

Builders' Association of India and Others

Vs

Union of India and Others

Writ Petition (Civil) No. 1060 of 1987

(CJI R. S. Pathak, N. D. Ojha, Rangath Misra, M. N. Vankatachaliah, E. S. Vankataramiah JJ)

31.03.1989

JUDGMENT

VENKATARAMIAH, J. –

1. In this batch of writ petition and civil appeals two questions arise for consideration. The first question to the constitutional validity of the Constitution (Forty-sixth Amendment) Act, 1982 (hereinafter referred to as 'the 46th Amendment') by which the legislatures of the States were empowered to levy sales tax on certain transactions described in sub-clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution and the second question is whether the power of the State legislature to levy tax on the transfer of property in goods involved in the execution of works contracts referred to in sub-clause (b) of clause (29-A) of Article 366 of the Constitution is subject to the restrictions and conditions contained in Article 286 of the Constitution.

2. An account of the history of the relevant constitutional and statutory provisions and of judicial decisions having a bearing on the said provisions has to be set out at this stage to appreciate the contentions of the parties. Prior to the commencement of the Constitution of India the power to levy sales tax had been conferred on the Provisional legislatures by entry 48 of the List II of the Seventh Schedule to the Government of India Act, 1935 which reads as "Taxes on the sale of goods and on advertisements". In exercise of the said power some of the Provisional legislatures had passed laws levying sales tax on the sale or purchase of certain commodities. There was no specific restriction or condition on the exercise of the said power under the Government of India Act, 1935. The Provincial legislatures exercised the power to levy sales tax acting on the principles of the territorial nexus, that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of the levy of sales tax under the legislation. Assam and Bengal made among other things the actual existence of the goods in the province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually found in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. Such claims to taxing led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. By the time the Constituent Assembly took up for consideration the provisions relating to the power of the State legislature to levy sales tax the difficulties created by the sales tax laws passed by the various Provinces and their effect on inter-state trade and commerce had come to be felt throughout the country. In order to minimise the adverse effects of the sales tax laws passed by the legislatures of States the Constituent Assembly enacted Articles 268, 301 and 304 of the Constitution.

Introducing an amendment to Article 264-A to the draft Constitution, which ultimately became Article 286 of the Constitution of India Dr. Ambedkar observed on the floor of the Constituent Assembly thus :

Sir, as everyone knows the sales tax has created a great deal of difficulty throughout India in the matter of freedom of trade and commerce. It has been found that the very many sales taxes which are levied by the various Provincial Government either cut into goods which are the subject matter of imports or exports, or cut into what it is called inter-State trade or commerce. It is agreed that this kind of chaos ought not to be allowed and that while the provinces may be free to levy the sales tax there ought to be some regulations whereby the sales tax levied by the provinces would be confined within the legitimate limits which are intended to be covered by the sales tax. It is, therefore, felt that there ought to be some specific provisions laying down certain limitations on the power of the provinces to levy sales tax.

The first thing that I would like to point out to the House is that there are certain provisions in this Article 264-A which are merely reproductions of the different parts of the Constitution. For instance, in sub-clause (1) of Article 264-A as proposed by me, sub-clause (b) is merely a reproduction of the article contained in the Constitution, the entry in the Legislative List that taxation of imports and exports shall be the exclusive province of the Central Government. Consequently so far as sub-clause (1)(b) is concerned there cannot be any dispute that this is in any sense an invasion of the right of provinces to levy sales tax.

Similarly, sub-clause (2) is merely a reproduction of Part X-A which we recently passed dealing with provisions regarding inter-State trade and commerce. Therefore so far as sub-clause (2) is concerned there is really nothing new in it. It merely says that if any sales tax is imposed it shall not be in conflict with the provisions of Part X-A.

With regard to sub-clause (3) it has also been agreed that there are certain commodities which are so essential for the life of the community throughout India that they should not be subject to sales tax by the province in which they are to be found. Therefore it was felt that if there was any such article which was essential for the life of the community throughout India, then it is necessary that, before the province should have the assent of the President, so that it would be possible for the President and the Central Government to see that no hardship is created by the particular levy proposed by a particular province.

The proviso to sub-clause (2) is also important and the attention of the House might be drawn to it. It is quite true that some of the sales taxes which have been levied by the provinces do not quite conform to the provisions contained in Article 264-A. They probably go beyond the provisions. It is therefore felt that when the rule of law as embodied in the Constitution comes into force all laws which are consistent with the provisions of the Constitution shall stand abrogated. On the date of the inauguration of the Constitution this might create a certain amount of financial difficulty or embarrassment to the different provinces which have got such taxes and on the proceeds of which their finances to a large extent are based. It is therefore proposed as an explanation to the general provisions of the Constitution that notwithstanding the inconsistency of any sales tax imposed by any province with the provisions of Article 264-A, such a law will continue in operation until March 31, 1951, that is to say, we practically propose to give the provinces a few months more to make such adjustments as they can and must in order to bring their law into conformity with the provisions of this article.

3. Article 286 of the Constitution, as it was originally enacted, read as follows.

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

(a) outside the State; or

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

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

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

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the day of March 31, 1951.

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

4. Articles 301 and 304 of the Constitution which were incorporated in Part XIII of the Constitution read thus :

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

304. Restrictions on trade, commerce and intercourse among States. - Notwithstanding anything in Article 301, or Article 303, the Legislature of a State may by law -

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

(b) impose such reasonable restrictions on the freedom of trade, commerce or

intercourse with or within that State as may be required in the public interest :

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

5. The power to levy sales tax was conferred on the legislatures of States by the Constitution by entry 54 of List II of the Seventh Schedule to the Constitution of India which, as originally enacted, read thus :

54. Taxes on the sale or purchase of goods other than newspapers.

The power to levy tax on purchase of goods was expressly stated in entry 54 even though it was implicit in the expression "taxes on the sale" which was found in entry 48 of List II of the Seventh Schedule to the Government of India Act, 1935. In exercise of the power conferred on it by entry 54 of the State List the legislature of Bombay passed an Act called the Bombay Sales Tax Act, 1952 which imposed a general tax on every dealer whose turnover in respect of sales within the State of Bombay during the prescribed period exceeded Rs. 30,000 and a special tax on every dealer whose turnover in respect of sales of special goods made within the State of Bombay exceeded Rs. 5000 during the prescribed period. The term 'sale' was defined as meaning any transfer of property in goods for cash or deferred payment or other valuable consideration, and an Explanation to this definition provided that the sale of any goods which have actually been delivered in the State of Bombay as a direct result of such sale for the purpose of consumption in the said State shall be deemed, for the purposes of the Act, to have taken place in the said State irrespective of the fact that the property in the goods has, by reason of such sale, passed in another State. Rules 5 and 6 of the Bombay Sales Tax Rules, 1952, which were brought into force on the same day on which Sections 5 and 10 of the Bombay Sales Tax Act came into force provided for the deduction of the following sales in calculating the taxable turnover, viz., sales which took place (a) in the course of the import of the goods into, or the export of the goods out of, the territory of India, and (b) in the course of inter-State trade or commerce (being the two kinds of sales referred to clauses (1)(b) and (2) respectively of Article 286 of the Constitution). Rule 5(2)(i), however, required, as a condition of the aforesaid deductions, that the goods should be consigned by a railway, shipping or aircraft company or country boat registered for carrying cargo or public motor transport service or by registered post. In an application made under Article 226 of the Constitution challenging the validity of the said Act and praying inter alia for a writ against the State of Bombay and the Collector of Sales Tax, Bombay, restraining them from enforcing the provisions of that Act, the High Court of Bombay held that the definition of 'sale' in that Act was so wide as to include the three categories of sale exempted by Article 286 of the Constitution from the imposition of tax by the States and thus not valid. On appeal to this Court the decision of the High Court of Bombay was reversed by the majority in the State of Bombay v. United Motors (India) Ltd. (1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133) Soon doubts came to be entertained about the correctness of the above decision and this Court got the opportunity to reconsider the correctness of the above decision and this Court got the opportunity to reconsider of the above decision in the United Motors case (1953 SCR 1069 : AIR 1953 SC 252 : (1953) 4 STC 133) in the Bengal Immunity Company Limited v. State of Bihar ((1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446).

6. In the case of the Bengal Immunity Company Ltd. ((1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446). the majority held that the operative provisions of the several parts of Article 286 of the Constitution, namely, clause (1)(b) and clauses (2) and (3) were intended to deal with different topics and one could not have projected or read into another. The bans imposed by Article

286 of the Constitution on the taxing powers of the States were independent and separate and each one of them had to be got over before a State legislature could impose tax on transactions of sale or purchase of goods. The Explanations to Article 286(1)(a) determined by the legal fiction created therein the situs of the sale in the case of transactions coming within that category and once it was determined by the application of the Explanation that a transaction was outside the State, it followed as a matter of course that the State, with reference to which the transaction could thus be predicated to be outside it, could never tax the transaction. After the judgment in the Bengal Immunity Company Ltd. case ((1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446). On the recommendations of the Taxation Enquiry Commission as regards the amendment of the constitutional provisions relating to sales tax, Parliament passed the Constitution (Sixth Amendment) Act, 1956 which received the assent of the President on September 11, 1956. By the said amendment the Constitution was amended in the following way. In List I of the Seventh Schedule to the Constitution entry 92-A was added. It reads as follows :

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.

7. In List II existing entry 54 was substituted by the following entry :

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

8. Article 269 of the Constitution which enumerated the taxes that were to be levied and collected by the Government of India but were to be assigned to the States was amended by adding sub-clause (g) to clause (1) and clause (3) to it. After such amendment Article 269 read thus :

269. (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2) namely :

- (a) duties in respect of succession to property other than agricultural
- (b) estate duty in respect of property other than agricultural land;
- (c) terminal taxes on goods or passengers carried by railway, sea or air;
- (d) taxes on railway fares and freights;
- (e) taxes other than stamp duties on transaction in stock exchanges and futures markets;
- (f) taxes on the sale or purchase of newspapers and on advertisements published therein;
- (g) 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.

(2) The net proceeds in any financial year of any such duty or tax, except insofar as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be

assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

9. By the above amendment Parliament was empowered to levy tax on the sales or purchase of goods other than newspapers where such sale or purchase took place in the course of inter-State Trade or commerce and was also empowered to formulate by law principles for determining when a sale or purchase of goods place in the course of inter-State trade or commerce.

10. By the very same Sixth Amendment Article 286 of the Constitution was amended. The Explanation to clause (1) was omitted by that Amendment. Clauses (2) and (3) of Article 286 were substituted by two new clauses. After such amendment Article 286 of the Constitution read thus :

286. Restrictions as to imposition of tax on the sale or purchase of goods. - (1) Now law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -

(a) outside the State; or

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

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in in clause (1).

(3) Any law of a State shall, insofar as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, by subject to such restrictions and conditions in regards to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

11. Pursuant to the power conferred on it Parliament enacted the Central Sales Tax Act, 1956 which received the assent of the President on December 21, 1956. The said Act was passed to formulate principles for determining when a sale or purchase of goods took place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare and certain goods to be of special importance in inter-State trade commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. Section 3 of the Central Sales Tax Act explained when a sale or purchase of goods in the course of inter-State trade of commerce took place. Section 4 of the said Act explained when a sale or purchase of goods took place outside a State and Section 5 explained when a sale or purchase of goods took place in the course of import or export for purchase of that Act. Section 14 of the Centres Sales Tax Act enumerated the goods which were considered to be of special importance in inter-State trade or commerce and Section 15 of that Act set out restrictions and conditions in regard to tax on sale or purchase of declared goods within a State. Section 15 of the Central Sales Tax Act as it is in force today reads thus :

15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State. - Every sales tax law of a State shall, insofar as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely :

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed four per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, and tax has been paid under this Act in respect of the sale of such goods in the course of inter-State trade or commerce, the tax levied under such law shall be reimbursed to the person making such sale in the course of inter-State trade or commerce, in such manner and subject to such conditions as may be provided in any law in force in that State :

(c) where a tax has been levied under that law in respect of the sale or purchase inside the State of any paddy referred to in sub-clause (i) of clause (i) of Section 14, the tax leviable on rice procured out of such paddy shall be reduced by the amount of tax levied on such paddy;

(d) each of the pulses referred to in clause (vi-a) of Section 14, whether whole or separated, and whether with or without husk, shall be treated as a single commodity for the purposes of levy of tax under that law.

12. By the time the Constitution (Sixth Amendment) Act and the Ventral Sales Tax Act, 1956 came into force controversy had arisen before some of the High Courts about the liability of contractors who had undertaken to carry out works contracts to pay sales tax on the transfer of property in the goods involved in works contracts.

13. In *Gannon Dunkerley and Co. (Madras) Ltd. v. State of Madras* (AIR 1954 Mad 1130 : (1955) 1 MLJ 87 : ILR 1955 Mad 832) the assesseees were carrying on business as engineers and contractors. Their business consisted mainly of execution of contracts for constructions of buildings, bridges, dams, roads and structural contracts of all kinds. During the assessment year the return made by the assesseees showed as many as 47 contracts, most of which were building contracts, which were executed by the assesseees. From the total of the amount which the assesseees received in respect of sanitary and other contracts and other contracts 20 per cent and 30 per cent respectively were deducted for Labour and the balance was taken as the turnover of the assesseees for the assessment year in question. Sales tax was levied on the said balance treating it as taxable turnover under the Madras General Sales Tax Act, 1939. The assesseees questioned the levy of sales tax on the said amount treated as turnover on the ground that there was no sale of good as understood in India and, therefore, no sales tax could be levied on any portion of the amount which was received by the assesseees from the persons for whose benefit they had constructed buildings. It was urged on behalf of the assesseees that there was no element of sale of the materials in a building contract and that such a contract was one entire and indivisible. Unless the contract was completed, the builder was not entitled to the price fixed under the contract or ascertainable under the terms of the contract. The property in the materials passed to the owner of the land not by virtue of the delivery of the materials as goods under and in pursuance of an agreement of sale which stipulated a price for the

materials. The property in the materials passed to the owner of the land because they were fixed in pursuance of the contract to build and along with the corpus, which ultimately resulted by the erection of the superstructure, the materials also passed to the owner of the land. It was urged that a contract to build was not a contract to sell goods used in the construction of a building. The High Court of Madras on a consideration of the submissions made before it came to the conclusion that the transactions in question were not contracts for sale of goods as defined under the provisions of the Sale of Goods Act, 1930 which was in force on the date on which the Constitution came into force and therefore the assesseees were not liable to pay sales tax on the amounts received by them from the persons for whom they had constructed building etc. during the year of assessment. But a petition filed by the very same assesseees for similar relief in the *Gannon Dunkerley & Co. Madras (Private) Ltd. v. Sales Tax Officer, Mattancheri* (AIR 1957 Ker 146 : (1957) 8 STC 347 : 1957 Ker LT 349) was dismissed by the Kerala High Court affirming the imposition of sales tax on the turnover relating to construction works and upholding the rules providing for apportionment of the determination of the taxable turnover on a percentage basis. In *Mohamed Khasim v. State of Mysore* ((1955) 6 STC 211 (Mys HC)), the Mysore High Court held that the provisions of the Mysore Sales Tax Act imposing sales Tax on construction of buildings under works contract were valid and further upheld the determination of the taxable turnover on percentage basis. The competence of the State legislature to levy sales tax on the supply of building materials for execution of building contracts came up for consideration before the Nagpur High Court in *Pandit Banarsi Das v. State of Madhya Pradesh* ((1955) 6 STC 93 (Nag HC)). The assesseees in the said case were Madhya Pradesh Contractors' Association and the Jabalpur Contractors' Association. They instituted a petition before the Nagpur High Court through their President and Secretary questioning the power of the State legislature to levy sales tax on the turnover consisting of the amounts received by the building contractors from the persons for whom they had constructed buildings by supplying the required materials. They relied upon the decision of the High Court of Madras in *Gannon Dunkerley case* (AIR 1954 Mad 1130 : (1955) 1 MLJ 87 : ILR 1955 Mad 832). The Nagpur High Court while declining to follow the decision of the High Court of Madras was of opinion that the State legislature could pick out a sale from the composite transaction of a building contract which included transfer of property in materials and could make the portion attributable to the cost of such materials subject to payment of sales tax in exercise of its undoubted and plenary powers. *Jubilee Engineering Co. Ltd. v. Sales Tax Officer, Hyderabad City* (AIR 1956 Hyd 79 : (1956) 7 STC 423) was a case decided by the High Court of Hyderabad. In that case that High Court held that in a works contract where a person undertook to build a particular or to make a particular thing, the materials involved in the building or making of the finished product, could not be the subject matter of sale because there was no agreement to sell the materials nor was price of the goods fixed. It was also found that in such cases there was no passing of the title in those goods as such, except as part of the building or the thing in which they were embedded. It accordingly held that the amount received by a building contractor from the person for whom he had constructed the building could not be taxed under the sales tax of the State of Hyderabad. A similar question arose before the High Court of Rajasthan in *Bhuramal v. State of Rajasthan* (AIR 1957 Raj 104 : (1957) 8 STC 463). The High Court of Rajasthan held that the definition of "dealer" in the Rajasthan Sales Tax Act, 1954 included not only those who sold goods, but also those who supplied goods, whether on commission, or for remuneration or otherwise and the said definition was very wide and included persons like the building contractors who in the course of their business as building contractors supplied goods to those who gave them contracts. Since the said supply was not gratis such building contractors should be held to be dealers within the meaning of that expression in the Rajasthan Sales Tax Act.

14. Ultimately the question whether the cost of the goods supplied by a building contractor in the course of the construction of building could be subjected to payment of sales tax was finally resolved by this Court in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* (1959 SCR 379 : AIR 1958 SC 560 : (1958) 9 STC 353) which was an appeal filed against the decision of the High Court of Madras in *Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras* (AIR 1954 Mad 1130 : (1955) 1 MLJ 87 : ILR 1955 Mad 832). In this case this Court held that on a true interpretation the expression "sale of goods" meant an agreement between the parties for the sale of the very goods in which eventually property passed. In a building contract where 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 received payment as provided therein, there was neither a contract to sell the materials used in the construction nor the property therein as movables. This Court further held that the expression "sale of goods" was at the time when the Government of India Act, 1935 was enacted, a term of well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and should be interpreted in entry 48 in List II in the Seventh Schedule of the Government of India Act, 1935 as having the same meaning as in the Sale of Goods Act, 1930. This Court further held that in a building contract which was one, entire and indivisible, there was no sale of good and it was not within the competence of the Provincial legislature under entry 48 in List II in the Seventh Schedule of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as a sale. The above decision though it was rendered on the basis of the provisions in the Government of India Act, 1935 is equally applicable to the provisions found in entry 54 of List II of the Seventh Schedule of the Constitution. In the above decision, the decision of the Nagpur High Court, the Rajasthan High Court, the Mysore High Court and the Kerala High court referred to above were overruled and the decision of the Hyderabad High Court and the decision of the Madras High Court against which the above appeal had been filed were affirmed. By virtue of the above decision of this Court no sales tax could be levied on the amounts received under a works contract by a building contractor even though he had supplied goods for the construction of the buildings.

15. In addition to the building contracts referred to above, certain other kinds of transactions were also held to be not sales liable to payment of sales tax by this Court even though they involved transfer or property in goods. In *M/s. New India Sugar Mills Ltd. v. CST* (1963 Supp 2 SCR 459 : AIR 1963 SC 1207 : (1963) 14 STC 316) this Court took the view that in the transfer of controlled commodities in pursuance of a direction under a control order, the element of volition by the seller, or mutual assent, as absent and therefore there was no sale as defined in the State of Goods Act, 1930. However, in *Oil and Natural Gas Commission v. State of Bihar* ((1976) 4 SCC 42 : 1976 SCC (Tax) 432 : (1977) 1 SCR 354) this Court had occasion to consider its earlier decisions with regard to the liability of transfers of controlled commodities to be charged to sales tax. This Court held that where there were any statutory compulsions, the statue should be treated as supplying the consensus and furnishing the modality of the consensus. In *Vishnu Agencies (Pvt.) Ltd. v. CTO* ((1978) 1 SCC 520 : 1978 SCC (Tax) 31 : (1978) 2 SCR 433) the decision in *M/s. New India Sugar Mills case* (1963 Supp 2 SCR 459 : AIR 1963 SC 1207 : (1963) 14 STC 316) was held to be not good law. Even after the decision in *Vishnu Agencies case* ((1978) 1 SCC 520 : 1978 SCC (Tax) 31 : (1978) 2 SCR 433) there was a certain area of doubt about the liability of transactions not consensual in nature in which property in goods passed to exigibility to sales tax.

16. Devices by way of leases of films had also been resulting in avoidance of sales tax. The main right in regard to a film related to its exploitation and after exploitation for a certain period of time, in most case, the film ceased to have any value.

17. There were also reports received by the State Government to whom revenues from sales tax had been assigned, as to the large scale avoidance of central sales tax leviable on inter-State sales of goods through the device of consignment of goods from the State to another.

18. In Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi ((1978) 4 SCC 36 : 1978 SCC (Tax) 198 : (1979) 1 SCR 557) this Court held that there was no sale when food and drink were supplied to guests residing in the hotel and that supply of meals was essentially in the nature of a service provided to the guests and could not be identified as a transaction of sale. This Court declined to accept the position that the revenue was entitled to split up the transaction into two parts, one of service and the other of sale of foodstuffs and accordingly the proprietor of a restaurant who provided many services in addition to the supply of food was not liable to pay sales tax on the value of the goods supplied by him.

19. The various problems which arose on account of the above decisions were referred to the Law Commission of India and its advice was sought as to the manner in which the types of transactions involved in the above decisions could be made exigible to sales tax. The Law Commission considered these matters in its 61st Report and recommended inter alia certain amendments to the Constitution, if as a matter of administrative policy it was decided to levy sales tax on transactions of the nature mentioned above. There were also complaints from the States that there was a large scale leakage of sales tax revenue by the adoption of devices such as hire purchase system. In the year 1982 Parliament passed the 46th Amendment amending the Constitution in several respects in order to bring many of the transactions in which property in goods passed but were not considered as sales for the purpose of levy of sales tax, within the scope of the power of the States to levy sales tax.

20. By the 46th Amendment a new clause, namely clause (29-A) was introduced in Article 366 of the Constitution. Clause (29-A) of Article 366 of the Constitution reads thus :

366. Definitions. - In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

(29-A) 'tax on the sale or purchase of goods' includes -

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) 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;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax the supply of goods by any unincorporated association or body of persons to a member therefore for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner

whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

21. A new entry was inserted in List I of the Seventh Schedule to the Constitution as entry 92-B to enable the levy of tax on the consignment of goods where such consignment took place in the course of inter-State trade or commerce :

92-B, Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

22. Clause (1) of Article 269 was amended by adding sub-clause (h) thereto, Clause (3) of that article was amended to enable Parliament to formulate by law principles for determining when a consignment of goods took place in the course of inter-State trade or commerce. After the amendment the relevant portion of Article 269 of the Constitution reads thus :

269. Taxes levied and collected by the Union but assigned to the States. - (1) The following duties and taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :

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(h) taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce .....

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

23. By the 46th amendment Article 286 of the Constitution also was amended by substituting clause (3) thereof by a new clause. After the amendment clause (3) of Article 289 reads thus :

286. Restrictions as to imposition of tax on the sale or purchase of goods. -

(3) Any law of a State shall, insofar as it imposes, or authorises the imposition of, -

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29-A) of Article 366,

be subjected to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

24. The 46th Amendment also validated laws levying tax and also collection by way of tax under such law subject to the conditions mentioned therein.

25. On the passing of the 46th Amendment the State Governments after making necessary amendments in their laws commenced to levy sales tax on the turnover of the works contracts entered into by the building contractors for constructing houses, factories, bridges etc. In some States taxable turnover was determined by deducting the money spent on labour engaged in connection with the execution of the works contracts from the amount received by the contractor for the execution of the works contracts. In some other States a certain fixed percentage of the total turnover was deducted from the total turnover as labour charges before arriving at the taxable turnover. Each State adopted its own method of determining taxable turnover either by framing rules under its sales tax law or by issuing administrative directions. It is not necessary for purposes of this judgment to refer in detail to the various patterns of law in force in the States and the rules or administrative instructions made or issued thereunder. It is sufficient to say that the methods adopted by the State for determining the taxable turnover relating to works contracts for purposes of levy of sales tax were such that sales tax had to be paid by the building contractors not merely on the value of materials supplied by them in connection with the works contracts but also on the expenditure they had incurred in securing the services of architects and engineers who had supervised the execution of the works and also on the amount which they were entitled to receive for supervising the execution of the works. While levying sales tax on the price of the materials supplied for the construction of houses, factories bridge etc. the sales tax authorities of the States did not take into account the conditions and restrictions imposed by Article 286 of the Constitution and the provisions of the Central Sales Tax Act, 1956. The assessing authorities did not make any attempt to ascertain whether the sales of the goods involved in a execution of works contract had taken place in favour of the person who had assigned the contract outside the State in which the works contract was being executed or whether any part of the goods so used in a works contract had been imported from abroad on account of the person who had assigned the contract or whether any part of the goods, such as, iron and steel etc. which were declared goods, had already suffered sales tax at an earlier point in the State and whether on such goods the tax which was being levied exceeded the limit prescribed by Section 15 of the Central Sales Tax Act, 1956. They did not also take into consideration whether the sale of the goods in question had been exempted under the sales tax laws of the State from payment of sales tax or whether it had already suffered payment of tax earlier where the sales tax law of the State had prescribed that the sale of such goods could be subjected to the levy of sales tax at a single point. Aggrieved by the levy of sales tax on the turnover relating to works contracts in the above manner, the petitioners and the appellants have filed these petitions and appeals.

26. The petitioners and the appellants have passed before us in these cases only two points, namely, (i) that the 46th Amendment is unconstitutional because it has not been ratified by the legislature of not less than one-half of the States by resolutions passed to that effect by those legislatures before the Bill which led to the amendment in question was presented to the President for assent; and (ii) that it was not open to the States to ignore the provisions contained in Article 286 of the Constitution and the provisions of the Central Sales Tax Act, 1956 while making assessments under the sales tax laws passed by the legislatures of the States.

27. By an order made by this Court on September 20, 1988 notices were issued to the Attorney General for India and the Advocates-General for the concerned States. The Attorney General and some of the Advocates-General appeared before us in response to the notices issued to them and made their submissions.

28. The first contention raised before us regarding the constitutionality of the 46th Amendment need not detain us long. This contention was based on the assumption that the legislatures of not less than one-half of the States which were in existence during the relevant period had not ratified the Bill which ultimately became the 46th Amendment before the President gave his assent. It was argued that such ratification was necessary since the provisions contained in the 46th Amendment had the effect of enlarging the scope of entry 54 of List II of the Seventh to the Constitution by empowering the legislatures of States to levy sales tax on the turnover relating to the transactions referred to in sub-clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution which they could not have done before the 46th Amendment. It was contended that irrespective of the fact whether the amendment of an entry in any of the list of the Seventh Schedule to the Constitution had the effect of either curtailing or enlarging the powers of Parliament or the legislatures of States, a Bill making provisions for such amendment had to be ratified by legislatures of not less than one-half of the States by resolutions passed to that effect before such a Bill was presented to the President for assent in view of the express provisions contained in clause (c) of the proviso to Article 368(2) the Constitution.

29. At the hearing of the above case the learned Attorney General for India produced before us the Memorandum dated January 31, 1982 signed by the Secretary-General of the Rajya Sabha which reads thus :

# Rajya Sabha Secretariat Parliament House, New Delhi No. Rs. 1/21/SI-B Dated :  
January 31, 1982 MEMORANDUM##

In pursuance of Article 368 of the Constitution of India, the assent copy of the Constitution (Forty-sixth Amendment) Bill, is presented to the President. This Bill has been passed by the Houses of Parliament and has been also ratified by the legislatures of not less than one-half of the States in accordance with the provision of the proviso to clause (2) of Article 368 of the Constitution. Legislatures of the following States have passed resolutions ratifying the amendments :

- (1) Haryana
- (2) Himachal Pradesh
- (3) Karnataka
- (4) Madhya Pradesh
- (5) Maharashtra
- (6) Manipur
- (7) Meghalaya
- (8) Orissa
- (9) Punjab
- (10) Rajasthan
- (11) Sikkim

(12) Tamil Nadu

A copy each of the letters received from these legislatures is placed below.

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Sd/- (Sudarshan Agarwal) Secretary-General To The Secretary to the President, (Through the Secretary, Minister of Law)##

The Attorney General has also produced before us the file containing the resolutions passed by the legislatures of the 12 States referred to in the Memorandum, set out above, We are satisfied that there has been due compliance of the provisions contained in the proviso to Article 368(2) of the Constitution. We, therefore, reject the first contention. Before proceeding further, we should observe that there would have been no occasion for an argument of this type being urged in court if at the commencement of the Act it had been stated that the Bill in question had been presented to the President for his assent after it had duly ratified by the required number of legislatures of States. We hope that this suggestion will be followed by the Central Secretariat hereafter since we found that even the Attorney General was not quite sure till the case was taken up for hearing that the Bill which had become the 46th Amendment had been duly ratified by the required number of States. 30. We shall now proceed to consider the other contention of the petitioners and the appellants, namely, that the States were bound to comply with the provisions of Article 286 of the Constitution and the provisions of the Central Sales Tax Act, 1956, even while levying sales tax on the turnover relating to the transactions described in sub-clause (b) of clause (29-A) of Article 366 of the Constitution. The grounds urged on behalf of the petitioners and the appellants may be summarised thus. The object of the 46th Amendment is to convert what is not a sale into a sale. A transfer of property in goods involved in the execution of a works contract which was held by this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1959 SCR 379 : AIR 1958 SC 560 : (1958) 9 STC 353) to be not a sale is deemed by a fiction of law to be a sale and is made taxable as such. In no other respect does the 46th Amendment enlarge the power of the States to levy sales tax. Articles 269, 286, 366(29-A), entry 92-A in List I of the Seventh Schedule and entry 54 in List II of the Seventh Schedule to the Constitution should be read together. Reading the above provisions together the position which emerges may be summed up as follows : The 46th Amendment has no bearing on the location of the sale. It does not deem an outside sale to be an inside sale. It does not confer on the States the power to tax sales outside the State. Therefore, if in the process of executing a works contract, a transfer of property in the goods takes place outside the State, the State would have no power to levy sales tax on such a transfer. The Amendment does not deem an inter-State sale to be an intra-State sale. It does not confer on the State the power to tax inter-State sales. Therefore, if in the process of executing a works contract a transfer of property in goods takes place in the course of inter-State sale, the State would have no power to levy sales tax on such a transfer. The 46th Amendment does not confer on the State the power to levy sales tax on a sale in the course of import. Therefore, if in the process of executing a works contract, a transfer of property in goods takes place in the course of import, the State would have no power to levy sales tax on such transfer. The price of goods supplied by a person who has assigned the contract for the purpose of executing a works contract cannot be treated as a part of the taxable turnover. The restrictions and conditions contained in Section 15 of the Central Sales Tax Act, 1956, on the power of the States to levy tax on the sale of declared goods apply equally and fully to transfer of property in goods under works contracts, even as they apply to ordinary sales. Therefore, if there is a transfer of property in declared goods - for example steel products - in the process of execution of works contract, the State can levy tax only at 4 per cent and only at one stage. It is clear that the entire works contract is not

deemed by the 46th Amendment to be a sale. Therefore only the price reasonably allocable to goods transferred under works contracts can be taxed, and not the totality of the consideration paid for the works contract. If goods - for example fuel and power - are used in the process of executing a works contract but are consumed in the process, the property in such goods cannot conceivably be transferred, because the goods themselves cease to exist. Such goods cannot be subject matter for the levy of sales tax at all. These in brief are the contentions of the petitioners and the appellants.

31. The abovementioned contentions of the petitioners and the appellants are met by the States thus. When a works contract is executed property does not pass as a movable property unless there is an express agreement stating that the properties in such movables will pass to the person who has assigned the contract as when the goods are used in the construction of the building. In the absence of any such agreement transfer of property in goods passes not as movables as such but by accretion and in an unidentifiable and indivisible manner. In all such cases it is not possible to disintegrate the contract into a contract for sale of goods and a contract for work and labour only. When a house or a factory or a bridge constructed by a building contractor is handed over to the person who had assigned the contract, what is handed over is a conglomerate of all the goods used in the construction of the building which was different from the specific goods used in the construction. Sub-clause (b) of clause (29-A) of Article 366 of the Constitution has conferred on the legislatures of States the power to levy tax on works contract which is independent of the power conferred on the legislatures of States under entry 54 of the State List. It is thus argued that it was not possible to break up the house, factory or bridge etc. which is constructed by a building contractor into individual items of goods and to tax the transfer of property in each of them in accordance with the provisions contained in Article 286 of the Constitution and the Central Sales Tax Act, 1956. It was further urged that in the case of a works contract there could not be a sale of goods which has taken place outside the State in which the work was executed, there could not be any sale of the goods in the course of import into India, there could not be any sale or purchase of goods which had taken place in the course of inter-State trade or commerce and there could not be a sale of any declared goods attracting Section 15 of the Central Sales Tax Act, 1956 since a house, a factory or a bridge was not one of those items specified as declared goods under Section 14 of the said Act. It was next contended that since in no sales tax law in force in any part of India it was stated that the turnover relating to a works contract was subject to payment of sales tax at one point only the question of considering whether the levy of sales tax relating to a works contract could be held to be bad on account of the fact that certain goods which had been used in the construction had suffered tax earlier did not arise. In other words it was urged that the goods involved in a works contract were different from the works contract. It was, however, argued that if any goods had been supplied by the person for whose benefit a building, factory or bridge was being constructed for the purpose of such construction the value of those goods would not be included in the taxable turnover.

32. Before proceeding further it is necessary to understand what sub-clause (b) of clause (29-A) of Article 366 of the Constitution means. Article 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the Constitution as including all materials, commodities and articles. It is true that in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1959 SCR 379 : AIR 1958 SC 560 : (1958) 9 STC 353) this Court held that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales tax. It was in order to overcome the effect of the said decision Parliament amended Article 366 by introducing sub-clause (b) of clause (29-A). Sub-clause (b) of clause (29-A) states that 'tax on the sale or purchase of goods' includes among other things a tax on the transfer of

property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to 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. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) says that 'such transfer, delivery or supply of any goods' shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) of (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression 'tax on the sale or purchase of goods' in entry 54 of the State List, thereof, 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 also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. Clause (1) of Article 286 says that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place - (a) outside the State; or (b) in the course of the import of the goods out of, the territory of India. Here again we have to read the expression 'a tax on the sale or purchase of goods' found in Article 286 as including the transfer of goods referred to in sub-clause (b) of clause (29-A) of Article 366 which is deemed to be a sale of goods and the tax leviable thereon would be subject to the terms of clause (1) of Article 286. Similarly the restrictions mentioned in clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286 would also be attracted to a transfer of goods contemplated under Article 366(29-A)(b). Similarly clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in sub-clause (b) of clause (29-A) of Article 366. Clause (3) of Article 286 consists of two parts. Sub-clause (3) of Article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under clause (29-A) of Article 366 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in Section 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (29-A) of Article 366 of the Constitution. We do not find much substance in the contention urged on behalf of the States that since sub-clause (b) of clause (3) of Article 286 of the Constitution refers only to the transactions referred to in sub-clauses (b), (c) and (d) of clauses (29-A) of Article 366, the transactions referred

to under those three sub-clauses would not be subject to any other restrictions set out in clause (1) or clause (2) or sub-clause (a) of clause (3) of Article 286 of the Constitution. It may be that by virtue of sub-clause (b) of clause (3) of Article 286 it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales. That however cannot make the other parts of Article 286 inapplicable to the transactions which was deemed to be sales under Article 366(29-A) of the Constitution. We are of the view that all transfers, delivers and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and delivers that take place under sub-clause (b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution.

33. It is useful to refer at this stage to the corresponding law in Australia. In *Sydney Hydraulic and Central Engineering Co. v. Blackwood & Son* (8 N.S.W.R. 10), the Supreme Court of New South Wales held that the works contract entered into between the parties which came up for consideration in that case was one to do certain work and to supply certain materials and not an agreement for the sale or delivery of the goods. Accordingly, no sales tax was payable thereon. In 1932 the legislature intervened and amended the statute of 1930 by introducing a new provision, Section 3(4) in the following terms :

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

34. After the above amendment there arose a case in Austria regarding the liability of a contractor to pay sales tax on the transfer of goods involved in a works contract, namely : *M. R. Hornibrook (Pty.) Ltd. v. Federal Commissioner of Taxation* ((1939) 62 CLR 272) The relevant facts involved in that case were these. *M. R. Hornibrook (Pty.) Ltd.* was a builder and a contractor and in addition to manufacturing ironwork and goods for use in contracts undertaken, manufactured items of plants for its own use. In the years 1934 and 1935, *M. R. Hornibrook (Pty.) Ltd.* constructed under contract for *Hornibrook Highways Ltd.* at a price set out in the contract, the *Hornibrook Highway* connecting Sandgate and Redcliffe, Queensland. Part of the highway consisted of a bridge of 1 3/4 miles in length over an arm of Moreton Bay. The bridge was built on reinforced concrete piles, which were driven into the bed of the sea in series of three in line, each set of three connected by a headstock of reinforced concrete. The piles varied in length depending upon the depth to which they had to be driven into the bed of the sea. They were made of a mixture of cement, crushed metal, sand and water, and reinforced with steel bars. The plies were constructed on the bank of Moreton Bay adjacent to the site of the bridge. The headstock was built in the same manner as the piles. So are as was known, concrete piles of the class used in the construction of the bridge were not manufactured for sale anywhere in Australia, nor were they an article of commerce in Australia or anywhere else in the world. Such piles had not been standardized because the construction of each pile depended upon the particular load which it was to carry and the nature of the ground into which it was to be driven, and therefore, each pile in a job might be different from every other pile in it in length. When the sales tax authorities made an assessment in respect of the value of the piles, *M. R. Hornibrook (Pty.) Ltd.* contended that the said piles had no sale value within the meaning of the *Sales Tax Assessment Act*, that the said piles were not a 'manufacture' or 'goods manufactured' within the meaning of the *Sales Tax Assessment Act*, and that the said piles formed part of a bridge

and were built on the job and were not article of commerce and were not procurable from any third person and were not of a class of goods manufactured for sale by any person and therefore the price of piles was not liable to payment of sales tax. Latham, C. J., with whom Justice Rich and Justice Starke agreed (Justice McTiernan dissenting) held as under :

Section 3(4) of the Act, referred to in para (f) abovequoted, was at the relevant time in the following form : "For the purposes of this Act, a person shall be deemed to have sold goods it, in the performance of any contract under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which (whether as goods or in some other form) passes, under the terms of the contract, to some other person'.

In my opinion the commissioner is right in his contention that this provision applies to the present case. The appellant company, in the performance of a contract for building a bridge under which contract it was entitled to receive and doubtless has received valuable consideration, has supplied goods, namely, reinforced concrete piles. Such piles are plainly manufactured articles. They are chattels. They were intended to be incorporated in a structure and were so incorporated. They lost their identity as goods in that structure. But this fact does not prevent the piles from being goods any more than it prevents bricks or stones or nuts and bolts from being goods. The fact that the goods were specially manufactured and designed for a particular purpose cannot be held to deprive them of the character of goods.

35. Sub-clause (b) of clause (29-A) of Article 366 of the Constitution of India more or less has adopted the language used in Section 3(4) of the Australian Act.

36. Even after the decision of this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd (1959 SCR 379 : AIR 1958 SC 560 : (1958) 9 STC 353). It was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. It could not have been the contention of the revenue prior to the 46th Amendment that when the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in Article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by Article 286 while levying sales tax on sale of goods involved in a works contract ? They cannot do so. When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect of it. If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the constitution, the power to tax a transaction which is deemed to be a sale under Article 366(29-A) of the Constitution should also be subject to the

same restrictions and conditions. Ordinary unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work. In Hudson's Building Contracts (8th edn.) at page 362 it is stated thus :

The well known rule is the property in all materials and fittings, once incorporated in or affixed to a building, will pass to the freeholder - *quicquid plantatur solo cedit*. The employer under a building contract may not necessarily be the freeholder, but may be lessee or licensee, or even have no interest in the land at all, as in the case of a sub-contract. But once the builder has affixed materials, the property in them passes from him, and at least as against him they become the absolute property of his employer, whatever the latter's tenure of or title to the land. The builder has no right to detach them from the soil or building, even though the building owner may himself be entitled to sever them as against some other person - e.g., as tenant's fixtures. Nor can the builder reclaim them if they have been subsequently severed from the soil by the building owner or anyone else. The principle was shortly and clearly stated by Blackburn J. in *Appleby v. Meyers* (1867 LR 2 CP 651 at 659) 'Materials worked by one into the property of another become part of that property. This is equally true whether it be fixed or movable property. Bricks built into a wall become part of the house, thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship.

37. In *Emden and Watson - Building Contracts and Practice* (6th edn.) (pages 229-230) it is stated thus :

#### A. VESTING OF PROPERTY IN MATERIALS

##### 1. By affixing materials, etc. to the Freehold.

Vesting of materials when built into the work. - As soon as materials of any description are built into a building or other erection they cease to be the property of the contractor and become that of the freeholder.

#### Illustration

A burial company, having erected a memorial stone, removed and sold it because it was not paid for - Held : The proper remedy of the company was to sue for payment and they had no right to remove the stone.

And where the employer has only an interest less than a freehold, he has the same interest in the built-in materials as he has in the land. Even if the employer detach them from the soil, the property in them does not revert to the contractor, and he acquires no right to remove them on the analogy of the law of landlord and tenant as to fixtures.

#### Illustration

Where the yearly tenant of a house had, at his own expense during his term, hung bells, but quitted the premises without removing them - Held : By remaining fixed to the freehold after the expiration of the term they became the property of the landlord.

Until, however, the materials are actually built into the work in the absence of some stipulation intended to pass the property in them when delivered on the site, they remain the property of the contractor.

38. In Benjamin's Sale of Goods (3rd edn.) in para 43 at page 36 it is stated thus :

Chattel to be affixed to land or another chattel. - Where work is to be done on the land of the employer or on a chattel belonging to him, which involves the use or affixing of materials belonging to the person employed, the contract will ordinarily be one for work and materials, the property in the latter passing to the employer by accession and not under any contract of sale. Sometime, however, there may instead be a sale of an article with an additional and subsidiary agreement to affix it. The property then passes before the article is affixed, by virtue of the contract of sale itself or an appropriation made under it.

39. In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.

40. We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366 (29-A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of Article 366 is to be found only in entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of Bengal Immunity Company Ltd. ((1894) 17 Mad 479) in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under entry 54 of the State List.

41. We, therefore, declare that sales tax laws passed by the legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of 'works contracts'. The case-book

is full of the illustrations of the infinite variety of the manifestation of 'works contracts'. Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the States as are applicable to 'works contracts' represented by "building contracts" in the context of the expanded concept "tax on the sale of purchase of goods" as constitutionally defined under Article 366 (29-A), would equally apply to other species of 'works contracts' with the requisite situational modifications.

42. The constitutional amendment in Article 366 (29-A) read with the relevant taxation entries has enabled the State to exert its taxing power in an important area of social and economic life of the community. In exerting this power particularly in relation to transfer of property in goods involved in the execution of 'works contracts' in building activity, insofar as it affects the housing projects of the under privileged and weaker sections of society, the State might perhaps, be pushing its taxation power to the peripheries of the social limits of that power and, perhaps, even of the constitutional limits of that power in dealing with unequals. In such class of cases 'building activity' really relates to a basic subsistential necessity. It would be wise and appropriate for the State to consider whether the requisite and appropriate classifications should not be made of such building activity attendant with such social purposes of appropriate separate treatment. There of course are matters for legislative concern and wisdom.

43. Having interpreted the relevant provisions of the Constitution, as stated above, we fell that it is unnecessary to take up each and every writ petition referred to above to express our opinion on the validity of the statutory provisions and rules which are questioned before us. The petitioners concerned are at liberty to approach the authorities under the Sales Tax Act or the High Court concerned for necessary relief. It is open to them to question the validity of the statutory provisions and the rules made thereunder before the High Courts concerned. When such petitions are filed the High Courts will proceed to dispose of the cases in the light of this judgment. With these observations all the writ petitions are disposed of.

44. The civil appeals filed against the orders of the High Court, however, shall be placed before the appropriate bench hearing tax mattes to decide the other question raised in them including the validity of any statutory provisions or rule in the light of this judgment.

45. These cases are accordingly disposed of. There is no order as to costs.

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