State of Orissa and Others

Vs

Titaghur Paper Mills Company Limited and Another

State of Orissa and Others

Vs

Mangalji Mulji Khara and Others

Civil appeals nos. 219 and 220 of 1982.

(V. D. Tulzapurkar, A. N. Sen, D. P. Madon JJ)

01.03.1985

JUDGMENT

MADON, J. -

1. These two appeals by special leave granted by this Court are against the judgment and order of the Orissa High Court allowing 209 writ petitions under Article 226 of the Constitution of India filed before it.

Genesis of the Appeals :

2. On May 23, 1977, the Government of Orissa in the Finance Department issued two notifications under the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947). We will hereinafter for the sake of brevity refer to this Act as "the Orissa Act". These notifications were Notification S. R. O. No. 372 of 1977 and Notification S. R. O. No. 373 of 1977. Notification S. R. O. No. 372 of 1977 was made in exercise of the powers conferred by Section 3-B of the Orissa Act and Notification S. R. O. No. 373 of 1977 was made in exercise of the powers conferred by the first proviso to sub-section (1) of Sections 5 of the Orissa Act. We will refer to these notifications in detail in the course of this judgment but for the present suffice it to say that Notification S. R. O. No. 372 of 1977 amended Notification No. 20209-CTA-14/76-F dated April 23, 1976, and made bamboos agreed to be severed and standing trees agreed to be severed liable to tax on the turnover of purchase with effect from June 1, 1977, while Notification S. R.

3. As many as 209 writ petitions under Article 226 of the Constitution of India were filed in the High Court of Orissa challenging the validity of the aforesaid two notifications dated May 23, 1977, and the said Entries 2 and 17 in each of the sad two notifications dated December 29, 1977 (hereinafter collectively referred to as "the impugned provisions"). The petitioners before the High Court fell into two categories. The first category consisted of those who had entered into agreements with the State of Orissa for the purpose of felling, cutting, obtaining and removing bamboos from forest areas "for the purpose of converting the bamboo into paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith". This agreement will be hereinafter referred to as "the Bamboo Contract". The other group consisted of those who had

entered into agreements for the purchase of standing trees. We will hereinafter refer to this agreement as "the Timber Contract". All the Bamboo

4. Each of the present two appeals has been filed by the State of Orissa, the Commissioner of Sales Tax, Orissa, and the Sales Tax Officer concerned in the matter, challenging the correctness of the said judgment of the High Court. The respondents in Civil Appeal 219 of 1982 are the Titaghur Paper Mills Company Limited (hereinafter referred to as "the respondent Company") and one Kanak Ghose, a shareholder and director of the respondent Company. The respondents in Civil Appeal 220 of 1982 are Mangalji Mulji Khara, a partner of the firm of Messrs. M. M. Khara, and the said firm. The Chief Conservator of Forests, Orissa, the Divisional Forest Officer, Rairkhol Division, and the Divisional Forest Officer, Deogarh Division, have also been joined as pro forma respondents to the said appeal.

Facts of C. A. No. 219 of 1982 :

5. The respondent Company is a public limited company. Its registered office is situate at Calcutta in the State of West Bengal. The respondent Company carries on inter alia the business of manufacturing paper. For this purpose it owned at the relevant time three paper mills - one at Titaghur in the State of West Bengal, the second at Kankinara also in the State of West Bengal, and the third at P. O. Choudwar, Cuttack District, in the State of Orissa. For the purpose of obtaining raw materials for its business of manufacturing paper, the respondent Company entered into a Bamboo Contract dated January 20, 1974, with the State of Orissa. This agreement was effective for a period of fourteen years from October 1, 1966, in respect of Bonai Main Areas of Bonai Division; for a period of thirteen years with effect from October 1, 1967, in respect of Kusumdih P. S. Bonai Division; and for a period of eleven years with effect from October 1, 1969, in respect of Gurundia Rusinath P. S. of Bonai Division, with an optio

6. After the said two notifications dated May 23, 1977, were issued, the Sales Tax Officer, Dhenkanal Circle, Angul, Ward A (The third appellant in Civil Appeal No. 219 of 1982) issued to the manager of the respondent Company's mill at P. O. Choudwar a notice dated August 18, 1977, under Rules 22 and 28(2) of the Orissa Sales Tax Rules, 1974, stating that though the respondent Company's gross turnover during the year immediately preceding June 1, 1977, had exceeded Rs. 25,000, it had without sufficient cause failed to apply of registration as a dealer under Section 9 of the Orissa Act and calling upon him to submit within one month a return in Form IV of the forms appended to the said rules, showing the particulars of "turnover for the quarter ending 76-77 & 6/77". By the said notice the said manager was required to attend in person or by agent at the Sales Tax Office at Angul on October 30, 1977, and to produce or cause to be produced the accounts and documents specified in the said notice and to show cause

7. The principal contentions raised in the said writ petitions were that the subject-matter of the Bamboo Contract was not a sale or purchase of goods but was a lease of immovable property or in any event was the creation of an interest in immovable property by way of grant of profit a prendre which according to the respondent Company amounted in Indian law to an easement under the Indian Easements Act, 1882 (Act 5 of 1882), and that for the said reason the mounts of royalty payable under the Bamboo Contract could not be made exigible to either sales tax or purchase tax in the exercise of the legislative competence of the State, and, therefore, the impugned provisions were unconstitutional and ultra vires the Orissa Act. It was further contended that the Bamboo Contract was a works contract and for the said reason also the transaction covered by it was not exigible to sales tax or purchase tax. It was also contended that as the said notifications dated December 29,

1977, were expressed to be made in superses

8. In addition to the said two writ petitions filed by the respondent Company and the said Kanak Ghosh, three other writ petitions were also filed by other parties who had entered into Bamboo Contracts with the State of Orissa in which similar contentions were raised and reliefs claimed. The record is not clear whether any assessment order was made against the respondent Company in pursuance of the said notice or whether further proceedings in pursuance of the said notice where stayed by the High court by an interim order. As mentioned earlier, by the said common judgment by an interim order. As mentioned earlier, by the said common judgment delivered by the High Court, the said writ petitions were allowed. As a natural corollary of the High Court quashing the impugned provisions it ought to have also quashed the said notice dated August 18, 1977, and the assessment order, if any, made in pursuance thereof. The High Court, however, did not do so, perhaps because as it heard and decided all the said 209 writ

Facts of C. A. No. 220 of 1982 :

9. Messrs. M. M. Khara, the second respondent to Civil Appeal 220 of 1982 (hereinafter referred to as "the respondent Firm"), as a partnership firm of which the first respondent to the said appeal, Mangalji Mulji Khara, is a partner. The respondent Firm carried on business at P. O. Sambalpur in the District of Sambalpur in the State of Orissa and was registered as a dealer both under the Orissa Act and the Central Sales Tax Act, 1956 (Act 74 of 1956), with the Sales Tax Officer, Sambalpur I Circle. The business of the respondent Firm so far as concerned this appeal consisted of bidding at auctions held by the Government of Orissa in respect of trees standing in forest areas and if it was the highest bidder, entering into an agreement with the Government for felling and removing such trees and in its turn selling the trees felled by it in the shape of logs to others. The procedure followed by the State of Orissa in giving forest areas was to publish notices of proposed auction sales of timber and other forest

10. During he relevant period, the respondent Firm was successful at five auction sales held by the State of Orissa. Its bids were ratified by he State Government. The respondent Firm also entered into five separate agreements (hereinafter referred to as "Timber Contracts") for felling and removing trees standing in such forest areas. Three of the said five Timber Contracts were for the period October 31, 1977 to January 31, 1979, the fourth was for the period October 1, 1977 to December 31, 1978, and the fifth was for the period October 28, 1977 to July 31, 1979.

11. After the said notifications dated May 23, 1977 were issued, the respondent Firm along with its said partner Mangalji Mulji Khara filed a writ petition in the Orissa High Court, being O. J. C. 1048 of 1977, against the State of Orissa, Commissioner of Commercial Taxes, Orissa Sales Tax Officer, Sambalpur Circle, Divisional Forest Officer, Rairkhol Division, and Divisional Forest Officer, Deogarh Division. Two main grounds were taken in the said writ petition, namely, (1) the levy of a purchase tax on standing timber agreed to be severed was beyond the legislative competence of the State Legislature and (2) the said notifications imposed a tax both at the point of sale and point of purchase and were, therefore, invalid and ultra vires the Orissa Act. It was also contended that the power conferred upon the State Government under Section 3-B of the Orissa Act to declare any goods or class of goods to be liable to tax on the turnover of purchase as also the power conferred upon the State Government to specif on were for quashing the said two notifications dated May 23, 1977.

12. While the said writ petition was pending, the Sales Tax Officer, Sambalpur I Circle, by his

assessment order dated November 28, 1978, assessed the respondent Firm to tax under the Orissa Act for the period April 1, 1977, to March 31, 1978. He held that the respondent Firm had paid royalty to the Forest Department in the aggregate sum of Rs. 11,52,175 on which purchase tax at the rate of ten per cent was payable by it. It was further stated in the said assessment order that the respondent Firm had not shown this amount in its gross turnover. Accordingly, the Sales Tax Officer enhanced the gross turnover to include this amount. The amount of purchase tax assessed on the respondent Firm amounted to Rs. 1,16,217.50p. Thereupon, the respondent Firm and its partner amended the said writ petition O. J. C. 1048 of 1977 and challenged the validity of the said assessment order and prayed for quashing the same. On an application made by the respondent Firm and its said partner, by an interim order the High Court st

13. Apart from the respondent Firm, 203 other forest contractors who had entered into similar agreements with the State Government also filed writ petitions in the High Court challenging the validity of the impugned provisions. By its judgment under appeal, the High Court allowed the said writ petition filed by the respondent Firm.As in the case of the writ petition filed by the respondent Company and very probably for the same reason, the High Court did not pass any order quashing the said assessment order consequent upon it holding that the impugned provisions were ultra vires the Act.

Judgment of the High Court :

14. All the said 209 writ petitions were heard by a Division Bench of the Orissa High Court consisting of S. K. Ray, C. J., and N. K. Das, J. The main judgment was delivered by Das, J., while Ray, C.J., delivered a short, concurring judgment. Das, J., rejected the contention that the effect of the word 'supersession' used in the notifications dated December 29, 1977, was to wipe out the liability under the earlier notifications dated May 23, 1977. He held that the notifications dated May 23, 1977, remained in force until the notifications dated December 29, 1977, came into operation. So far as the other points raised before the High Court were concerned, Das, J., summarized the conclusions reached by the Court in paragraphs 19 and 20 of his judgment as follows :

> 19. For the reasons stated above, we hold as follows :
>
> > (1) That the bamboos and trees agreed to be severed are nothing but bamboos and timber after those are felled. When admittedly timber and bamboos are liable for taxation at the sale point, taxation of those goods at the purchase point amounts to double taxation and, as such the notifications are ultra vires the provisions of the Act;
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> > (2) The impugned notifications amount to taxation on agreements of sale, but not on sale and purchase of goods; and
> >
> > (3) In the case of bamboo exploitation contracts, the impugned notifications amount also to impost of tax on profit a prendre and, as such, are against the provisions of the Orissa Sales Tax Act.

20. In view of the aforesaid findings, we do not consider it necessary to go into the other questions raised by the petitioners, namely, whether it is a works contract and whether the notifications amount to excessive delegation, or whether there has been business of purchase by the petitioners or whether there has been restriction on trade and business.

15. In his concurring judgment Ray, C.J., agreed with Das, J., and further held that in the series of

sales in question he first sale, that is, the taxable event, started from the Divisional Forest Officer and that the Divisional Forest Officer was the taxable person who had sold taxable goods, namely, timber, and that as what was sold by the Divisional Forest Officer was purchased by the petitioners before the High Court, the identity of goods sold and purchased was the same, and that where such a sale was taxed, the purchase thereof was excluded from the levy of tax by virtue of Sections 3-B and 8 of the Orissa Act and consequently the levy of purchase tax by the impugned provisions was bad in law.

16. In view of its above findings, the High Court allowed all the writ petitions and quashed the impugned provisions. The High Court made no order as to the costs of the writ petitions.

17. We will set out the submissions advanced at the Bar at the hearing of these appeals when we deal with the various points which fall to be decided by us. In order, however, to test the correctness of the judgment of the High Court as also of the rival contentions of the parties, it is necessary to see first the relevant provisions of the Constitution of India as also of the Orissa Act and of the various notifications issued thereunder.

Constitutional provisions :

18. The Orissa Act received the assent of the Governor-General of India on April 26, 1947, and was published in the Orissa Gazette on May 14, 1947. Under Section 1(3) of the Orissa Act, section I was to come into force at once and the rest of the Orissa Act on such date as the Provincial Government may by notification in the Orissa Gazette appoint. The rest of the Orissa Act was brought into force on August 1, 1947. The Orissa Act is thus a pre-Constitution Act. At the date when it was enacted as also when it came into force, the constitutional law of India was the Government of India Act, 1935, the Legislature of a Province alone had the power to make laws for a Province or any part thereof in respect of any of the matters enumerated in List II in the Seventh Schedule to that Act, namely, the Provincial Legislative List. Entry 48 in the Provincial Legislative List provided for "Taxes on the sale of goods and on advertisements". Thus, under the Government of India Act, 1935, sales tax was an exclusively Prov

> 92-A Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

The amended Entry 54 in List II reads as follows :

> 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I.

19. We are not concerned in these appeals with the amendment made in Entry 55 in the State List by the Constitution (Forty-second Amendment) Act, 1976. We are also not concerned with Entry 92-B inserted in the Union List or with the extended meaning given to the expression "tax on the sale or purchase of goods" by the new clause (92-A) inserted in Article 366 of the Constitution whereby that expression inter alia includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, by the Constitution (Forty-Sixth Amendment) Act, 1982. We are equally not concerned in these appeals with the restrictions imposed by Article 286 of the Constitution on a State's power to levy a tax on certain classes of sales and purchases of goods.

The Orissa Act :

20. In keeping with the legislative history of fiscal measures in general, the Orissa Act has been amended several times. Thus, by the middle of July 1981 it had been amended twenty-eight times. It is needless to refer to all the provisions of the Orissa Act of the various amendments made therein except such of them as are relevant for the purpose of these appeals.

21. The Orissa Act when enacted levied a tax only on the sales of goods taking place in the Province of Orissa. By the Orissa Sales Tax (Amendment) Act, 1958 (Orissa Act 28 of 1958), a purchase tax was for the first time introduced in the State of Orissa with effect from December 1, 1958.

22. The tax under the Orissa Act is levied not on goods but on sales and purchases of goods or rather on the turnover of sales and turnover of purchases of goods of a dealer. Under Section 4(2) of Orissa Act, a dealer becomes liable to pay tax on sales and purchases with effect from the month immediately following a period not exceeding twelve months during which his gross turnover exceeded the limit specified in that sub-section which during the relevant period was Rs. 25,000. Under Section 4(3) a dealer who has become liable to pay tax under the Orissa Act continues to be so liable until the expiry of three consecutive years during each of which his gross turnover has failed to exceed the prescribed limit and such further period after the date of the said expiry as may be prescribed by the Orissa Sales Tax Rules and his liability to pay tax ceases only on the expiry of the further period so prescribed. A special liability is created by Section 4-A on a casual dealer as defined in clause (bb) of Section 2.

23. Section 2 is the definition section. Clause (c) of that section defines the term 'dealer'. The definition as it stood during the relevant period and at the date when the judgment of the High Court was delivered (omitting what is not relevant) read as follows :

> (c) "Dealer" means any person who carries on the business of purchasing or selling or supplying goods in Orissa, whether for commission, remuneration or otherwise and includes a Department of the Government which carries on such business and any firm. . .

Explanation. - The manager or agent of a dealer who resides outside Orissa and who carries on the business of purchasing or selling or supplying goods in Orissa shall, in respect of such business, be deemed to be a dealer for the purposes of this Act.

> 24. It was on the basis of the above Explanation to Section 2(c) that the notice impugned in Civil Appeal 219 of 1982 was issued to the manager of the respondent Company and he was sought to be made liable to purchase tax under the said notifications dated May 23, 1977.

25. Under the aforesaid definition of the term 'dealer', before a person can be a dealer, he must be carrying on the business of purchasing or selling or supplying goods. There was no definition of the word 'business' in the Orissa Act and the Orissa High Court had interpreted it as connoting an activity carried on with the object of making profit. By the Orissa Sales Tax (Amendment) Act, 1974 (Orissa Act 18 of 1974), a definition of 'business' was for the first time inserted as clause (b) in Section 2, the original clause (b) which defined the term 'contract' having been omitted by the Orissa Sales Tax (Amendment) Act, 1959, after the decision of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. The effect of this definition of the term 'business' was to do away with the requirement of profit motive. As a consequence of the decision of the Orissa high Court in Straw Products Limited v. State of Orissa, the above definition of the term 'dealer' in clause

(c) was substituted with retrospec

> (c) 'Dealer' means any person who carries on the business of purchasing, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and includes -

(i). . . a company,. . . firm or association which carries on such business;

> #* * * *##

Explanation I. -. . . and every local branch of the firm registered outside the State or of a company the principal office or headquarters whereof is outside the State, shall be deemed to be a dealer for the purposes of this Act.

Explanation II. - The Central Government or a State Government or any of their employees acting in official capacity on behalf of such Government, who, whether or not in the course of business, purchases, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or for other valuable consideration, shall, except in relation to any sale, supply or distribution of surplus, unserviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of this Act.

> 26. What is pertinent to note about the new definition of 'dealer' is that in the case of the Central Government, a State Government or any of their employees acting in official capacity on behalf of such Government, it is not necessary that the purchase, sale, supply or distribution of goods should be in the course of business, while in all other cases for a person to be a dealer he must be carrying on the business of purchasing, selling, supplying or distributing goods. Writ petitions challenging the validity of this amending and validating Ordinance and Act have been filed in this Court under Article 32 of the Constitution of India and are still pending. These writ petitions are Writ Petition 958 of 1979 Orient Paper Mills v. State of Orissa and Writ Petition 966 of 1979 Straw Products Limited v. State of Orissa.

27. We are concerned in these appeals only with purchases and sales of goods and not with their supply or distribution. The terms 'sale' and 'purchase' are defined in clause (g) of Section 2. Clause (g), omitting the Explanation which is not relevant for our purpose, reads as follows :

> (g) 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge and the words 'buy' and 'purchase' shall be construed accordingly;
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> # * * *##

28. The expressions 'goods', 'purchase price' and 'sale price' are defined in clauses (d), (ee) and (h) of Section 2 as follows :

> (d) 'Goods' means all kinds of movable property other than actionable claims, stocks, shares or securities and includes all growing crops, grass and things attached to or

forming part of the land which are agreed before sale or under the contract of sale to be served;

(ee) 'purchase price' means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time of or before delivery of such goods other than the cost of freight or delivery or the cost of installation when such cost is separately charged;

(h) 'Sale Price' means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof.

29. As the liability of a dealer to pay tax under the Orissa Act depends upon his gross turnover exceeding the limit prescribed by Section 4(2), it is necessary to see the definition of the expression 'gross turnover'.'Gross turnover' is defined by clause (dd) of Section 2 as follows :

(dd) 'gross turnover' means the total of "turnover of sales' and "turnover of purchases".

The expressions "turnover of sales" and "turnover of purchases" are defined in clause (i) and (j) of Section 2 as follows :

(i) 'Turnover of sales' means the aggregate of the amounts of sale prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods other than those declared under Section 3-B effected or made during a given period;

* * *##

(j) 'Turnover of purchases' means the aggregate of the amounts of purchase prices paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared under Section 3-B;

* * *##

30. So far as is material for our purpose, Section 5(1) provides for the rates at which the tax under the Orissa Act is payable. Sub-section (1) of Section 5 and the first proviso thereto as they stood prior to the Orissa Sales Tax (amendment) Ordinance, 1977, read as follows :

5. Rate of Tax. - (1) The tax payable by a dealer under this Act shall be levied at the rate of six per cent on his taxable turnover :

Provided that the State Government may, from time to time, by notification and subject to such conditions as they may impose, fix a higher rate of tax not exceeding thirteen per cent or any lower rate of tax payable under this Act on account of the sale or purchase of any goods or class of goods specified in such notification :

* * *##

> The words "at the rate of six per cent" in the main sub-section (1) were substituted for the words "at the rate of five per cent" and the words "not exceeding thirteen per cent" were substituted for the words "not exceeding ten per cent" in the first proviso thereto by the Orissa Sales Tax (Amendment) Act, 1976 (Orissa Act 7 of 1976), with effect from May 1, 1976.

31. Amongst the amendments made by the Orissa Sales Tax (Amendment) Ordinance, 1977, which were re-enacted by the Orissa Sales Tax (Amendment) Act, 1978, was the substitution of sub-section (1) of Section 5 and the first proviso thereto by a new sub-section (1). Thus, with effect from January 1, 1978, sub-section (1) reads as follows :

> 5. Rate of Tax. - (1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, not exceeding thirteen per cent, and subject to such conditions as the State Government may, from time to time, by notification, specify;
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> # * * *##

The other provisos to the said sub-section (1) are not relevant for our purpose. Sub-section (2) (A) of Section 5 defines the expression 'taxable turnover' as meaning that part of a dealer's gross turnover during any period which remains after deducting therefrom the turnover of sales and purchases specified in that sub-section.

32. Section 3-B confers upon the State Government the power to declare what goods or classes of goods would be liable to tax on the turnover of purchases. Section 3-B reads as follows :

> 3-B. Goods liable to purchase tax. - The State Government may, from time to time by notification, declare any goods or class of goods to be liable to tax on turnover of purchases :

Provided that no tax shall be payable on the sales of such goods or class of goods declared under this section.

This section was inserted in the Orissa Act with effect from December 1, 1958, by the Orissa Sales Tax (Amendment) Act, 1958.

33. As the tax under the Orissa Act is intended to be a single-point levy, Section 8 confers upon the State Government the power to prescribe points at which goods may be taxed or exempted. Section 8 provides as follows :

> 8. Power of the State Government to prescribe points at which goods may be taxed or exempted. - Notwithstanding anything to the contrary, in this Act the State Government may prescribe the points in the series of sales or purchases by successive dealers at which any goods or classes or descriptions of goods may be taxed or exempted from taxation and in doing so may direct that sales to or purchases by a person other than a registered dealer shall be exempted from taxation :

Provided that the same goods shall not be taxed at more than one point in the same series of sales or purchases by successive dealers.

Explanation. - Where in a series of sales, tax is prescribed to be levied at the first point, such point,

in respect of goods dispatched from outside the State of Orissa shall mean and shall always be deemed to have meant the first of such sales effected by a dealer liable under the Act after the gods are actually taken delivery of by him inside the State of Orissa.

Rules 93-A to 93-G of the Orissa Sales Tax Rules, 1947, prescribe the goods on which tax is payable at the first point in a series of sales. The goods so prescribed have no relevance to these appeals.

Notifications under the Act :

34. In exercise of the powers conferred by Section 3-B of the Orissa Act the State Government from time to time issued notifications declaring what goods or classes of goods were liable to tax on the turnover of purchases. As a result of the amendments made in the rates specified in sub-section (1) of Section 5 and the first proviso to that sub-section by the Orissa Sales Tax (Amendment) Act, 1976, with effect from May 1, 1976, all these notifications were superseded and a fresh list of goods declared under Section 3-B by Notification No. 20209-C. T. A.-14/76-F. dated April 23, 1976. All the notifications issued from time to time under the first proviso to sub-section (1) of Section 5 specifying the rates of purchase tax on goods declared under Section 3-B were also superseded and new rates of purchase tax in respect of the goods declared in the said new list were specified with effect from May 1, 1976, by Notification No. 20212-C. T. A.-14/76-F. dated April 23, 1976. It is these two notifications which were

Notification S. R. O. No. 372 of 1977 dated May 23, 1977

In exercise of the powers conferred by Section 3-B of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), the State Government do hereby declare that standing trees and bamboos agreed to be severed shall be liable to tax on turnover of purchase with effect from the first day of June 1977 and direct that the following amendment shall be made in the notification of government of Orissa, Finance Department No. 20209-CTA-14/76-F., dated April 23, 1976.

AMENDMENT

In the schedule to the said notification after Serial Numbers 2 and 16, the following new serial and entry shall be inserted under appropriate heading, namely :

#----------Serial No. Description of goods----------(1) (2)---------- 2-A Bamboos agreed to be served16-A Standing trees agreed to be severed.---------- ##

Notification S. R. O. No. 373 of 1977 dated May 23, 1977

In exercise of the powers conferred by the first proviso to sub-section (1) of Section 5 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), the State Government do hereby direct that the following amendment shall be made in the notification of theGovernment of Orissa, Finance Department No. 20212-CTA-14/76-F., dated April 23, 1976 and that the said amendment shall take effect from the first day of June 1977.

AMENDMENT

In the schedule to the said notification after Serial Numbers 2 and 16, the following new serial and entry shall be inserted under appropriate heading, namely :

#----------Serial No. Description of goods Rate of Tax----------(1) (2) (3)---------- 2-A Bamboos agreed to be severed Ten per cent16-A Standing trees agreed to be severed Ten per cent.----------##

35. The above two notifications were struck down by the High Court by its judgment under appeal.

36. The State Government had also issued from time to time notifications in exercise of the powers conferred by the first proviso to sub-section (1) of Section 5 prescribing a rate of tax different from the rate specified in Section 5(1) so far as sales of certain goods were concerned. As a result of the amendments made by the Orissa Sales Tax (Amendment) Act, 1976, all these notifications were superseded and new rates specified with effect from May 1, 1976, by Notification No. 20215-C. T. A.-14/76-F dated April 23, 1976. By Notification No. S. R. O. 374 of 1977 dated May 23, 1977, made in exercise of the powers conferred by the first proviso to sub-section (1) of Section 5, the State Government directed that with effect from June 1, 1977, the said, Notification No. 20215-C. T. A.-14/76-F. dated April 23, 1976, should inter alia be amended by inserting a new entry therein as Entry 86-A. By this entry the rate of sales tax on timber was enhanced to ten per cent. In view of the amendment made in sub-section (1)

Notification No. 67178-C. T. A. 135 of 1977 (Pt.)-F dated December 29, 1977

S. R. O. No. 900 of 1977. - In exercise of powers conferred by Section 3-B of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), and in Government do hereby declare that the goods mentioned in column (2) of the Schedule given below shall be liable totax on turnover of purchase, with effect from the first day of January 1978.

#SCHEDULE----------Serial No. Description of goods----------(1) (2)---------- * * * 2. Bamboos agreed to be severed * * *17. Standing trees agreed to be severed * * *----------##

37. The relevant portions of the notification specifying the rats of purchase tax read as follows :

Notification No. 67181-C. T. A. 135 of 1977-F dated December 29, 1977

S. R. O. No. 901 of 1977. - In exercise of the powers conferred by sub-section (1) of Section 5 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), as amended by the Orissa Sales Tax (Amendment) Ordinance, 1977 (Orissa Ordinance 10 of 1977) and insupersession of all previous notifications in this regard, the State Government do hereby direct that with effect from the first day of January 1978 the tax payable by a dealer under the said Act on account of the purchase of the goods specified in column(2) of the Schedule given below, shall be at the rate specified against each in column (3) thereof :

#SCHEDULE----------Serial No.

Description of goods Rate of Tax----------(1) (2) (3)---------- * * * 2. Bamboos agreed to be served Ten per cent * * *17. Standing trees agreed to be severed Ten per cent * * *----------##

38. The relevant portions of the notification specifying the rates of sales tax read as follows :

Notification No. 67184-C. T. A.-135 of 1977-F., dated December 29, 1977

S. R. O. No. 902 of 1977. - In exercise of the powers conferred by sub-section (1) of Section 5 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), as amended by the Orissa Sales Tax (Amendment) Ordinance, 1977 (Orissa Ordinance 10 of 1977) and insupersession of all previous notifications on the subject, the State Government do hereby direct that with effect from the first day of January 1978, the rate of tax payable by a dealer under the said Act on account of the sale of goods specified in column (2) of the Schedule given below shall be at the rate specified against each in column (3) thereof.

#SCHEDULE----------Sl. No. Description of goods Rate of tax----------(1) (2) (3)---------- * * *101. All other articles Seven per cent.----------##

39. Entries 2 and 17 in the Schedule to each of the said Notifications Nos. 67178-C. T. A.-135/77 (Pt.)-F and 67181-C. T. A. 135/77-F were also struck down by the High Court by its judgment under appeal.

The ambit of the Orissa State's taxing power :

40. The validity of the impugned provisions is challenged on two grounds : (1) they levy a tax on what is not a sale or purchase of goods and are, therefore, unconstitutional, and (2) assuming the subject-matter of the impugned provisions is a sale or purchase of goods, they levy a tax on the same goods both at the sale-point and purchase-point and are, therefore, ultra vires the Orissa Act. In order to test the correctness of these challenges, it is necessary to bear in mind the ambit of the Orissa State's power to levy a tax on the sale or purchase of goods. This power is subject to a twofold restriction - one constitutional; and the other, statutory. The constitutional restriction on the legislative competence of the Orissa State in this behalf is shared by it in common with all other States, while the statutory restriction is self-imposed and flows from the provisions of the Orissa Act.

41. We have already set out earlier the relevant provisions of the Government of India Act, 1935, the Constitution of India and the Orissa Act. To recapitulate, the Orissa Act is a pre-Constitution Act and the legislative competence of the Orissa Provincial Legislature to enact the Orissa Act was derived from Section 100(3) of the Government of India Act, 1935, read with Entry 48 in List II in the Seventh Schedule to that Act. After the coming into force of the Constitution of India the power of the Orissa State Legislature to enact a law imposing a tax on the sale or purchase of goods (other than newspapers) is to be found in Articles 245(1) and 246(3) of the Constitution of India read with Entry 54 of the Constitution of India. Thus, Entry 54 in the State List in the Constitution of India is,

with certain modifications, the successor entry to Entry 48 in the Provincial Legislative List in the Government of India Act, 1935.

42. While Entry 48 spoke of "taxes on the sale of goods", Entry 54 speaks of "taxes on the sale or purchase of goods". The addition of the words 'purchase' permits the State Legislature to levy a purchase tax and does not confine its taxing power merely to levying a sales tax. Sale and purchase are merely two ways of looking at the same transaction. Looked at from the point of view of the seller a transaction is a sale, while looked at from the point of view of the buyer the same transaction is a purchase.

43. Entry 48 in List II of the Seventh Schedule of the Government of India Act, 1935, came up for interpretation by this Court in S. T. O. v. M/s Budh Prakash Jai Prakash. This Court held in that case that 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 authorized the imposition of a tax only when there was a completed sale involving transfer of title. In that case the Uttar Pradesh Sales Tax Act, 1948, had been amended so as to include forward contracts in the definition of 'sale' and to provide that forward contracts should be deemed to have been completed on the date originally agreed upon for delivery. These amendments were held by this Court to be ultra vires.

44. In State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd. another Constitution Bench of this Court held that at the time when the Government of India Act, 1935, was enacted, the expression "sale of goods" was a term of well-recognized import in the general law relating to sale of goods and the legislative practice relating to that topic and, therefore, that expression must be interpreted when used in the said Entry 48 as having the same meaning as in the Sale of Goods Act, 1930. The Court further held that any attempt, therefore, to give to the expressions 'sale', 'goods' or "sale of goods" an artificial meaning or an enlarged meaning or to bring within their scope what would not be comprehended within it would be ultra vires and unconstitutional. The Court further observed (at page 413-14) :

> "... 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 and 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 that case the definition of the term 'sale' in the Madras General Sales Tax Act, 1939, was enlarged by an amendment so as to include "a transfer of property in goods involved in the execution of a works contract" and the definition of 'turnover' was expanded to include within it the amount payable for carrying out a works contract less such portion as may be prescribed. A new definition of 'works contract' inserted in the said Act by the said amendments included within its meaning inter alia the construction, fitting out, improvement or repair of any building, road, bridge or other

immovable property. The Court held the amendments to be void and beyond the legislative competence of the Madras Provincial Legislature on the ground that in the case of a building contract, which was one and indivisible, the agreement between the parties was that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefore receive payment as provided the

45. The same interpretation as was placed on Entry 48 in the Provincial Legislative List in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. was adopted by this Court while construing Entry 54 in the State List and attempts by the State Legislatures to enlarge the meaning of the expressions 'sale', 'sale of goods' or 'goods' have been held to be beyond their legislative competence : see, for instance, Bhopal Sugar Industries Ltd., M. P. v. D. P. Dube, S. T. O., Bhopal Region, Bhopal; K. L. Johar and Company v. Deputy C. T. O.; Joint C. T. O. Harbour Div. II, Madras v. Young Men's Indian Association (Regd.), Madras; and State of Maharashtra v. Champalal Kishanlal Mohta.

46. In addition to the above constitutional limitations on the Orissa State's power to tax sales or purchases of goods, there are other restrictions imposed by Sections 3-B and 8 of the Orissa Act. A State is free when there is a series of sales in respect of the same goods to tax each one of such sales or purchases in that series or to levy the tax at one or more points in such series of sales or purchases. Legislation of all States in this respect is not uniform. Some States have adopted a single-point levy; others, a two-point levy; and yet others, a multi-point levy. The State of Orissa has adopted a single-point levy. It has done this by enacting the proviso to Section 3-B and the proviso to Section 8. Under the proviso to Section 3-B no tax is payable on the sales of goods or class of goods declared under that section to be liable to tax on the turnover of purchases. The proviso to Section 8 states that "the same goods shall not be taxed at more than one point in the same series of sales or purchases b

47. As any attempt on the part of the State of impose by legislation sales tax or purchase tax in respect of what would not be a sale or a sale of goods or goods under the Sale of Goods Act, 1930, is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation, either by way of a rule or notification, would be equally unconstitutional; and so would such an act on the part of the authorities under a sales Tax Act purporting' to be done in the exercise of powers conferred by that Act or any rule made or notification issued thereunder. Similarly, where any rule or notification travels beyond the ambit of the parent Act, it would be ultra vires the Act. Equally, sales tax authorities purporting to act under an Act or under any rule made or notification issued thereunder cannot travel beyond the scope of such Act, rule or notification. Thus, the sales tax authorities under the Orissa Act cannot assess to sales tax or purchase tax a transaction which is not a sale or

Subject-Matter of the Impugned Provisions :

48. What now falls to be determined is the subject-matter of the impugned provisions. Relying upon the definition of the term 'goods' in the Sale of Goods Act, 1930, and in the Orissa Act, it was submitted on behalf of the appellant State that the subject-matter of the impugned provisions is goods and that what is made exigible to tax under the impugned provisions is a completed purchase of goods. On behalf of the contesting respondents it was submitted that by impugned provisions a new class of goods not known to law was sought to be created and made exigible to purchase tax and that this attempt on the part of the State Government was unconstitutional as being beyond its legislative competence. The High Court held that the impugned provisions amounted to a tax on an

agreement of sale and not on a sale or purchase of goods. It further held that in the case of Bamboo Contracts, the impugned provisions also amount to levying a tax on a profit a prendre.

49. The term 'goods' is defined in clause (7) of section 2 of the Sale of Goods Act as follows :

> (7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

We have already reproduced earlier the definition of 'goods' given in clause (d) of Section 2 of the Orissa Act. However, for he purposes of ready reference and comparison, we are reproducing the same here again. That definition is as follows :

> (d) "Goods" means all kinds of movable property other than actionable claims, stocks, shares or securities, and includes all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed;

What is pertinent to note, however, is that under both the definitions the term 'goods' means all kinds of moveable property (except the classes of moveable property specifically excluded) and includes growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The Transfer of Property Act, 1882 (Act 4 of 1882), does not give any definition of the term 'moveable property', but clause (36) of Section 3 of the General Clauses Act, 1879 (Act 10 of 1897), Cause (27) of the Orissa General Clauses Act, 1937 (Orissa Act 1 of 1937), and clause (9) of Section 2 of the Registration Act, 1908 (Act 16 of 1908) do. Clause (36) of Section 3 of the General Clauses Act provides as follows :

> (36) "movable property" shall mean property of every description, except immovable property.

The definition in the Orissa General Clauses Act is in identical terms. The definition in the Registration Act is as follows :

> (9) "moveable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property;

The Transfer of Property Act does not give any exhaustive definition of 'immovable property'. The only definition given therein is in Section 3 which states :

> "immovable property" does not include standing timber, growing crops or grass;

50. This is strictly speaking not a definition of the term 'immovable property' for it does not tell us what immovable property is but merely tells us what it does not include. We must, therefore, turn to other Acts where that term is defined. Clause (26) of Section 3 of the General Clauses Act defines 'immovable property' as follows :

> (26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

The definition of 'immovable property' in clause (21) of section 2 of the Orissa General Clauses Act is in the same terms. A more elaborate definition is given in clause (6) of Section 2 of the Registration Act which states :

> (6) "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

What is pertinent to note about the definitions is that things attached to the earth are immovable property. The expression "attached to the earth" is defined in Section 3 of the Transfer of Property Act as follows :

> "attached to the earth" means -
>
> (a) rooted in the earth, as in the case of trees and shrubs;
>
> (b) imbedded in the earth, as in the case of walls or buildings; or
>
> (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

51. Thus, while trees rooted in the earth are immovable property as being things attached to the earth by reason of the definition of the term 'immovable property' given in the General Clauses Act, the Orissa General Clauses Act and the Registration Act, read with the definition of the expression "attached to the earth" given in the Transfer of Property Act, standing timber is movable property by reason of it being excluded from the definition of 'immovable property' in the Transfer of Property Act and the Registration Act and by being expressly included within the meaning of the term 'moveable property' given in the Registration Act. The distinction between a tree and standing timber has been pointed out by Vivian Bose, J., in his separate but concurring judgment in the case of Smt. Shantabai v. State of Bombay as follows :

> Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of "immovable property" and "attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of "standing timber" and not of "timber tree"

Timber is well enough known to be -

> "wood suitable for building houses, bridges, ships, etc., whether on the tree or cut and seasoned." (Webster's Collegiate Dictionary).

Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practical purposes even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it

"standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical commonsense. It grew empirically from instance to instance and decision to decision until a recognizable and workable pattern emerged; and here, this is the shape it has taken.

Thus, trees which are ready to be felled would be standing timber and, therefore, moveable property. What is, however, material for our purpose is that while trees (including bamboos) rooted in the earth being things attached to the earth are immovable property and if they are standing timber are moveable property, trees (including bamboos) rooted in the earth which are agreed to be severed before sale or under the contract of sale are not only moveable property but also goods.

52. In this connection it may be mentioned that in English law there exists (or rather existed) a difference between fructus naturales and fructus industriales. Fructus naturales are natural growth of the soil, such as, grass, timber and fruit on trees, which were regarded at common law as part of the soil. Fructus industriales are fruits or crops produced "in the year, by the labour of the year" in sowing and reaping, planting, and gathering, e.g., corn and potatoes. Fructus industriales are traditionally chattels being considered the 'representative' of the labour and expense of the occupier and thing independent of the land in which they are growing and were not treated as an interest in land. Fructus naturales are regarded until severance as part of the soil and an agreement conferring any right or interest in them upon a buyer before severance was a contract or sale of an interest in land and were, therefore, governed by section 4 of the Statute of Frauds of 1677 (29 Car. II c. 3). If they were severed

53. As pointed out in Mahadeo v. State of Bombay [1959 Supp 2 SCR 339, 349 : AIR 1959 SC 735 : 1959 SCJ 1021] the distinction which prevailed in English law between fructus naturales and fructus naturales and fructus industriales does not exist in Indian law, and the only question which would fall to be considered in India is whether a transaction concerns 'goods' or 'moveable property' or 'immovable property'. The importance of this question is twofold : (1) in the case immovable property, a document of the kind specified in Section 17 of the Registration Act requires to be compulsorily registered and if it is not so registered, the consequences mentioned in Sections 49 and 50 of that act follow, while a document relating to goods or moveable property is not required to be registered; and (2) by reason of the interpretation placed on Entry 54 in List II in the Seventh Schedule to the Constitution of India by this Court a State cannot levy a tax on the sale or purchase of any property other than 'goods'.

54. The submission of the respondents that the impugned provisions levied a purchase tax on immovable property and not on goods and hence travelled beyond the taxing power of the State Government under the said Entry 54 was based upon the omission in the impugned provisions of the words "before sale or under the contract of sale". It was urged that unless these words qualified the phrase "agreed to be severed", standing trees and bamboos would not be 'goods' within the meaning of the definition of that term in the Sale of Goods Act and the Orissa Act. The High Court held that the impugned provisions amounted to levying a tax on an agreement of sale and not on actual sale or purchase. According to the High Court, no tax can be imposed unless the taxable event (namely, the transfer of property in the goods from the seller to the buyer) takes place; and standing trees (including bamboos) being unascertained goods, under the forest contracts entered into by the State Government, they continue to be the property

55. Does the absence of the words "before sale or under the contract of sale' make any difference to this position? The answer in our opinion must be in the negative. The very use of the word 'agreed' in the description of goods shows that there is to be an agreement between the buyer and the seller and under this agreement standing trees must be agreed to be severed and so also bamboos. According to the definition of 'goods' such severance may be either before sale or under the contract of sale. At the first blush, therefore, it would appear that the goods which form the subject-matter of the impugned provisions are either bamboos and standing trees agreed to be severed before sale or bamboos and standing trees agreed to be severed under the contract of sale. The question is "which one is it?". The answer to this question depends upon the distinction in law between as agreement to sell and sale. Section 4 of the Sale of Goods Act, 1930, deals with a sale and an agreement to sell and it provides as follows :

> 4. Sale and agreement to sell. - (1) A contract of sale of gods is contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a 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.

Thus, where there is a transfer from the buyer to the seller of property in the goods which are the subject-matter of the agreement to sell, the contract of sale is a sale, but when the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, it is an agreement to sell which becomes a sale when the time elapses or such conditions are fulfilled. In the first case the contract is executed, while in the second case it is executory.

56. The distinction between an agreement to sell and sale and the legal consequences flowing from each have been succinctly stated in Benjamin's Sale of Goods, paras 25-26 at page 23, as follows :

> Agreement to sell. . . . An agreement to sell is simply a contract, and as such cannot give rise to any rights in the buyer which are based on ownership or possession, but only to claims for breach of contact. In the normal case at least, so long as the property in the goods remains in the seller, they are his to deal with as he chooses (except that he may be in breach of his contract with the buyer); they are liable to seizure in distress or execution as his property; and they pass to the trustee in the event of his bankruptcy.

Sale. - The Sale of goods Act, 1979 defines a sale in the following passages : first "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"; and secondly, "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". It is therefore possible for a sale within the statutory meaning to come about in one of two ways : either by a contract which itself operates to transfer the goods from the ownership of the seller to that of the

buyer, the property passing when the contract is made; or by a contract which is initially only an agreement to sell, but is later performed or executed by the transfer of the property. In either case it is clear that the sale involves not only a contract, but also a conveyance of the property in the goods, and so it may confer on the buyer right to bring a claim in tort for wrongful interference with the goods as we

The test, therefore, is the transfer of the property in the goods, form the seller to the buyer. In order to determine whether for the impugned provisions to apply standing trees or bamboos are to be severed before sale or under the contract of sale, what is required to be ascertained, therefore, is the point of time when the property in the goods is transferred from the seller to the buyer. Under section 18 of the Sale of Goods Act, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Under Section 19, where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and for the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract, the conduct of the parties and circumstances of the case. Further, unless a different intention app

> 20. Specific goods in a deliverable state. - Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods, or both, is postponed.
>
> 21. Specific goods to be put into a deliverable state. - Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.
>
> 22. Specific goods in a deliverable state, when the seller, has to do anything thereto in order to ascertain price. - Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.
>
> 22. Sale of unascertained goods and appropriation. - (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.
>
> (2) Delivery to carrier. - Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

57. We are not concerned with Section 24 which provides when property in the goods passes to the

buyer where goods are delivered to the buyer on approval or "on sale or return" or other similar terms. The terms 'deliverable state' and 'specific goods' are defined in clauses (3) and (14) of Section 2 of the Sale of Goods Act as follows :

> (3) goods are said to be in a ('deliverable state') when they are in such state that the buyer would under the contract be bound to take delivery of them;
>
> (14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made;

58. Under the Orissa act also 'sale' is defined as meaning "transfer of property in goods" and the word 'purchase' is to be construed accordingly. The language of the impugned provisions, especially the governing words thereof, makes it clear that what is made exigible to tax is not an executory contract of sale but an executed contract of sale or in other words, not an executory contract of purchase but a completed contract of purchase. Bearing in mind the statutory provisions referred to above, it is further clear that such purchase would be complete when the standing trees or bamboos are specific goods, that is, when they are identified and agreed upon at the time the contact of sale is made, and the contract is unconditional and further such standing trees or bamboos are in a deliverable state, that is, nothing remains to be done except for the buyer to enter upon the land of the seller and to fell and remove the trees or bamboos, as the case may be, without any let or hindrance. If these factors exist,

59. The fallacy underlying the reasoning of the High Court is that it has confused the question of the interpretation of the impugned provisions with the interpretation of Timber Contracts and the Bamboo Contract. On the interpretation it placed upon the Timber Contracts it came to the conclusion that the property in the standing trees passed only after severance and after complying with the conditions of that contract and, therefore, the impugned provisions purported to levy a purchase tax on an agreement to sell. In the case of bamboos agreed to be severed, the High Court on an interpretation of the Bamboo Contract held that it was a grant of a profit a prendre and from that it further held that the impugned provisions were bad in law because they amounted to a levy of purchase tax on a profit a prendre. This approach adopted by the High Court was erroneous in law. The question of the validity of the impugned provisions had nothing to do with the legality of any action taken thereunder to make exigible to

Double taxation :

60. Another ground on which the High Court invalidated the impugned provisions was that bamboos agreed to be severed and trees agreed to be served were the same as bamboos and timber after they are felled and as bamboos and timber were liable to tax at the sale-point, the taxation of the same goods at the purchase-point amounted to double taxation and was contrary to the provisions of the Orissa Act. The general rule of construction is that a taxing statute will not be so construed as to result in taxing the same person twice in respect of the same income or transaction. There is, however, nothing to prohibit the Legislature from so enacting it. If what the High court held were correct, it would not be double taxation in the strict sense of the term because the same person is not being taxed twice in respect of the same transaction but he same transaction is being taxed twice though in different hands, that is, the seller in a transaction of sale is being subjected to sales tax and the purchaser in the same

61. We find that the High Court has misunderstood the scheme of taxation under the Orissa Act. As

the notifications dated December 29, 1977, were issued as a result of the amendments made by the Orissa Sales Tax (Amendment) Ordinance, 1977, replaced by the Orissa Sales Tax (Amendment) Act, 1978, while the notifications dated May 23, 1977, were issued prior to these amendments, it is necessary to consider the scheme of taxation under the Orissa Act both prior to and after January 1, 1978, being the date on which the relevant provisions of the said Ordinance came into force.

62. Prior to January 1, 1978, under Section 5(1) the tax payable by a dealer under the Orissa Act on his taxable turnover was at the rate specified in that sub-section. At the relevant time the rate was six per cent. The rate specified in Section 5(1) was for both sales tax and purchase tax. As under the Orissa Act a dealer is liable to pay tax on his turnover of Sales as also on his turnover of purchases and as purchase tax is payable only on the turnover of purchases of those goods declared under Section 3-B, in respect of the goods not so declared a dealer would be liable to pay sales tax. Under the proviso to Section 3-B, when any goods are declared to be liable to tax on the turnover of purchases, no tax is payable on the sales of such goods. Prior to January 1, 1978, a notification was to be issued by the State Government under the first proviso to Section 5(1) only when it wanted to fix a rate of tax higher or lower than that specified in Section 5(1). If no such notification was issued, then the tax

63. After January 1, 1978, the scheme of taxation is that no rate of tax is specified in the Orissa Act but under Section 5(1) the State Government is given the power to notify from time to time the rate of tax, whether sales tax or purchase tax, by issuing notifications. The notifications issued under Section 5(1) fixing the rate of sales tax, namely, Notification No. 67184-C. T. A.-135/77-F dated December 29, 1977, does not contain any entry in respect of bamboos or timber or in respect of bamboos agreed to be severed or standing trees agreed to be severed. If they were liable to sales tax, they would fall under the residuary Entry 101 and be liable to sales tax at the rate of seven per cent. If, however, any goods falling under the residuary entry or any other entry in that notification are declared under Section 3-B to be liable to tax on the turnover of purchases, the residuary entry or that particular entry would automatically cease to operate in respect of those goods by reason of the proviso to Secti

64. The High Court was, therefore, in error in holding that the impugned provisions were invalid and ultra vires the Orissa Act as they amounted to 'double taxation'.

Effect of 'Supersession' :

65. Yet another contention raised by the contesting respondents with respect to the impugned provisions was that the two notifications dated December 29, 1977, having been made in 'supersession' of all previous notifications issued on the subject, the effect was to wipe out all tax liability which had to hold that the liability was so wiped out would amount to give a retrospective effect to the notifications dated December 29, 1977, and as the Legislature had not conferred upon the State Government the power to issue notifications having retrospective effect, to so hold would be to render the said notification void. The High court referred to a number of decisions on the question of the power to make subordinate legislation having retrospective effect.

66. We find it unnecessary for the purpose of deciding this point to refer to any of the authorities cited by the High Court. Both the notifications dated December 29, 1977, are in express terms made with effect from January 1, 1978. They do not at all purport to have any retrospective effect and, therefore, they could not affect the operation of the earlier notifications dated May 23, 1977, until they came into force on January 1, 1978. Further, both Section 3-B and section 5(1) in express terms

confer power upon the State Government to issue notifications "from time to time". Section 3-B provides that "the State may, from time to time by notifications, declare...." goods liable to purchase tax. Prior to January 1, 1978, the proviso to sub-section (1) of Section 5 provided that "The State Government may, form time to time by notification. . . fix a higher rate not exceeding thirteen per cent or any lower rate of tax. . ." Section 5(1) as amended with effect from January 1978, provides that "the tax shall be

67. The two notifications dated December 29, 1977, impugned by the respondents were not the only notifications which were issued on that date. There was another notification issued on that date, namely, Notification No. 67184-C. T. A. -135/77-F, directing that with effect from January 1, 1978, the rate of tax payable by a dealer under the Orissa Act on account of the sale of goods specified in column (2) of the Schedule to the said notifications would be at the rate specified against each in column (3) thereof. The issuance of these three notifications became necessary by reason of the change brought about in the scheme of taxation by the Orissa Sales Tax (Amendment) Ordinance, 1977. Prior to that Ordinance, the rate of tax was as specified in sub-section (1) of Section 5 with power conferred upon the State Government by the first proviso to that sub-section to fix by notification issued from time to time a higher rate of tax not exceeding the limit mentioned in the said proviso or to fix from time to time a

Exigibility to Tax - Preliminary Contention :

68. The question which now remains to be considered is as regards the exigibility to purchase tax of the amounts payable under the Bamboo Contract and the Timber Contracts. Before we address ourselves to this question, it is necessary to dispose of a preliminary contention raised by the appellant with respect to this part of the case. It was submitted that the question whether a particular contract is a sale or purchase of goods is a question of fact or a question of interpretation of documents and one to be decided by the assessing authorities and, therefore, if this Court holds that the impugned provisions are valid (as we have now done), it should not go into the question of the exigibility to purchase tax of the transactions in question. This plea was not raised at any stage before the High Court but has been raised for the first time in the petitions for special leave to appeal, and that too only with respect to the Bamboo Contract though during the course of hearing before us, it was raised with respec

Timber Contracts :

69. We will first take up the Timber Contracts. The High Court held that standing tees were unascertained goods and continued to be the property of the State Government until felled and, therefore, the title to them was transferred to the forest contractor only when the trees were felled or severed by him after complying with all the conditions of the forest contract and as the impugned provisions applied only to standing trees, that is, to trees before their severance, purchase tax was not attracted and any attempt to levy purchase tax on the amounts payable under the Timber Contracts would amount to taxing an agreement of sale of goods and not a completed sale or purchase of goods. The High Court further held that the trees so severed in which the property passed to the forest contractor were liable to sales tax by reason of the retrospectively amended definition of the term 'dealer' in clause (c) of Section 2 of the Orissa Act and they could not, therefore, be again made liable to purchase tax. The High C

70. On behalf of the appellant State it was submitted that the Timber Contracts read with the sale notice advertising the auction in respect of the standing trees showed that the standing trees which

were the subject-matter of the Timber Contracts were goods identified and agreed upon at the time when the contract of sale was made and were thus specific goods and that, therefore, there was an unconditional contract for the sale of specific goods in a deliverable state and the property in the said trees passed to the forest contractor, namely, the respondent Firm, when the contract was made, and the fact that the time of delivery as also the payment of price was postponed was irrelevant. It was the appellant's submission that for the reason et out above the amounts payable under the Timber Contracts were exigible to purchase tax. It was further submitted that in any event the property in the standing trees passed when the forest contractor was permitted to get into the area as delineated under Rule 12 of the

71. While setting out the facts of Civil Appeal 220 of 1982, we have outlined the procedure followed by the State of Orissa in entering into forest contracts. The notice of public auction with which we are concerned was published in the Orissa Gazette and was headed "Sale Notice of Timber and Other Forest Products. . . ". This sale notice related to different forest produce and was in three parts. Part I gave "the list of timber and other forest products" for the session 1977-78 which would be "sold by public auction" and the places and dates where such auction sales were to be held. Clause 2 of Part I of the sale notice stated that the sale lots were subject to the special conditions of sale as published in Part II of the sale notice, the general conditions of sale as published in Part III of the sale notice so faras they may be applicable and the conditions mentioned in the sanctioned form of agreement. Clause 3 stated that the successful bidders shall be bound by the Orissa Forest Act, 1972, the Forest C

72. Under condition 1 of the special conditions of sale set out in Part II of the sale notice the contract period of timber coupes was to commence from the date of the ratification of sale by the competent authority and was to include the number of working months mentioned in the sale notice against each lot. Condition 2 stated the time and manner of "payment of purchase price" in full or by instalments. Under condition 8, the intending bidders were asked to inspect the coupes and lots before bidding in the auction and their act of bidding was to be deemed as sufficient proof of their having inspected the coupes and satisfied themselves about the correctness of the quality and quantity of the produce and the area of the contract. Condition 9 provided that no extension of time for working any coupe beyond the contract period as published in the sale notice and declared in the auction hall would be allowed except under very exceptional circumstances. Under condition 14, the prescriptions contained in the worki

73. Under condition 1 of the general conditions of sale published tin Part III of the sale notice, the bid was to be accepted by the Divisional Forest Officer subject to the approval of the competent authority and the right to take contract for exploiting forest produce in the lots advertised in Part I of the sale notice was to be granted when the competent authority approved the bid. Under condition 4, intending bidders were to deposit as earnest money a sum of Rs. 200. In the case of unsuccessful bidders this amount was to be refunded immediately after the auction was held and in the case of successful bidders the amount was to be adjusted towards the security deposit. Under condition 10, a bidder whose bid was conditionally or finally accepted by the Divisional Forest Officer was to make the security deposit in cash. On payment of the security deposit, the bidder was to sign the necessary agreement but the signing of such agreement was not to confer any right on the bidder unless the sale was ratified be

74. On its bids being accepted the respondent Firm entered into five Timber Contracts in the forms prescribed in the Schedule to the Forest Contract Rules. The main heading of each of these Timber Contracts is "Forest Contract - Agreement Form" and the long heading states that it is "an agreement

for the sale and purchase of forest produce". Under Clause 1, the forest produce "sold and purchased under" the Timber Contracts was to be as specified in Schedule I thereof and the forest area in which it was situated was indicated in Schedule V thereof and was to be referred to as the contract area. Schedule I in each of the Timber contracts mentioned that the forest produce "sold and purchased under" the Timber Contracts consisted of a certain number of sound and unsound trees marked and numbered serially on the blazes, one at the base of the trees and the other about 4 1/2 feet from the ground level, with the hammer mark of facsimile shown in the sale notice. clause 2 stated that the quantity of the forest produ sold and purchased under" the Timber Contracts was all the said forest produce which then existed or might come into existence in the contract area which the forest contractor might remove from the said area during the period of the contract and it was further provided that the said forest produce was to be extracted by the forest contractor only during the aforesaid period. That part of Clause 2 which spoke of forest produce which might come into existence in the contract area was obviously inapplicable to the respondent Firm's case inasmuch as the Timber Contracts were in respect of a certain number of existing trees. This provision was there because the Timber Contract was in the form which is the prescribed form of contract in respect of all forest produce and under Rule 33 of the Forest Contract Rules all forest contracts are required to be made in this form. Clause 4 stated that the routes by which the said forest produce was to be removed from the contract area and the depots at which it was to be pre

75. The bids given by the respondent Firm were ratified in due course by the government of Orissa and the fact of such ratification was communicated to the respondent Firm by the Divisional Forest Officer. Each of these ratification letters specified the number and amounts of the instalments payable by the respondent Firm and the dates when each instalment was payable. Each of these ratification letters required the respondent Firm to take delivery of the particular coupe within one and half months from the date of issue of the ratification order and to get the respondent Firm's property hammer mark registered in the office of the Divisional Forest Officer on payment of the appropriate registration fee. Each of these letters required the respondent Firm not to commence work in the contract area before the payment of the first instalment and before furnishing the Coupe Declaration Certificate or intimating in writing that it intended to commence work from a particular date, as the case may be, as required und

76. As the Orissa Forest Contract act, 1972 (Orissa Act 14 of 1972), and the Forest Contract Rules formed part of the agreement between the State of Orissa and the respondent Firm, it may be convenient at this stage to look at the relevant provisions thereof. Clause (g) of Section 2 of the Orissa Forest Contract Act defines 'forest produce' as including inter alia timber, whether found in or brought from a forest or not, and trees when found in or brought from a forest. Clause (n) defines 'timber' as including "trees fallen or felled and all wood cut-up or sawn". Clause (o) of Section 2 of the Act defines 'trees' as including bamboos. Section 36 of the Orissa Forest Act confers powers upon the State Government to make rules inter alia for the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest produce, from protected forests. Under Section 37, any infringement of a rule made under Section 36 is an offence punishable with imprisonment for a term w

77. Under Rule 2 of the Forest contract Rules, all contracts whereby the Government sells forest produce to a purchaser are, subject to the Forest Contract Rules insofar as they are applicable, and the Forest Contract Rules are deemed to be binding on every forest contractor. The Forest Officer executing a forest contract is, however, given the power to vary the rules by express provision in such contract. A 'forest contract' is defined in clause (1) of Rule 3 as meaning "a contract whereby Government agrees to sell and purchaser agrees to buy forest produce" and a 'forest contractor' is

defined in clause (2) of Rule 3 as meaning "the person who purchases produce under a forest contract". Under Rule 6, a forest contract is to carry with it an accessory licence entitling the forest contractor and his servants and agents to go upon the land specified in the contract and to do all acts necessary for the proper extraction of the forest produce purchased under the contract. Under Rule 7 where a period is specifie t or in the sale notice or that the area of the contract differs in any way from that indicated in the schedule attached to the contract. Under Rule 44, all forest produce removed from a contract area in accordance with the Forest Contract Rules is to be at the absolute disposal of the forest contractor.

78. Bearing in mind the terms and conditions of the Timber Contracts - not only those expressly set out therein but also those incorporated therein by reference, namely, he terms of the sale notice, the special conditions of contract, the general conditions of contract and the various statutory provisions - we have now to determine whether the property in the trees which were the subject-matter of the Timber Contracts passed to the respondent Firm while the trees were still standing or after they were severed. In the first case the impugned provisions would apply and the amounts payable under the Timber Contracts would become exigible to purchase tax, while in the second case the impugned provisions would not apply and no purchase tax would be payable. The above conspectus of these terms and conditions shows that the heading of the sale notice, namely, "Sale Notice of Timber" as also the use of the words "timber and other forest products.. . will be sold by public auction "are not determinative of the matter

79. It is true that under Rule 40 if the trees were destroyed by reason of fire, tempest, disease, pest, flood, drought or other natural calamity or by reason of any wrongful act committed by any third party or by reason of the unsoundness or breakage of any trees which were the subject-matter of the contract, the respondent Firm was not entitled to any compensation for any loss sustained by it. This would show that after a Timber Contract was concluded, the risk passed to the respondent Firm. Under Section 26 of the Sale of Goods Act, the goods remain at the seller's risk until the property in the goods is transferred to the buyer and when the property is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Section 26 is, however, qualified by the phrase "Unless otherwise agreed". Thus, this section is sufficient to show that the Timber Contracts were subject to a contract to the contrary and under them the risk passed to the respondent Firm before the property

80. It is, therefore, clear that the Timber Contracts were not transactions of sale or purchase of standing trees agreed to be severed. They were merely agreements to sell such trees. As pointed out above, each stage of the felling and removal operations was governed by the Forest Contract Rules and was under the control and supervision of the Forest Officers. The property passed to the respondent Firm only in the trees which were felled, that is, in timber, after all the conditions of the contract had been complied with and after such timber was examined and checked and removed from the contract area. The impugned provisions, therefore, did not apply to the transactions covered by the Timber Contracts.

81. It will be useful in the context of the conclusion which we have reached to refer to the decision of this Court in Badri Prasad v. State of M. P [1969 2 SCR 380 : (1971) 3 SCC 23]. The question in that case was whether there was a contract of sale of standing timber and whether under the contract he property had passed to the appellant or whether the property had passed after the trees had been felled and hence the right of the appellant's transferor had vested in the State Government before the trees were felled by reason of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M. P. Act 1 of 1951). The Court held that under the

terms of the contract the trees had to be felled before they became the property of the appellant. The Court observed (at pages 390-1) : (SCC p. 31, para 11)

It will be noticed that under Clause 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not "ascertained goods" within section 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees, after cutting, had to be 3 inches high. In other words, the contract was not to sell the whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when trees are felled. But before that happened the trees had vested in the State.

It is pertinent to note that conditions 16 to 18 of the special conditions of sale which from part of the Timber Contracts also prescribe the girth of the trees which are to be felled and the height above the ground level at which they are to be felled.

Timber and Logs :

82. On our above finding that the transactions under the Timber Contracts are sales of timber and not sales of standing trees agreed to be severed the tax which would be attracted would be sales tax and not purchase tax under the impugned provisions. This would, however, be so if he Divisional Forest Officer were a dealer. Under the terms of the Timber Contracts the respondent Firm is liable to reimburse to the Divisional Forest Officer the amount of sales tax which he would be liable to pay. The question whether the Divisional Forest Officer is a dealer within the meaning of that term as defined in clause (c) of Section 2 prior to its being substituted with retrospective effect by he Orissa Sales Tax (Amendment and Validation) Act, 1979, which repealed and replaced and replaced the Ordinance with the same title, is pending before this court in Civil Appeals 1237-1238 of 1979 and 1420-1421 of 1979. Whatever be the position under the old definition, after the substitution of that definition with retrospective

83. Though under Section 8 the State Government has the power to prescribe the points in the series of sales or purchases by successive dealers at which any goods or class or description of goods may be taxed, it has not done so either in the case of timber or logs, tough in the case of some other goods, as pointed out earlier, the State Government has made rules prescribing that the tax would be levied at the first point of sale. Thus, if the contention of the respondent Firm were correct, as tax has already been levied at one point in the same series of sales, it would not be now open to the State government to say that by reason of the substituted definition of the term 'dealer', sales tax could also be levied at another point.

84. We will first see how different High Courts have dealt with this question. In Shaw Bros. and Co. v. State of W. B. [(1963) 14 STC 878 (Cal HC)] a learned Single Judge of the Calcutta High Court held that planks sawed out of logs are different things from logs and timber in its nascent state. No reasons are given in that judgment for reaching this conclusion. In Bachha Tewari v. Divisional Forest Officer, West Midnapore Division [(1963) 14 STC 1067 (Cal HC)] the same learned Judge held that the chopping of timber into firewood was a manufacturing process and, therefore, the imposition of a tax on timber and on firewood manufactured from that timber did not amount to double taxation. The question in both those cases was whether sawing of planks and chopping of timber into firewood amounted to manufacture so as to make the assessee liable to pay sales tax on the manufactured goods. This is a different question from that to which we have to address ourselves. We may, however, point out that even where the qu

85. A decision more relevant to our purpose than the two Calcutta decisions is a decision of a Division Bench of the Madhya Pradesh High Court in Mohanlal Vishram v. C. S. T. [(1969) 24 STC 101 (MP HC)]. In that case the Madhya Pradesh High Court held that by felling standing timber tees, cutting them and converting some of them into 'ballis', a dealer did not alter their character as timber or used them for manufacture of other goods within the meaning of Section 8(1) of the Madhya Pradesh Sales Tax Act, 1958. Another decision equally relevant for our purpose is that of a Division Bench of the Andhra Pradesh high Court in G. Ramaswamy v. State of A. P. [(1973) 32 STC 309 (AP HC)] in which the question was very much the same as the one which we have to decide. The assessees in that case purchased nascent timber, that is, logs of wood, and had sawn or cut them into planks, rafters, cut sizes, etc., and sold them for the purpose of construction of buildings and the like. Under Section 5(2) (a) of the Andhra Pr d the standing timber trees to them and, therefore, the planks, rafters, cut sizes etc., sold by them could not again be made liable to sales tax treating those goods as different commercial commodities. The Division Bench held that in dealing with matters relating to the general public, statutes are presumed to use words in their popular rather than their narrowly legal or technical sense, and that as the provision levying a tax on timber was directed to deal with a matter affecting people generally, as timber is in common use, the word 'timber' would have the same meaning attached to it as in the common and ordinary use of language. The Division Bench further held that although dictionaries are not to be taken as authoritative exponents of the meanings of words used in a statute, it was a well-known rule of courts of law that words should be taken to be used in the ordinary sense and courts are, therefore, sent for instruction to the dictionaries in the absence of any legislative or judicial guidance. The

86. We will now turn to the decisions of the Orissa High Court on this point. In State of Orissa v. Rajani Timber Traders [(1974 34 STC 374 (Ori HC)] a Division Bench of that High Court held that timber logs and sized timber were different commodities in the commercial sense though sized timbers were brought out only from timber logs by a particular process. The Division Bench further observed that the person who had a need of timber logs would not be satisfied had sized timber been offered to him and similarly a person requiring sized timber would not be satisfied if timber logs were supplied. In Krupasindhu Sahu & Sons v. State of Orissa [(1975) 35 STC 270] another Division Bench of the same High Court held that the dictum in the Rajani Timber Traders case was too widely stated and it did not indicate the meaning of the word 'timber' as used in common parlance in commercial circles and it also did not purport to specify the meaning of the expression 'sized timber' as used in that judgment. The Division Ben

87. Having seen how the different High Courts have dealt with this question, we will now ascertain the true position for ourselves. In Ganesh Trading Co., Karnal v. State of Haryana [(1973) 32 STC 623, 625 (1974) 3 SCC 620 : 1974 SCC (Tax) 100] Hegde, J., speaking for this Court, said : (SCC p. 621, para 3)

This Court has firmly ruled that in finding out the true meaning of the entries in a Sales Tax Act, what is relevant is not the dictionary meaning, but how those entries are understood in common parlance, specially in commercial circles.

Applying this principle, the Court held that although rice was produced out of paddy, paddy did not continue to be paddy after dehusking and that when paddy was dehusked and rice produced, there was a change in the identity of the goods and, therefore, rice and paddy were two different things in ordinary parlance. A careful reading of the judgment in that case shows that there was no evidence before the Court to show how 'paddy' and 'rice' were understood in commercial circles or what these words meant in commercial or trade parlance and that what the Court did was to refer to various

authorities dealing not with rice or paddy but with other goods and the meaning in ordinary parlance of the words 'paddy' and 'rice' in order to ascertain the meaning of these words in the sense stated by it above.

88. So far as the case before us is concerned, there is no material on the record to show what the words 'timber' and 'logs' mean in commercial or trade parlance nor do the pleadings of the parties filed in the Orissa High Court throw any light on the matter. The averment of the respondent Firm in this behalf is to be found in paragraph 13 of its writ petition in the High Court and all that is stated therein is that under the impugned provisions it would be required to pay purchase tax on "timber agreed to be severed" and after severing the timber, while effecting sales of timber would be liable to pay sales tax on such sales. In the counter-affidavit of the Law Officer in the Office of the Commissioner of Commercial Taxes, Orissa, filed on behalf of the commissioner of Commercial Taxes and the Sales Tax Office, Sambalpur Circle, while replying to the said paragraph 13 all that is stated is that timber commercially does not remain the same after being cut, sized and shaped, and, therefore, there was no legal

89. In view of this state of the record we must seek to ascertain the meaning of these two terms in common parlance with such aid as is available to the Court. It is now well settled that the dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance. In doing so the court must bear in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the court would, therefore, have to select the particular meaning which would be relevant to the context in which it has to interpret that word. The Orissa Act does not define the term 'timber' or 'logs'. Orissa is, however, a State which is rich in natural wealth and mostly all, if not all, forests in the State of Orissa are protected or reserved forests and come within the purview of the Oris

(n) 'timber' includes trees fallen or felled and all wood cut-up or sawn. Prior to the enactment of the Orissa Forest Act, 1972, there were two Forest Acts in force in the State of Orissa, namely, the Madras Forest Act, 1882 (Madras Act 5 of 1882), and the Indian Forest Act, 1927 (Act 16 of 1927). The Madras Forest act applied to the districts of Koraput and Ganjam and part of Phulbani District, namely, Baliguda and Udaygiri Taluks. The Indian Forest Act applied to the rest of the State. Both these Act were repealed in their application to the State of Orissa by the Orissa Forest Act but as prior to the enactment of the Orissa Forest Act, these were the two Acts which provided for the protection and management of forest in the State of Orissa, we may also refer to the definition of the word 'timber' given in those Acts. Section 2 of the Madras Forest Act defines 'timber' as including "trees when they have fallen or have been felled, and all wood, whether cut up or fashioned or hollowed out for any purpose or

90. On turning to various dictionaries, we find that the dictionary meaning largely coincides with the statutory meaning of the word 'timber'. While discussing the question of the subject-matter of the impugned provisions we have set out the definition of the word 'timber' contained in the Webster Collegiate Dictionary occurring in the passage from the judgment of Vivian Bose, J., in Shrimati Shantabai v. State of Bombay. The relevant meanings of the term 'timber' given in the Shorter Oxford Dictionary, Third Edition are "building material generally; wood used for the building of houses, ships, etc., or for the use of the carpenter, joiner or other artisan". This definition also states that the word is "applied to the wood of growing trees capable of being used for structural purposes; hence collectively to the trees themselves". Amongst the meanings given in the Concise Oxford

Dictionary, Sixth Edition, are "wood prepared for building, carpentry, etc.; trees suitable for this; woods, forests, piece of wood,

91. A question which remains is whether beams, rafters and planks would also be logs or timber. The Shorter Oxford English Dictionary defines 'beam' inter alia as a large piece of squared timber, long in proportion to its breadth and thickness" and the Concise Oxford Dictionary defines it as a "long piece of squared timber supported at both ends, used in houses, ships, etc..." and according to Webster's Third New International Dictionary, it means "a long piece of heavy often squared timber suitable for use in house construction". A beam is thus timber sawn in a particular way. 'Rafter' as shown by the Shorter Oxford English Dictionary is nothing but "one of the beams which give shape and form to a roof, and bear the outer covering of slates, tiles, thatch, etc.". The Concise Oxford Dictionary and Webster's New International Dictionary define 'rafter' in very much the same way; the first defines it as "one of the sloping beams forming framework of a roof" and the second as "one of the sloping beams forming f orrect so far as planks and rafters are concerned. In our opinion, planks and rafters would also be timber.

92. The result is that sales of dressed or sized logs by the respondent Firm having already been assessed to sales tax, the sales to the first respondent firm of timber by the State Government from which logs were made by the respondent firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers assuming without deciding that the retrospectively substituted definition of 'dealer' in clause (c) of Section 2 of Orissa Sales Tax Act, 1947, is valid.

93. Yet another aspect of this question now arises for our consideration. During the period from June 1, 1977 to December 3, 1977, by reason of Notification S. R. O. No. 374 of 1977 dated May 23, 1977, the rate of sales tax on timber was fixed at ten per cent by the State Government. Since it was the contention of the State Government that logs are commercially a different commodity, the tax could not have been assessed on the sales of logs by the respondent Firm during this period at the rate of ten per cent but would have been assessed at the general rate of six per cent specified in Section 5(1) of the Orissa Act. If such was the case, on the findings given by us above, the respondent Firm would be liable to pay sales tax not at the rate of six per cent but at the rate of ten per cent and it might be argued that the respondent Firm has been under-assessed or part of its turnover of sales of logs has escaped assessment. The assessment order made on the respondent firm referred to earlier includes both the

Bamboo Contract :

94. We will now ascertain the nature of the Bamboo Contract. Unlike the Timber Contracts, the Bamboo Contract is not in a prescribed statutory from but it appears from the judgment of the High Court that all the Bamboo Contract before it contained identical terms and conditions except with respect to the contract area, the period of the contact and the amount of royalty. The parties to the Bamboo Contract were the governor of the State of Orissa referred to in the said Contract as 'the Grantor' and the respondent Company. The Bamboo Contract is headed "Agreement of Bamboo Areas in Bonai Forest Division to the Titaghur Paper Mills Company Limited". The second and the third recitals of the Bamboo Contract are as follows :

And whereas the Company is desirous of obtaining grant from the Grantor of exclusive right and licence to fell, cut, obtain and remove bamboos from all felling series of Bamboos. Working Circle in the Bonai Forest Division in the State of Orissa for the purpose of converting the bamboos into

paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith.

And whereas the Grantor has agreed to grant the said licence to the Company subject to the restriction, terms and conditions hereinafter appearing.

Clause I of the Bamboo Contract is headed "Area over which the grant operates". Sub-clause (a) of clause I sets out the dates of commencement of the Bamboo Contract in respect of different contract areas. Under sub-clause (b) of Clause I, the forest produce "sold and purchased" is stated to be as specified in Schedule I and to be situated in the areas indicated in Schedule V. Under the said sub-clause, the Grantor understood to render at all times to the respondent Company all possible facilities to enable it to extract and obtain its requirements of bamboos upto the limit imposed by the Bamboo Contract. Under Clause II, the quantity of forest produce "sold and purchased" is stated to be "all the said forest produce which now exist or may come into existence in the contract area which the Company may fell, cut, obtain and remove from the said area in accordance with the time-table given in Schedule V during the period..." and then the periods in respect of different areas, already mentioned while reciting th

95. It was submitted on behalf of the appellant that the Bamboo Contract was a composite contract of sale, in that it was an agreement to sell existing goods, namely, bamboos standing in the contract areas at the date of the Bamboo Contract, coupled with an agreement to sell future goods, namely, bamboos to come into existence in the future. According to the appellant the property in the existing bamboos would pass after they were ripe for cutting and under Rule 12 of the Forest Contract Rule the Divisional forest Officer had delineated the boundaries and limits of the annual coupe from which bamboos were to be cut for the respondent Company to take delivery of them inasmuch as the bamboos then became ascertained goods. In the alternative it was submitted that the property passed when the respondent Company started the work of cutting bamboos. According to the appellation, in either event property passed before the bamboos were severed. So far as the bamboos which were not in existence at the date of the Bam ame way as in the case of bamboos in existence at the date of the Bamboo Contract.

96. While discussing the subject-matter of the impugned provisions, we have already held that they apply where there is a completed contract of purchase and the property in the goods which are the subject-matter of the contract passes from the seller to the buyer when the contract is made. In other words, the purchase would be complete when the standing trees or bamboos are specific goods, that is, when they are identified and agreed upon at the time the contract of sale is made, and the contract is unconditional and further such standing trees or bamboos are in a deliverable state, that is, nothing remains to be done except for the buyer to enter upon the land of the seller and to fell and remove the trees or bamboos, as the case may be, without any let or hindrance. The very submission of the appellant with respect to when the property passes to the respondent Company in the case of the Bamboo Contract are sufficient to show that the impugned provisions cannot have any application to the case. The Bamboo C

97. In this view of the matter, the impugned provisions would have no application and the amounts payable under the Bamboo Contract would not be exigible to purchase tax. By reason, however, of the substitution of the definition of the term 'dealer' in clause (c) of Section 2 of the Orissa Act with retrospective effect, it may be argued that if the Bamboo Contract was a contract of sale of goods, then on the sale taking place to the respondent Company, sales tax would become payable and the respondent Company would be bound to reimburse to the Forest Department the amount payable by

it as sales tax. In order to avoid future legal controversy and particularly in view of the fact that High Court has held the Bamboo Contract to be a grant of a profit a prendre it becomes necessary to determine whether the Bamboo Contract is at all a contract of sale of goods. According to the respondent Company the High Court was right in holding that Bamboo Contract was not a contract of sale of goods but was a grant of a prof

98. The meaning and nature of a profit a prendre have been thus described in Halsbury's Laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117 :

> 240. Meaning of "profit a prendre". - A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. The term "profit a prendre" is used in contradistinction to the term "profit a render", which signified a benefit which had to be rendered by the possessor of land after it had come into his possession. A profit a prendre is a servitude.
>
> 241. Profit a prendre as an interest in land. - A profit a prendre is an interest in land, and for this reason any disposition of it must be in writing. A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce....
>
> 242. What may be taken as a profit a prendre. - The subject-matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals ferae naturae while they are upon the soil belongs to the o

99. A profit a prendre is a servitude for it burdens the land or rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the thing itself (see Jowitt's Dictionary of English Law, Second Edition, Volume 2, page 1640, under the heading 'Servitude'). 'Servitude' is a wider term and includes both easements and profits a prendre (see Halsbury's Laws of England, Fourth Edition, Volume 14, paragraph 3, page 4). The distinction between a profit a prendre and an easement has been thus stated in Halsbury's Laws of England, Fourth Edition, paragraph 43 at pages 21 to 22 :

> The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or to prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servient tenement same part of the soil of that tenement or minerals under it or some part of its natural produce or the animals ferae natural existing upon it. What is taken must be capable of ownership, for otherwise the right

amounts to a mere easement.

In Indian law an easement is defined by Section 4 of the Indian Easement Act, 1882 (Act of 1882) as being "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own". A profit a prendre when granted in favour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore, be an easement but it would not be so if the grant was not for the beneficial enjoyment of the grantee's heritage.

100. Clause (26) of Section 3 of the General Clauses Act, 1897, defines "immovable property" as including inter alia "benefit to arise out of lane". The definition of "immovable property" in clause (f) of Section 2 of the Registration Act, 1908, illustrates a benefit to arise out of land by stating that immovable property "includes... rights to ways, lights, ferries, fisheries or any other benefit to arise out of land". As we have seen earlier, the Transfer of Property Act, 1882, does not give any definition of "immovable property" except negatively by stating that immovable property does not include standing timber, growing crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act. However, by Section 4 of the General Clauses Act, the definitions of certain words and expressions, including "immovable property" and "movable property", given in Section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to

101. The earlier decisions showing what constitutes benefits arising out of land have been summarized in Mulla on the Transfer of Property Act, 1882, and it would be pertinent to reproduce the whole of that passage. That passage (at pages 16-17 of the Fifth Edition) is as follows :

A "benefit to arise out of land" is an interest in land and therefore immovable property. The first Indian Law Commissioners in their report of 1879 said that they had "abstained from the almost impracticable task of defining the various kinds of interests in immovable things which are considered immovable property". The Registration Act, however, expressly includes as immovable property benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable property : a varashasan or annual allowance charged on land, a right to collect dues at a fair held on a plot of land; a that or market; a right to possession and management of a saranjam; a malikana; a right to collect rent or jana; a life interest in the income of immovable property; a right of way; a ferry; and a fishery; a lease of land.

102. Having seen what the distinctive features of a profit a prendre are, we will now turn to the Bamboo Contract to ascertain whether it can be described as a grant of a profit a prendre and thereafter to examine the authorities cited at the Bar in this connection. Though both the Bamboo Contract in some of its clauses and the Timber Contracts speak of "the forest produce sold and purchased under this Agreement", there are strong countervailing factors which go to show that the Bamboo Contract is not a contract of sale of goods. While each of the Timber Contracts is described in it body as "an agreement for the sale and purchase of forest produce", the Bamboo Contract is in express terms described as "a grant of exclusive right and licence to feel, cut, obtain and remove bamboos. . . for the purpose of converting the bamboos into paper pulp or for purposes connected with the manufacture of paper. . . ". Further, throughout the Bamboo Contract, the person who is giving the grant, namely, the governor of the

Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right.

Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

We are not concerned with the second meaning of the word 'royalty' given in Jowitt. Unlike the Timber contracts, the Bamboo Contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas for the purpose of felling and removing the bamboos nor is it, unlike the Timber Contracts in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different contract areas with an option to the respondent company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the Bamboo Contract has no relation to the actual quantity of bamboos cut and removed. Further, the respondent Company is bung to pay a minimum royalty and the amount of royalty to be paid by it is always to be i

103. We may pause here to note what the Judicial Committee of the Privy Council had to say in the case of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. C. I. T., Bihar and Orissa [(1943) 11 ITR 513 (PC)] about the payment of minimum royalty under a coal mining lease. The question in that case was whether the annual amounts payable by way of minimum royalty to the lessor were in his hands capital receipt or revenue receipt. The Judicial Committee held that it was an income flowing from the covenant in the lease. While discussing this question, the Judicial committee said (at pages 522-3) :

These are periodical payments, to be made by the lessee under his covenants in consideration of the benefits which he is granted by the lessor. What these benefits may be is shown by the extract from the lease quoted above, which illustrates how inadequate and fallacious it is to envisage the royalties as merely the price of the actual tons of coal. The tonnage royalty is indeed only payable when the coal or coke is gotten and dispatched : but that is merely the last stage. As preliminary and ancillary to that culminating act, liberties are granted to enter on the land and search, to dig and sink pits, to erect engines and machinery, coke ovens, furnaces and form railways and roads. All these and the like liberties show how fallacious it is to treat the lease as merely one for the acquisition of a certain number of tons of coal, or the agreed item of royalty as merely the price of each ton of coal.

Though the case before the Judicial Committee was of a lease of a coal-mine and we have before us the case of a grant for the purpose of felling, cutting and removing bamboos with various other rights and licences ancillary thereto, the above observations of the Judicial Committee are very pertinent and apposite to what we have to decide.

104. Under the Bamboo Contract, the respondent Company has the right to use all lands, roads and streams within as also outside the contract areas for the purpose of free ingress to and egress from the contract areas. It is also given the right to make dams across streams, cut canals, make water courses, irrigation works, roads, bridges, buildings, tramways and other work useful or necessary for the purpose of its business of felling, cutting and removing bamboos for the purpose of converting the same into paper pulp or for purposes connected with the manufacture of paper. For

this purpose it has also the right to use timber and other forest produce to be paid for at the current schedule of rates. The respondent Company has the right to extract fuel from areas allotted for that purpose in order to met the fuel requirements of the domestic consumption in the houses and offices of the persons employed by it and to pay a fixed royalty for this purpose. Further, the Government was bound, if required by the respo

105. We have highlighted above only the important terms and conditions which go to show that the bamboo Contract is not and cannot be a contract of sale of goods. It confers upon the respondent Company a benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil coupled with several ancillary rights and is thus a grant of a profit a prendre. It is equally not possible to view it as a composite contract -one, an agreement relating to standing 'bamboos agreed to be severed and the other, an agreement relating to bamboos to come into existence in the future. The terms of the Bamboo Contract make it clear that it is one, integral and indivisible contract which is not capable of being severed in the manner canvassed on behalf of the appellant. It is not a lease of the contract areas to the respondent company for its terms clearly show that there is no demise by the State Government of any area to the respondent Company. The respondent Company has also no right to the

106. We will now turn to the authorities cited at the Bar. The cases which have come before the courts on this point have mainly involved the question whether the document before the court required registration. After the coming into force of the Constitution of India and the introduction of land reforms with consequent abolition of 'Zamindari' and other proprietary interests in land, the question whether a particular document was a grant of a proprietary interest in land has also fallen for determination by various courts. It is unnecessary to refer to all the decisions which were cited before us and we propose to confine ourselves to considering only such of them as are directly relevant to the question which we have to decide. Of the High Court decisions the one most in point is that of a Full Bench of the Madras High Court in Seeni Chettiar v. Santhanathan Chettiar [ILR (1897 20 Mad 58 (FB) : 6 MLJ 281]. The question in that case was whether a document which granted to the defendant a right to enjoy the

The principle of these decisions appears to be this, that wherever at the time of the contract is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods.

107. So far as the decisions of this Court are concerned, the one which requires consideration first is Firm Chhotabhai Jethabai Patel & Co. v. State of M. P [1953 SCR 476 : AIR 1953 SC 108 : 1953 SCJ 96]. This was one of the two cases strongly riled upon by the appellant, the other being State of M. P. v. Orient Paper Mills Ltd.[(1977) 2 SCR 149 : (1977) 2 SCC 77 : 1977 SCC (Tax) 261] The facts in Chhotabhai case were that the petitioners had entered into contracts with the proprietors of certain estates and mahals in the State of Madhya Pradesh under which they acquired the right to pluck, collect and carry away tendu leaves; to cultivate, culture and acquire lac; and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. On January 26, 1951, the Madhya pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951), came into force and on the very next day a notification was issued under the said Act putting

The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course, implies the right to appropriate them as their own property.

The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be, e.g., a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short-term contracts. The picking of the leaves under them has to start at once or practically at once and to proceed continuously.

According to this Court, the contracts entered into by the petitioners before it related to goods which had a potential existence and there was a sale of a right to such goods as soon as they came into existence, the question whether the title passed on the date of the contract itself or later depending upon the intention of the parties. This Court, therefore, came to the conclusion that the State had no right to interfere with the petitioners' rights under the said contracts.

108. As we will later point out, the authority of the decision in Chhotabhai case has been considerably shaken, if not wholly eroded, by subsequent pronouncements of this Court. For the present, it will be sufficient for us to point out that the reliance placed in Chhotabhai case on the decision of the Judicial Committee in Messrs. Mohanlal Hargovind case does not appear to be justified for the contracts before the Judicial Committee and before this Court were different in their contents and this Court appears to have fallen into an error in assuming that they were similar. For instance, the contracts before the Privy Council were short term contracts while those before the Court in Chhotabhai case were for different periods including terms of five to even fifteen years. Apart from this, we have pointed out above the features which go to make the Bamboo Contract a benefit to arise out of land. These features were conspicuously absent in the contracts before the Court in Chhotabhai case.

109. The decision next in point of time on this aspect of the case is Ananda Behera v. State of Orissa. The petitioners in that case had obtained oral licences for catching and appropriating fish from specified sections of the Chilka Lake from its proprietor, the Raja of Parikud, on payment of large sums of money prior to the enactment of the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952). Under the said Act, the estates of the Raja of Parikud vested in the State of Orissa and the State refused to recognize the rights of the petitioners and was seeking to reauction the rights of fishery in the said lake. The petitioners, contending that the State had infringed or was about to infringe their fundamental rights under Articles 19(1) (f) and 31(1) of the Constitution of India, filed petitions in this Court under Article 32 of the Constitution. In their petition, the petitioners claimed that the transactions entered into by them were sales of future goods, namely, fish in the sections of the lake cover

It is necessary to advert to Firm Chhotabhai Jethabai Patel & Co. v. State of M. P. and explain it because it was held there the a right to "pluck, collect and carry away" tendu leaves does not give the owner of the right any proprietary interest in the land and so that sort of right was not an 'encumbrance' within the meaning of the Madhya Pradesh Abolition of proprietary Rights Act. But the contract there was to "pluck, collect and carry away" the leaves. The only kind of leaves that can be 'plucked' are those that are growing on trees and it is evident that there must be a fresh drop of leaves at periodic intervals. That would make it a growing crop and a growing crop is expressly exempted from the definition of "immovable property" in he Transfer of Property Act. That case is distinguishable and does not apply here.

110. The next decision which was cited and on which a considerable debate took palace at the Bar was Smt. Shantabai v. State of Bombay. The facts in that case where that by an unregistered document the petitioner's husband had granted to her in consideration of a sum of Rs. 20,000 the right to take and appropriate all kinds of wood from certain forest in his Zamindari. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, all proprietary rights in land vested in the State of Madhya Pradesh and the petitioner could no longer cut any wood. She thereupon applied to the Deputy Commissioner and obtained from him an order permitting her to work the forest and started cutting the trees. The Divisional Forest Officer took action against he and passed an order directing that the cut materials be forfeited. She made representations to the Government and they proving fruitless, she filed in this Court a petition under Article 32 of the Constitution the State was also bound by the contract she could only seek to enforce the contract in the ordinary way and sue the State if so advised and claim whatever damages or compensation she might be entitled to for the alleged breach of it. After so holding the majority of the learned Judges observed (at page 269) :

> This aspect of the matter does not appear to have been bought to the notice of this Court when it decided the case of Chhotabhai Jethabai Patel and Co. v. State of M. P. and had it been so done, we have no doubt that case would not have been decided in the way it was done.

Unlike the majority of the Judges, Vivian Bose, J., in his separate judgment considered in detail the nature of the document in that case. Vivian Bose, J., pointed out the distinction between standing timber and a tree. We have earlier extracted those passages from the learned Judge's judgment. The learned Judge then pointed out that the duration of the grant was for a period of twelve years and that it was evident that trees which would be fit for cutting twelve years later would not be fit for felling immediately and, therefore, the document was not a mere sale of trees as wood. Vivian Bose, J., held that the transaction was not just a right to cut a tree but also to derive a profit from the soil itself, in the shape of the nourishment in the soil that went into the tree and made it to grow till it was of a size and age fit for felling as timber and if already of that size, in order to enable it to continue to live till the petitioner chose to fell it. The learned Judge, therefore, held that though such tr

111. According to learned counsel for the appellant, the judgment of Vivian Bose, J., in that case was not the judgment of the Court since the other learned Judges expressly refrained from expressing any opinion as to the actual nature of the transaction under the document in question. Learned counsel submitted that what the Court really held in the case was that there was no breach of any fundamental right of the petitioner which would entitle her to approach this Court under Article 32 of the Constitution, and this decision was, therefore, not an authority for the proposition that a document of the type before the Court was a grant of a profit a prendre as held by Vivian Bose, J. It is true as contended by learned counsel that the majority expressly refrained from deciding the nature of the document because, as it pointed out, in any view of the matter, the petition would fail and it would, therefore, be difficult to say that what Vivian Bose, J., held was the decision of the Court as such. However, the ju

112. The decision to which we must now advert is Mahadeo v. State of Bombay. The facts in that case were that some proprietors of Zamindaris situate in territories, then belonging to the State of Madhya Pradesh and on the reorganisation of States transferred to the erstwhile State of Bombay, granted to the petitioners rights to take forest produce, mainly tendu leaves, from forests included in their Zamindaris. The agreements conveyed to the petitioners in addition to the tendu leaves other

forest produce like timber, bamboos, etc., the soil for making bricks, and the right to build on and occupy land for the propose of their business. In a number of cases, these rights were spread over many years. Some of the agreements were registered and the others unregistered. After the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the Government disclaimed the agreements and auctioned the rights afresh, acting under Section 3 of the said Act. The p

It is clear from the foregoing analysis of the decision in Chhotabhai case that on a construction of the documents there under consideration and adopting a principle enunciated by the Privy Council in Mohanlal Hargovind of Jabbulpore v. CIT, Central Provinces and Berar and relying upon a passage each in Benjamin on Sale and the well-known treatise of Baden Powell, the Bench came to the conclusion that the documents there under consideration did not create any interest in land and did not constitute any grant of any proprietary interest in the estate but were merely contracts or licences given to the petitioners "to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber or wood". But then, it necessarily followed that the Act did not purport to affect the petitioners' rights under the contracts or licences. But what was the nature of those rights of the petitioners? It is plain, that if they were merely contractual rights, then as pointed out in the two later decisions, in Anan

We may also usefully reproduce the following passages (at page 354) from the concluding portion of the judgment;

From this, it is quite clear that forests and trees belonged to the proprietors, and they were items of proprietary rights. . . .

> If then the forests and the trees belonged to the proprietors as items in their 'proprietary rights', it is quite clear that these items of proprietary rights have been transferred to the petitioners. . . Being a 'proprietary right' it vests in the State under Sections 3 and 4 of the Act. The decision in Chhotabhai case treated these rights as bare licences, and it was apparently given per incuriam, and cannot therefore be followed.

113. Faced with this decision, learned counsel for the appellant sought to distinguish it on the ground that the terms of the agreement in that case were different from the terms of the Bamboo Contract. We are unable to accept this submission. It is unnecessary to set out in detail the terms of the agreements in Mahadeo case. The differences sought to be pointed out by learned counsel for the appellant are unsubstantial and make no difference. The essential and basic features are the same and the same interpretation as was placed upon the agreements in Mahadeo case must, therefore, apply to the Bamboo Contract.

114. In State of M. P. v. Yakinuddin [(1963) 3 SCR 13 : AIR 1962 SC 1916 : (1963) 2 SCJ 253] the respondents had entered into agreements with the former proprietors of certain estates in the State of Madhya Pradesh acquiring the right to propagate lac, collect tendu leaves and gather fruits and flowers of Mahua leaves. Some of these documents were registered and others unregistered. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the State of Madhya Pradesh took possession of all the villages comprised in the respective estates of the proprietors who had granted the aforesaid rights to the respondents and refused to recognize the respondents' rights. The respondents thereupon filed petitions under Article 226 of the Constitution in the High Court of Madhya Pradesh and the High

Court relying upon the decision in Chhotabhai case, granted to the respondents the reliefs claimed by them. A Bench of five Judges of this Court allowed the a

In view of these considerations, it must be held that these cases are equally governed by the decisions aforesaid of this Court, which have overruled the earliest decision in the case of Chhotabhai Jethabai Patel and Co. v. State of M. P.

115. In Board of Revenue v. A.M. Ansari [(1976) 3 CSR 661 : (1976 3 SCC 512 : 1976 SCC (Tax) 350], the respondent were the highest bidders at an auction of forest produce, namely, timber, fuel, bamboos, minor forest produce, bidi leaves, tanning barks, pards mohwa, etc., held by the Forest Department of the Government of Andhra Pradesh. They were called upon to pay in terms of the conditions of sale stamp duty on the agreements to be executed by them as if these documents were leases of immovable property. The respondents thereupon filed petitions under Article 226 of Constitution in the High Court of Andhra Pradesh. In the said petitions, the State contended that under the agreements, the respondents had acquired an interest in immovable property. The High Court held in favour of the respondents. The State went in appeal to this Court. On a consideration of the terms of the agreements, this Court held that the agreements were licences and not leases. The Court laid emphasis upon three salient features of th

".. . Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturales, we were clearly of the view that the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31(c) of the Stamp Act.

The conclusion arrived at by us gains strength from the judgment of this Court in Firm Chhotabhai Jethabai Patel and Co. v. State M. P. where contracts and agreements entered into by persons with the previous proprietors of certain estates and mahals in the State under which they acquired the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos were held in essence and effect to be licences.

There is, of course, a judgment of this Court in Mahadeo v. State of Bombay where seemingly a somewhat different view was expressed but the facts of that case were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land, to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years.

We fail to see how this authority in any way supports the case of the appellant before us or resuscitates the authority of Chhotabhai case. In Ansari case the Court seems to have assumed that Chhotabhai case dealt with short term contracts while, as we have seen above, most of the contracts in Chhotabhai case were of far greater duration extending even to fifteen years, nor was the Court's attention drawn to the case of State of M. P. v. Yakinuddin. While the agreement in Ansari case was a mere right to enter upon the land and take away tendu leaves, etc., the right under the Bamboo Contract is of a wholly different nature. Further, the question whether the agreements were a grant of a profit a prendre or a benefit to arise out of land was not raised and, therefore, not considered in Ansari case and the only point which fell for decision by the Court was whether the agreements were licences or leases. In fact, another question which arose in that case was whether the respondents were liable to pay the amount

116. We now come to the case of State of M. P. v. Orient Paper Mills Ltd., the second of the two cases on which learned counsel for the appellant relied so strongly in support of his submission that the Bamboo Contract was a contract of sale of goods. The facts in that case as appearing from the judgment of the High Court reported as Orient Paper Mills Ltd. v. State of M. P. were that the President of India acting on behalf of the former Part C State of Vindhya Pradesh had entered into an agreement with the respondent. The said agreement was a registered instrument and was styled as a lease and under it the respondent acquired the right for a period of twenty years with an option of renewal for a further period of twenty years to enter upon the leased area" to fell, cut or extract bamboos and salai wood and to remove, store and utilize the same for meeting the fuel requirement of its paper mill. A copy of the said agreement has been produced before us. Some of the terms of the said agreement were the same as

117. We are unable to agree with the interpretation placed by the Court on the document in the Orient Paper Mills case. We find that in that case this Court as also the High Court adopted a wrong approach in construing the said document. It is a well-settled rule of interpretation that a document must be construed as a whole. This rule is stated in Halsbury's Laws of England, Fourth Edition, Volume 12, paragraph 1469 at page 602, as follows :

> Instrument construed as whole. - It is a rule of construction applicable to all written instruments that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree. Effect must, as far as possible, be given to every word and every Clause.

In Mahadeo v. State of Bombay a five-Judge Bench of this Court categorically held (at page 349) that "Whether the right to the leaves can be regarded as a right to a growing crop has, however, to be examined with reference to all the terms of the documents and all the rights conveyed thereunder". In spite of this clear and unequivocal pronouncement by a five-Judge Bench of this Court, the learned Judges of the High Court who decided the Orient Paper Mills case held (at page 538) that "we have to consider the stage when bamboos and salai wood have already been felled and appropriated". While a two-Judge Bench of this Court evolved for itself in the appeal from that judgment a rule of interpretation which was thus stated (at page 152) by Krishna Iyer., J., who spoke for the Court : (SCC p. 81, para 6)

> The meat of the matter is the judicial determination of the true character of the transaction of 'lease' from the angle of the MGST Act and the sale of Goods Act whose combined operation is pressed into service for making the tax exigible from the Forest Department and, in turn, from the respondent mills. It is the part of judicial prudence to decide and issue arising under a specific statute by confining the focus to that statutory compass as far as possible. Diffusion into wider jurisprudential areas is fraught with unwitting conflict or confusion. We, therefore, warn ourselves against venturing into the general law of real property except for minimum illumination thrown by rulings cited. In a large sense, there are no absolutes in legal propositions and human problems and so, in the jural cosmos of relativity, our observations here may not be good currency beyond the factual-legal boundaries of sales tax situations under a specific statute.

118. A little later the learned Judge stated (at page 157) as follows : (SCC pp. 85-86, para 23)

We may also observe that the question before us is not so much as to what nomenclature would apply describe the deed but as to whether the deed results in sale of trees after they are cut. The answer to that question, as would appear from the above, has to be in the affirmative.

The above rule enunciated by this Court in that case falls into two parts, namely, (1) a document should be so interpreted as to bring it within the ambit of a particular statute relevant for the purpose of the dispute before the Court, and (2) in order to do so, the Court can look at only such of the clauses of the document as also to just one or more of he consequences flowing from the document which would fit in with the interpretation which the court wants to put on the document to make that statute applicable. The above principle of interpretation cannot be accepted as correct in law. It is fraught with considerable danger and mischief as it may expose documents to the personal predilections and philosophies of individual judges depending upon whether according to them it would be desirable that documents of the type they have to construe should be made subject to a particular statute or not. The result would be that a document can be construed as amounting to a grant of a benefit to arise out of land w

The State of Madhya Pradesh, blessed with abundant forest wealth, whose exploitation, for reasons best known to that Government, was left in part to the private sector, viz., the respondent, Orient Paper Mills. . . .

> We may point out here that in making this observation the Court overlooked three important aspects of the matter, namely, (1) it was a matter of policy for the State to decide whether such transactions should be entered into or not, (2) the transaction was entered into by the State so that a paper mill could be started in the State as shown by the various terms of the said agreement and thus was an encouragement to setting up of industries in the State, and (3) the transaction ensured employment for the people of the area because the said agreement expressly provided that the respondent was to engage minimum 50 per cent of the labour for the working of the contract area from the local source if available.

119. Just as a document cannot be interpreted by picking out only a few clauses ignoring the other relevant ones, in the same way the nature and meaning of a document cannot be determined by its end-result or one of the results or consequences which flow from it. If the second art of the above rule were correct, the result would be startling. There would be almost no agreement relating to immovable property which cannot be construed as a contract of sale of goods. Two instances would suffice to show this. If a man were to sell his building to anther and the deed of sale were to provide that the building should be demolished and reconstructed and the price should be paid to the vendor partly in money and partly by giving him accommodation in the new building, according to this rule of interpretation adopted by the Court in the Orient Paper Mills case it would for the purpose of sales tax by a sale of goods because the old building when demolished would result in movable property, namely, debris, doors, window

120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. They, however, have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the Court did in the Orient Paper Mills case.

121. Thus, in coming to the conclusion that the term 'royalty' used in the document before it was merely "a feudalistic euphemism for the 'price' of the timber", the Court overlooked the fact that the amount of royalty payable by the respondent was consideration for all the rights conferred upon the respondent under the contact though it was to be calculated according to the quantity of the bamboos felled, and the Court also overlooked the fact that this was made further clear by the provision for payment of a minimum royalty.

122. It is also true that an interpretation placed by the court on a document is not binding upon it when another document comes to be interpreted by it but that is so where the two documents are of different tenors and not where they have the same tenor. On the ground that they dealt with the general law of real property, the Court in orient Paper Mills case did not avert to the earlier decisions of this Court relating to documents with similar tenor even though those cases were referred to in the judgment of the Madhya Pradesh High Court under appeal before it. In view of this, the Orissa High Court in the judgment under appeal before us held that the Orient Paper Mills case was decided by this Court per incuriam because it did not take into consideration decisions of larger benches of this Court. In Union of India v. K. S. Subramanian [(1977) 1 SCR 87, 92 : (1976) 3 SCC 677 : 1976 SCC (L & S) 492], this Court held as follows : (SCC p., 681, para 12)

But, we do not think that the High Court acted correctly in skirting the views expressed by larger benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized into a rule of law declared by this Court.

Had the Court looked at these decisions of larger benches, it would have appreciated that the only question before it could not be whether the document was a lease or a contract of sale of goods and that even though the documents was not a lease it could be a grant of a profit a prendre and that where there is a grant of a profit a prendre, that is, a benefit to arise out of land, it is immaterial whether the possession of the land is given to the grantee or whether the grantee is given only a licence to enter upon the land to receive the benefit. The basic and salient features of the agreement before the Court in the Orient Paper Mills case were the same as in the case of Mahadeo v. State of Bombay and this Court was not justified in not adverting to that case and the other cases referred to by us earlier on the ground that these cases dealt with the general law of real property.

123. A chameleon may change its colour according to its surroundings but a document is not a chameleon to change its meaning according to the purpose of the statute with reference to which it falls to be interpreted and if documents having the same tenor are not to be construed by courts in the same way, it would make for great uncertainty and would introduce confusion, leaving people bewildered as to how they should manage their affairs so as to make their transactions valid and legal in eye of the law.

124. The authorities discussed above show that the case of Chhotabhai Jethabai Patel & Co. v. State of M. P. is not good law and has been overruled by decisions of larger benches of this Court. They equally show that the case of State of M. P. v. Orient Paper Mills Ltd., is also not good law and that this decision was given per incuriam and laid down principles of interpretation which are wrong in law and cannot be assented to. The discussion of the above authorities also confirm us in our opinion that the Bamboo Contract is not a contract of sale of goods but is a grant of a profit a prendre, that is, of a benefit to arise out of land and that it is not possible to bifurcate the Bamboo Contract into two : one for the sale of bamboo existing at the date of the contract and the other for

the sale of future goods, that is, of bamboos to come into existence in the future. In order to ascertain the true nature and meaning of the Bamboo Contract, we have to examine the said contract as a whole with reference to a

Works Contract :

125. The only point which now remains to be considered is the one canvassed by the contesting respondents, namely, that the Bamboo Contract as also the Timber Contracts are works contracts and the amounts payable thereunder cannot, therefore, be made exigible to any tax under the Orissa Act. A work contract is a compendious term to describe conveniently a contract for the performance of work or services in which the supply of materials or some other goods is incidental. The simplest example of this type of contract would be where an order is given to a tailor to make a suit from suiting supplied by the customer. This would be a contract of work or services in which the supply of materials, namely, thread, lining, and buttons used in making he suit, would be merely incidental. Similarly, if an artist is commissioned to paint a portrait, it would be a contract of work and services in which the canvas on which the portrait is painted and the paint used in painting the portrait would be merely incidental. In C.

The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the things produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price.

126. As pointed out above the Timber Contracts are agreements relating to moveables while the Bamboo Contract is a grant of an interest in immovable property. The question, therefore, whether there is a works contract or a contract of sale of goods can arise only with respect to the Timber Contracts but the very meaning of a works contract would show that the Timber Contracts cannot be works contracts. The payee of the price, namely the Government has not undertaken to do any work or labour. The work or labour under the Timber Contracts is to be done by the payer of the price, namely, the forest contractor, that is, the respondent Firm. It is the respondent Firm which has to enter upon the land and to fell the standing trees and to remove them. Assuming for the sake of argument that the Bamboo Contract were a contract relating to moveables, the same position would apply to it. This contention of the respondents, is therefore, without any substance.

Conclusions :

127. To summarize our conclusions :

> (1) The impugned provisions, namely, (1) Notification S. R. O. No. 372 of 1977 dated May 23, 1977, (2) Notification S. R. O. No. 373 of 1977 dated May 23, 1977, (3) Entries 2 and 17 in the Schedule to Notification No. 67178-C. T. A. 135/77 (Pt.)-F (S. R. O. No. 900 of 1977) dated December 29, 1977, and (4) Entries 2 and 17 in the Schedule to Notification No. 67181-C. T. A. 135/77-F (S. R. O. No. 901 of 1977) dated December 29, 1977, levying purchase tax at the rate of ten per cent on the purchase of bamboos agreed to be severed and standing trees agreed to be severed, are not ultra vires either Entry 54 in List II in the Seventh schedule to the Constitution of India or the Orissa Sales Tax Act, 1947, but are constitutional and

valid.

(2) Under the impugned provisions the taxable event is not an agreement to sever standing trees or bamboos but the purchase of standing trees or bamboos agreed to be severed.

(3) The absence in the impugned provisions of the words "before sale or under the contract of sale" is immaterial for the impugned provisions read as a whole clearly show that the severance of standing trees or bamboos has to be under the contract of sale and before the purchase thereof has been completed and not before sale of such trees or bamboos.

(4) The subject-matter of the impugned provisions is goods and the tax that is levied thereunder is on a completed purchase of goods.

(5) When under Section 3-B of the Orissa Sales Tax Act, 1947, any goods are declared to be liable to tax on the turnover of purchases, such goods automatically cease to be liable to sales tax by reason of the proviso to that section.

(6) The word 'supersession' in the notifications dated December 29, 1977, is used in the same sense as the words "repeal and replacement" and, therefore, does not have the effect of wiping our the tax liability under the previous notifications. All that was done by using the words "in the supersession of all previous notifications" in the notifications dated December 29, 1977, was to repeal and replace previous notifications and not to wipe out any liability incurred under the previous notifications.

(7) The Timber Contracts are not works contracts but are agreements to sell standing timber.

(8) Under the Timber Contracts the property in the trees which were the subject-matter of the contracts passed to the respondent Firm, Messrs. M. M. Khara, only in the trees which were felled, that is, in timber, after all the conditions of the contract had been complied withe and after such timber was examined and checked and removed from the contract area. The impugned provisions, therefore, did not apply to the transactions covered by the Timber Contracts.

(9) The dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance, bearing in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word, and the court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word.

(10) Timber and sized or dressed logs are one and the same commercial commodity. Beams, rafters and planks would also be timber.

(11) As the sales of dressed or sized logs by the respondent Firm have already been assessed to sales tax, the sales to the first respondent Firm of timber by the State

Government form which logs were made by the respondent Firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers, assuming without deciding that the retrospectively substituted definition of 'dealer' in clause (c) of Section 2 of the Orissa Sales Tax Act, 1947, in valid.

(12) During the period June 1, 1977 to December 31, 1977, the sales of logs by the respondent Firm would be liable to tax at the rate of ten per cent. Assuming that these sales have been assessed to tax at the rate of six per cent, by reason of the period of limitation prescribed by Section 12(8) of the Orissa Sales Tax Act, 1947, the respondent Firm's assessment for the relevant period cannot now be reopened to reassess such sales at ten per cent.

(13) The Bamboo Contract is not a lease of the contract areas to the respondent Company, The Titaghur Paper Mills Company Limited.

(14) The Bamboo Contract is also not a grant of an easement to the respondent Company.

(15) The bamboo Contract is a grant of a profit a prendre which is Indian law is a benefit to arise out of land and thus creates an interest in immovable property.

(16) Being a benefit to arise out of land, any attempt on the part of the State Government to tax the amounts payable under the Bamboo Contract would be not only ultra vires the Orissa Act but also unconstitutional as being beyond the State's taxing power under Entry 45 in List II in the Seventh Schedule to the Constitution of India.

(17) The case of Firm Chhotabhai Jethabai Patel & Co. v. State of M. P. is not good law and has been overruled by decisions of larger benches of this Court as pointed out by this Court is State of M. P. v. Yakinuddin.

(18) The case if State if M. P. v. Orient Paper Mill Ltd. is also not good law as that decision was given per incuriam and laid down principles of interpretation which are wrong in law.

(19) The real nature of a document and the transaction thereunder have to be determined with reference to all the terms and clauses of that document and all the rights and results flowing therefrom.

128. On the above conclusions reached by us the judgment of the High Court insofar as it holds the impugned provisions to be unconstitutional and ultra vires the Orissa Sales Tax Act, 1947, requires to be reversed. This, however, does not mean that the writ petitions filed by the respondent Company and the respondent Firm in the High Court should be dismissed because in its writ petitions the respondent Company had prayed for quashing the notice dated August 18, 1977, issued against it under Rules 22 and 28(2) of the Orissa Sales Tax Rules, 1947, and the respondent Firm in its writ petition had prayed for setting aside the assessment order dated November 28, 1978, for the period April 1, 1977, to March 31, 1978. On the findings given by us the said notice must be quashed. So far as the said assessment order is concerned, as we have pointed out earlier, it is severable and does not require to be set aside in to but only insofar as it imposed purchase tax on the

amounts paid by the respondent Firm under the Ti

129. In the result, we reverse the judgment of the High Court insofar as it holds (1) Notification S. R. O. No. 372 of 1977 dated May 23, 1977, issued under Section 3-B of the Orissa Sales Tax Act, 1947, (2) Notification S. R. O. No. 373 of 1977 dated May 23, 1977, issued under the first proviso to sub-section (1) of section 5 of the said Act prior to the amendment of the said sub-section by the Orissa Sales Tax (Amendment) Act, 1978, which repealed and replaced the Orissa Sales Tax (Amendment) Ordinance, 1977, (3) Entries 2 and 17 in the schedule to Notification No. 67178-C. T. A. 135/77 (Pt.)-F (S. R. O. No. 900 of 1977) dated December 29, 1977, issued under the said Section 3-B and (4) Entries 2 and 17 in the Schedule to Notification No. 67181-C. T. A. 135/77-F (S. R. O. No. 901 of 1977) dated December 29, 1977, issued under sub-section (1) of the said Section 5 after its amendment by the Orissa Sales Tax (Amendment) Act, 1978, to be unconstitutional as being ultra vires Entry 54 in List II in the Seventh

130. As the real object of he State Government in making the impugned provisions was to make exigible to purchase tax the amounts payable under the Bamboo Contracts and the Timber Contracts in which object it has failed in our opinion, a fair order for costs would be that the parties should bear and pay their own costs of these appeals and we direct accordingly.

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