the possession of the insolvents at the time of their bankruptcy but which had been made for the purpose of being fitted into the ships of the appellants. It was held by the House of Lords approving Tripp v. Armitage ([1839] 4 M & W. 687; 150 E.R. 1597) that there had been no sale of the machinery and parts as such, and that therefore they vested in the assignee. For the appellant, reliance is placed on the following observations of Lord Watson at p. 380 :

> "The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property."

It is to be noted that even in this passage the title to the parts is held to pass not under any contract but on the principle of accretion. The respondents rely on the following observations at p. 381 as furnishing the true ground of the decision :

> "There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold', unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in Wood v. Bell ([1856] 6 E. & B. 355; 119 E.R. 669). In Woods v. Russell ([1822] 5 B. & Al. 942; 106 E.R. 1436). the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord chief Justice Jervis, delivering the judgment of the Court in Wood v. Bell ([1856] 6 E. & B. 355; 119 E.R. 669), who stated the real question to be 'what is the ship, not what is meant for the ship', and that only the things can pass with the ship 'which have been fitted to the ship and have once formed part of her,

> although afterwards removed for convenience'. I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in Tripp v. Armitage ([1839] 4 M & W. 687; 150 E.R. 1597)".

In Reid v. Macbeth & Gray ([1904] A.C. 223), the facts were that a firm of ship-builders who had agreed to build a ship became bankrupt. At the date of the bankruptcy, there was lying at railway stations a quantity of iron and steel plates which were intended to be fixed in the ship. The dispute was between the assignee in bankruptcy and the shipowners as to the title to these articles. It was held by the House of Lords following Seath v. Moore ([1886] 11 App. Cas. 350) and in particular the observations of Lord Watson at p. 381 that the contract was one for the purchase of a complete ship, and that under that contract no title to the articles in question passed to the shipowners. The following observation of Lord Davey are particularly appropriate to the present question :

> "There is only one contract - a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatim; and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case."

If in a works contract there is no sale of materials as defined in the Sale of Goods Act, and if an action is not maintainable for the value of those materials as for price of goods sold and delivered, as held in the above authorities, then even a disintegration of the building contract cannot yield any sale such as can be taxed under Entry 48.

The decision in Love v. Norman Wright (Builders) Ld. ([1944] 1 K.B. 484, 487), cited by the appellant does not really militate against this conclusion. There, the defendants to the action had agreed with the Secretary of State to supply black-out curtains and curtain rails, and fix them in a number of police stations. In their turn, the defendants had entered into a contract with the plaintiffs that they should prepare those curtains and rails and erect them. The question was whether the sub-contract was one for sale of goods or for work and services. In deciding that it was the former, Goddard L.J. observed :

> "If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office."

It will be seen that in this case there was no question of an agreement to supply materials as parcel of a contract to deliver a chattel; the goods to be supplied were the curtains and rails which were the subject-matter of the contract itself. Now was there any question of title to the goods passing as an accretion under the general law, because the buildings where they had to be erected belonged not to the defendants but to the Government, and therefore as between the parties to the contract, title could pass only under their contract.

The contention that a building contract contains within it all the elements constituting a sale of the materials was sought to be established by reference to the form of the action, when the claim is in quantum meruit. It was argued that if a contractor is prevented by the other party to the contract from completing the construction he has, as observed by Lord Blackburn in Appleby v. Myres

([1867] L.R. 2 C.P. 651), a claim against that party, that the form of action in such a case is for work done and materials supplied, as appears from Bullen & Leake's Precedents of Pleadings, 10th Ed., at pp. 285-286, and that showed that the concept of sale of goods was latent in a building contract. The answer to this contention is that a claim for quantum meruit is a claim for damages for breach of contract, and that the value of the materials is a factor relevant only as furnishing a basis for assessing the amount of compensation. That is to say, the claim is not for price of goods sold and delivered but for damages. That is also the position under section 65 of the Indian Contract Act.

Another difficulty in the way of accepting the contention of the appellant as to splitting up a building contract is that the property in materials used therein does not pass to the other party to the contract as movable property. It would so pass if that was the agreement between the parties. But if there was no such agreement and the contract was only to construct a building, then the materials used therein would become the property of the other party to the contract only on the theory of accretion. The position is thus stated by Blackburn J. at pp 659-660 in Appleby v. Myres ([1867] L.R. 2 C.P. 651) :

> "It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a well become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become a part of the coat or the ship."

When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle quicquid plantatur solo, solo credit and it vests in the other party not as a result of the contract but as the owner of the land. Vide Hudson on Building Contracts, 7th Edn., p. 386. It is argued that the maxim, what is annexed to the soil goes with the soil, has not been accepted as a correct statement of the law of this country, and reliance is placed on the following observations in the Full Bench decision of the Calcutta High Court in Thakoor Chunder Poramanick v. Ramdhone Bhuttacharjee ([1866] 6 W.R. 228) :

> "We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, - the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

The statement of the law was quoted with approval by the Privy Council in Beni Ram v. Kundan Lall ([1899] L.R. 26 I.A. 58) and in Narayan Das Khettry v. Jatindranath ([1927] L.R. 54 I.A. 218). But these decisions are concerned with rights of persons who, not being trespassers, bona fide put up constructions on lands belonging to others, and as to such persons the authorities lay down that the maxim recognised in English law, quicquid plantatur solo, solo credit has no application, and that they have the right to remove the superstructures, and that the owner of the land should pay compensation if he elects to retain them. That exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract. It

may be, as was suggested by Mr. Sastri for the respondents, that when the thing to be produced under the contract is moveable property, then any material incorporated into it might pass as movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables.

To sum up, the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible - and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.

This conclusion entails that none of the legislatures constituted under the Government of India Act, 1935, was competent in the exercise of the power conferred by section 100 to make laws with respect to the matters enumerated in the Lists, to impose a tax on construction contracts and that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor-General under section 104 of the Act. And it must be conceded that a construction which leads to such a result must, if that is possible, be avoided. Vide Manikkasundara v. R. S. Nayudu ([1946] F.C.R. 67, 84). It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt, Art. 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the Centre should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression "sale of goods" in Entry 48 a wider meaning than what it has in the Indian Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the Centre, the Constitution might have given an inclusive definition of "sale" in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48.

To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building contracts, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such case, there are really two agreement, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.

In the result, the appeal fails, and is dismissed with costs.

Appeal dismissed.

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