

M/s. Gannon Dunkerley And Co. and Others

Vs

State of Rajasthan and Others

Larsen and Toubro Ltd

Vs

Union of India and Others

Civil Appeal Nos. 4861-64 of 1992 and Civil Writ Petition No. 197 of 1991

(CJI M.M. Kania, J.S. Verma, S.C. Agarwal, Yogeshwar Dayal, Dr. A.S. Anand JJ)

17.11.1992

JUDGMENT

S. C. AGRAWAL, J.

1. Having heard learned counsel in SLP(C) Nos. 3365-68 of 1992, we hereby grant special leave to appeal and proceed to dispose of the appeals.
2. These appeal arising from the judgment of the Rajasthan High Court dated September 3, 1991 and the connected writ petition filed under Article 32 of the Constitution raise questions relating to imposition of tax on the transfer of property in gook involved in the execution of works contracts. The power to impose this tax became available to the State Legislature as a result of the amendments introduced in the constitution by the Constitution (Forty-sixth Amendment) Act, 1982 hereinafter referred to as the 'Forty-sixth Amendment'. The validity of the said amendment has been upheld by this Court in Builders Associations of India v. Union of India((1989) 2 SCC 645: 1989 SCC (Tax) 317: (1989) 2 SCR 320) wherein this Court has also considered the scope and ambit of the legislative power to impose the said tax.
3. The relevant historical background leading to the enactment of the Forty-sixth Amendment has been set out in detail in Builders Association case. We would, therefore only make brief reference to the circumstances which led to the said amendment.
4. Under Entry 48 in List II of Seventh Schedule to the Government of India Act 1935 the legislative power to impose "taxes on sale of goods and on advertisements" was conferred on the Provincial Legislatures. Under the Constitution as adopted the said taxing power and divided between Parliament and the State Legislature. Under Entry 92 in List I of the Seventh Schedule to the Constitution Parliament was empowered to impose "taxes on the sale or purchase of newspapers and on advertisements published therein" under Entry 54 in List II the State Legislatures were empowered to impose "taxes on the sale or purchase of goods other than newspapers". With regard to imposition of sales tax on goods involved inn execution of works contracts where the contract was singled and indivisible, the question arose whether there is a 'sale' of those materials with the meaning of that word on Entry 48 in List II of the Seventh Schedule on the Government of India

Act 1935 and Entry 54 in List II of the Seventh Schedule to the Constitution. There was sharp cleavage of opinion among the High Courts on that question. The High Court of Madras in *Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras*(AIR 1945 Mad 1130 : (1955) 1 MLJ 87 : (1954 5 STC 216) took the view that the expression sale of goods in Entry 48 in List II of the Government of India Act 1935 and Entry 54 List II of the Constitution had the same meaning as it has in the Sale of Goods Act 1930 and that construction works contracts were not contracts for sale of the materials used term and that the contract being entire and indivisible could not be broken into a contract for sale of materials and a contract for payment for work done. On that view it was held that the provisions of the amendments introduced by the Amendment Act of 1947 in Madras General Sales Tax Act 1939 whereby the definition of sale was enlarged to include "a transfer of property in goods involved in the execution of a works contract" and thereby impose sales tax on such transfers were declared as ultra vires the powers of the Provincial Legislature. The same view was taken by the Hyderabad High Court in *Jubilee Engineering Co. Ltd. v. STO*(AIR 1956 Hyd 79 : (1956) 7 STC 423). The Kerala High Court in *Cannon Dunkerley & Co. Madras (P.) Ltd. v. STO*(AIR 1957 Ker 146 : (1957) 8 STC 347) and the Mysore High Court in *Mohammed Khasim v. State of Mysore*((1955) 6 STC 211 (Mys)) took the contrary view and upheld the power of the State to impose sales tax on the turnover relating to construction works. The Nagpur High Court in *Pandit Banarasi Das v. State of M.P.*((1955) 6 STC 93 (Nag)) while declining to follow the decision of the Madras High Court expressed the view that the State Legislature could pick out a sale from the composite transactions of a building contract which included transfer of property in materials and could make the portion attributable to the cost such materials subject to payment of sales tax in exercise of its undoubted and plenary powers. The Rajasthan High Court in *Bhuramal v. State of Rajasthan*(AIR 1957 Raj 104 : (1957) 8 STC 463) took a similar view.

5. This conflict was 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) wherein the decision of the Madras High Court was affirmed and it was held that the expression sale goods in Entry 48 in List II of Seventh Schedule to the Government of India Act 1935 had the same meaning as the said expression had in the Sale of goods Act 1930 its essential ingredients being an agreement to sell movable for a price and property passing therein pursuant to that agreement. It was further held that in a building contract, which is entire and indivisible there is no sale of goods because in such a contract the agreement between the parties is that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefore receive payment as provided therein and in such an agreement, there was neither a contract to sell the materials used in the constructions nor does the property pass therein as movables. This Court, therefore laid down that it was not within the competence of the Provincial Legislature under Entry 48 in List II of Seventh Schedule to the Government of India Act 1935 to impose tax on the supply of materials used in such a contract treating it as a sale. The said decision though rendered in the context of Entry 48 in List II of the Seventh Schedule to the Government of India Act 1935 was equally applicable to the provisions found in Entry 54 in List II of the Seventh Schedule to Constitution. In the *Gannon Dunkerley* case it was made clear that the above mentioned conclusions had reference to works contract which were entire and indivisible and the Court has observed: (SCR p. 427)

"It is possible that the parties might enter into distinct and separate contracts one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done. In such a case there are really two agreements though there is single instrument embodying them and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned and will stand untouched by

the present judgment."

6. It may also be mentioned that in *Mithan Lal v. State of Delhi* (1959 SCR 445 : AIR 1958 SC 682 : (1958) 9 STC 417) 1959 SCR 444; AIR 1958 SC 682; (1958) 9 STC 417 this Court in the context of a law made by Parliament in relation to Part C States under Article 246(4) of the Constitution has held that Parliament could impose a tax on the supply of materials in buildings contracts and to impose it under the name of sales tax because the said power of Parliament was plenary and absolute and was untrammelled by the limitations prescribed by Article 246 clauses (2) and (3) and Entry 54 in List II and that the decision in *Gannon Dunkerley* case 1959 SCR 379; AIR 1958 560; (1958) 9 STC 353 which was given on a statute passed by the Provincial Legislature under the Government of India Act 1935, had not application to such a case (SCR p. 451)

7. After the decision in *Gannon Dunkerley* case the matter with regard to taxability of goods involved in execution of works contracts was examined by the Law Commission. In its 61st Report the Law Commission after considering the legal position including the decision in *Gannon Dunkerley* case expressed the view;

"Before the judgments of the Supreme Court, however sale was usually regarded as including a works contract. The question is ultimately one of policy but the Commission would prefer restoration of the power to the States.

Narrow interpretation of the expression sale was not the practice before the Supreme Court judgments. Entries in the legislative list should receive a broad interpretation. Fine nuances need not be material. The transactions resemble sale in substance. Hence the power should be give to the States.

If this alterative is adopted there are several drafting devices open e.g.;

- (a) amending State List Entry 54 or
- (b) adding a fresh entry in the State List, or
- (c) inserting in Article 366 a wide definition of Sale so as to include works contracts.

The commission prefers the last one. It would avoid multiple amendments".

8. Keeping in view the said recommendation of the law Commissions the Constitution was amended by the Forty-sixth Amendment. By the said amendment clause (29-A) was inserted in Article 366 and clause (3) of Article 286 was substituted. The other amendments introduced by it are not relevant for this case. Clause (29-A) of Article 366 is in the following terms;

"(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 valuation 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

installments;

(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 on the supply of goods by any unincorporated association or body of person to a member thereof 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 persons to whom such transfer delivery or supply in made."

9. Clause (3) of Article 286 provides as under;

"(3) Any law of a State shall in so far as it impose or authorizes 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-section 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) of sub-clause (d) of clause (29-A) of Article 366.

be subjects 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".

10. After the Forty-sixth Amendment various State Legislature amended their sales tax legislation to make provisions for imposition of sales tax in relation to works contracts. The constitutional validity of the Forty-sixth Amendment as well as the amendment made in the State legislations on that basis were challenged before this Court in appeals as well as writ petitions filed under Article 32 of the Constitution. The said matters were disposed of by this Court by its judgment in Builders Associations case. In that case two points were raised before this Court; (i) the Forty-sixth Amendment was unconstitutional for the reason that it had not been ratified by the legislatures of not less than one half the States which led to the amendment in question was presented to the President for assent; and (ii) 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.

11. Rejecting the first contentions this Court upheld the validity of the Forty-sixth Amendment in view of the Memorandum dated January 31, 1982 signed by the Secretary General Rajya Sabha which showed that the Bill before it was presented to the President for his assent has been ratified by the legislatures of twelve States and it showed that there was due compliance of the provisions contained in the proviso to Article 368(2) of the Constitution. As regards the second contention this Court on a consideration of the contentions raised on behalf of the petitioners and the appellants and the submissions urged by the States to meet those contentions declared that; (SCC p. 675 para 41 SCR p. 355)

"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 restriction and conditions mentioned in each clause or sub-clause Article 286 of the Constitution".

12. This Court has observed that Parliament amendment Article 366 by introducing sub-clause (b) of clause (29-A) in order to overcome the effect of the decision in Gannon Dunkerley case. Constructing the provision sub-clause (b) of clause (29-A) of Article 366 this Court has laid down: (SCC p. 669 para 32: SCR pp. 347-48).

"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 goods (whether as good 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 includes 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 positions very clear. While referring to the transfer delivery or supply of any goods that takes place as per sub-clause (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 as sale of those goods by the person making the transfer delivery or supply and a purchase of those goods by the person to who, such transfer delivery or supply is made. Hence a transfer of property in goods under sub-section (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, therefor, to enlarge the scope of tax on ale 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) to (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, therefore, includes a tax on the transfer of roperty 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."

13. Explaining the effect of the Forty-sixth Amendment on the powers of the State to levy sales tax this Court has held: (SCC p. 672 para 36: SCR pp. 351-52)

"Even after the decision of this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. 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 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 seals 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 contracts 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 has been entered into in two distinct and separate parts as stated above. It could not have been the contentions 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 restriction 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 is 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 the sale of goods involved in 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 to it. If the power to tax a sale in any 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."

14. After referring to the provision of clause (1) Article 286 where the expression a tax on sale or purchase of goods is used this Court has observed: (SCC pp 669-70 para 32: SCR p. 348)

".... 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) Article 286."

15. Similarly with reference to clause (2) and (3) of Article 286 this Court has observed: (SCC p. 670, para 32: SCR p. 348)

".. Similarly the restrictions mentioned in clause (2) of Article 286 of the Constitution which says that Parliament may by law formulate principle for determining when a sale or purchase of goods takes places 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 (a) of 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 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provisions which empowers Parliament to impose any additional restrictions or

conditions in regard to the levy of sales tax on transaction which will be deemed to be sales under sub-clause (b) or sub-clauses (c) or sub-clause (d) of clause (29-A) of Article 366 of the Constitution."

16. Rejecting the contention urged on behalf of the States that since sub-clause (b) of clause (3) of the Article 286 of the Constitution refers only to the transactions referred to in sub-sections (b), (c) and (d) of clause (29-A) of Article 366 the transactions referred to under those three sub-clauses would not be subjected to any other restriction set out in clause (1) or clause (2) or sub-clause (a) of clause (3) of Article 286 of the Constitution this Court has observed: (SCC p. 670 para 32: SCR p. 349)

".... 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 restriction or condition 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 are deemed to be sales under Article 366(29-A) of the Constitution. We are of the view that all transfers deliveries and of Article 366 of the Constitutions are subject to the restrictions and condition mentioned in clause (1) clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfer and (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 Constitutions."

17. The contentions urged on behalf of the States that the properties that are transferred to the owner in the executions of 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 was rejected by the Court and it was observed that after the Forty-sixth Amendment it is not possible to accede to the plea of the States that what is transferred in works contract is the right in the immovable property. (SCC p. 674 para 39; SCR p. 354) This Court also rejected the plea put forward on behalf of the States that the Forty-sixth Amendment had conferred on the States of larger freedom than what they had before in regard to their power to levy sales-tax under Entry 54 of the State List. It was held that the Forty-sixth 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 sales of such goods and materials. (SCC p. 674, para 40: SCR p. 354)

18. Since it had interpreted the relevant provisions of the Constitutions this Court did not consider it necessary to take up each and every writ petitions to express its opinion on the validity of the statutory provisions and rules which were questioned before the Court and the petitioners concerned were given the liberty to approach the authorities under the Sales Tax Act or the High Court concerned for necessary relief and further made it clear that it would be open to them to question before the High Court concerned.

19. In pursuance of the decision of this Court in Builders Associations case fresh writ petitions were filed by the appellants in the appeals challenging the validity of the provisions of the Rajasthan Sales Tax Act 1954 and the Rajasthan Sales Tax Rules, 1955 relating to imposition of tax on transfer of property in goods involved in the executions of a works contract. The said writ petitions were dismissed by a division bench of the Rajasthan High Court by judgment dated September 3, 1991. The appeals are directed against the said judgment of the High Court.

20. Writ Petition (Civil) No. 197 of 1991 has been filed under Article 32 of the Constitution by

Larsen & Toubro Ltd., a company incorporated under the Companies Act, 1956, which undertakes contracts for executing turnkey projects involving building construction, erection and installation of equipment, etc. In the writ petition, the validity of the provisions relating to imposition of tax on the transfer of property in goods involved in the execution of a works contract contained in the Sales Tax Laws of the State of Tamil Nadu, Andhra Pradesh and Rajasthan have been challenged. The reason for approaching this court under Article 32 of the Constitution, as stated in the writ petition, is that in spite of the decision of this Court in Builders' Association case the petitioner is being subjected to demands for tax in relation to works contracts by the various States and each State is wanting to tax the same transaction on the basis that it constitution sale under its sales tax law. In the said writ petition, the petitioner has impleaded all the States as respondent. We purpose to consider this writ petition with reference to the provisions contained in the Rajasthan Sales Tax Act, 1954 and the Rajasthan Sales Tax Rules, 1955.

21. During the course of arguments, Shri F. S. Nariman and Shri Harish Salve, learned counsel appearing for the appellants in the appeals, and Shri K. Parasaran, learned counsel appearing for the petitioner in the writ petition, raised questions having a bearing on the exercise of the legislative involved in the execution of a works contract, the applicability of the provisions of the Central Sales Tax Act to such a transfer, the fixation of the suits of such a transfer for the purpose of ascertaining whether it constitutes a sale outside the State, the measure for levy and fixing the rates for imposition of such tax and other matters incidental thereto. Since other writ petitions and appeals involving similar questions were listed for hearing along with these matters, we have heard Shri K. M. Vijaayan, Shri A. K. Ganguli, Shri B. R. L. Iyengar, Shri Sankar Ghosh, Shri B. Datta and Shri G. S. Jetly, learned counsel appearing for the contractor in those cases. On behalf of the States, who are parties in the appeals and the writ petition, we have heard Shri T. S. Krishnamoorthy Iyer, Shri R. N. Narasinhamoorthy, Shri C. Sitaramiah, Shri S. K. Dholakia, Shri T. A. Ramachandran, Shri R. N. Sachthey and Shri N. M. Ghatate. Shri Ahuja, learned counsel appealing for the Union of India, did not choose to make any submission for the reason that the matter appertains to the legislative powers of the State Legislatures.

22. On behalf of the contractors, it has been urged that in view of the declaration of the law made by this Court in Builders' Association case the State Legislature, in exercise of its legislative power to impose a tax on the transfer of property in goods involved in the execution of a works contract under Entry 54 of the State List read with Article 366(29-A)(b), cannot levy such a tax in respect of transactions which are in the nature of sales in the course of inter-State trade and commerce or are sales outside the State levying such tax or sales in the course of import inasmuch as it is beyond the legislative competence of the State Legislature to impose a sales tax on inter-State sales as well as sales outside the State and sales in the course of import or export. It has also been urged that the existence of a law made by Parliament under Article 269(3), Article 286(2) and Article 286(3)(b) is a condition precedent for the exercise of the legislative power by the State to impose a tax on transfer of property in goods involved in the execution of a works contract and since no law has been enacted by Parliament under Articles 269(3), 286(2) and 286(3)(b) in relation to imposition of tax on transfer of property in goods involved in the execution of a works contract, it was not open to the State Legislatures to exercise the power to impose such tax. In this regard, it was contended that the Central Sales Tax Act, 1956, having not been amended after the Forty-sixth Amendment to include within its ambit a transfer of property in goods involved in execution of works contract, is not applicable to such a transfer and it cannot be treated to be a law made under Article 269(3) and Article 286(2) in relation to sales arising out of such transfers. It was further submitted that it is not permissible for the State Legislature to define the expression 'sale' in a manner as to include within its ambit an inter-State sale as well as sale outside the State or sale in the course of import and

thereby assume power to impose tax on the same. It has been contended that since the tax livable by virtue of sub-clause (b) of clause (29-A) of Article 366 is on goods which are involved in execution of a works contracts, the measure for such an imposition can only be the value of such goods and the value of the works contract cannot be made the measure or such an imposition and for the same reason, the rate of imposition cannot also be fixed on the basis of the value of the works contract and it has to be fixed in relation to the goods which are involved in the execution of a works contract.

23. In reply to these contentions, it has been urged on behalf of the States that in their absence of the applicability of the provisions of the Central Sales Tax Act, 1956 to transfer of property in goods involved in the execution of a works contract and Parliament having not enacted any law under Articles 269(3) and Article 286(2), there is no limitation whatsoever on the legislative power of the States to impose tax on such a transfer. It has also been submitted that the nature of works contract is such that there can never be any sale in the course of inter-State trade or commerce or an outside sale or a sale in the course of import in respect of goods which are involved in the execution of such a contract since the transfer of property in such goods takes place only when the goods are incorporated in the works and this can only be in the State in which the works is to be executed. It has been further urged that there is a distinction between the nature of the tax and the measure of the tax and that though a tax on transfer of property in goods involved in the execution of a works contract is imposed on the goods which are involved in the execution of a works contract, the value of the works contract can be made the measure for levy of such a tax as well as for prescribing the rate for imposition of such tax.

24. Before we proceed to consider these submissions, it is necessary to deal with the contention urged by Shri Narasinhamoorthy, learned counsel appearing for the State of Karnataka, with regard to the location of the legislative power to impose the tax on transfer of property in goods involved in the execution of a works contract. Shri Narasinhamoorthy has urged that as a result of the Forty-sixth Amendment, a new field of taxation in respect of the works contracts has been made available to the State and that the said power is independent of the legislative power conferred under Entry 54 in List II of the Seventh Schedule to the Constitution and it is not subject to the constitutional limitations contained in Article 286 of the Constitution. In this regard, Shri Narasinhamoorthy has a) argued that this question did not directly arise for consideration in Builders' Association case and the observations with regard to location of the power to impose this tax in the said judgment are in the nature of incidental or casual observation only and they do not preclude this Bench from considering this question.

25. We find it difficult to accept this contention. The question whether as a result of the Forty-sixth Amendment, an independent taxing power has been conferred on the States had arisen for consideration before this Court in Builders' Association case since it was specifically raised in the contentions urged on behalf of the States. While summarising the said contentions this Court has thus mentioned this contention: "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 State under Entry 54 of the State List." (SCC p. 668, para 31: SCR pp. 346) The said contention was rejected with these observations: (SCC p. 669, para 32: SCR pp. 347-48)

"... 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) to (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, therefore, 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."

26. The Court has further observed: (SCC p. 674-75, para 40: SCR p. 354)

"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 State 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 observation of the Constitution Bench in the case of Bengal Immunity Company Ltd.(Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 2 SCR 603 : AIR 1955 SC 661 : (1955) 6 STC 446) 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 intend 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."

27. These observations clearly indicated that the question whether the power to impose tax on the transfer of property in goods involved in the execution of a works contract is to be found in Entry 54 in List II or is an independent taxing power squarely arose for consideration in Builders Association case and has been answered categorically. It cannot, therefore, be said that the said question did not arise for consideration in that case and the observations of this Court in that regard are incidental or casual in nature only which do not preclude us from going into this question.

28. Shri Narasinhamoorthy has been contended that the view of this Court in Builders' Association case that power conferred on the State Legislatures to impose tax on the transfer of property in goods involved in the execution of a works contract is subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution, does not lay down the correct law and needs to be considered. We are not inclined to agree. The principles governing reconsideration of an earlier decision are settled by the various decision of this Court. It has been laid down: "This Court should not, except when it is demonstrated beyond all reasonable doubt that its privacies ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue." (See: Lt. Col. Khajoor Singh v. Union of India((1961) 2 SCR 828, 845 : AIR 1961 SC 532)). In Keshav Mills Co. Ltd. v. CIT((1965) 2 SCR

908 : AIR 1965 SC 1636 : (1965) 56 ITR 365) it has been observed: (SCR pp. 921-22).

"When this Court decided questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavor and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified."

29. In *Ganga Sugar Co. Ltd. v. State of U.P.* ((1980) 1 SCC 223 : 1980 SCC (Tax) 90 : (1980) 1 SCR 769) it has been laid down: (SCC p. 233, para 28: SCR p. 782)

"... Pronouncements by Constitution Benches should not be treated so cavalierly as to be revised frequently. We cannot devalue the decisions of this Court to brief ephemerality which recalls the opinion expressed by Justice Roberts of the U.S. Supreme Court in *Smith v. Allwright* (88 L Ed 987 : 321 US 649, 669 (1944)) that adjudications of the Court were rapidly gravitating into the same class as a restricted railroad ticket, good for this day and train only."

30. Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which are covered by the decision in *Builders' Association* case and we will, therefore, deal with the matter in accordance with the law as laid down in that case that the expression "tax on the sale or purchase of goods" in Entry 54 of the State list 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 and the tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution is subject to the discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution.

31. The legislative power of the States under Entry 54 of the State List is subject to two limitations - one flowing from the entry itself which makes the said power "subject to the provisions of Entry 92-A of List I", and the other flowing from the prohibition contained in Article 286. Under Entry 92-A of List I, Parliament has the power to make a law in respect of taxes on 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 levy and collection of such tax is governed by Article 269. This shows that the legislative power under Entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Similarly clause (1) of Article 286 prohibits the State from making a law imposing or authorising 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 goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under Entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which take place in the course of import or export of goods. In view of the aforesaid limitations imposed

by the Constitution on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29-A) of Article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sale outside the State or sales in the course of import or export. Consequently, it is not permissible for a State to frame the legislative enactment in exercise of the legislative power conferred by Entry 54 in the State List in a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations. Apart from the limitations referred to above which curtail the ambit of the legislative competence of the State Legislatures, there is clause (3) of Article 286 which enables Parliament to make a law placing restrictions and conditions on the exercise of the legislative power of the State under Entry 54 in State List in regard to the system of the levy, rates and other incidents of tax. Such a law may be in relation to (a) goods declared by Parliament by law to be of special importance in inter-State trade or commerce, of (b) to taxes of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366. When such a law is enacted by Parliament the legislative power of the States under Entry 54 in State List has to be exercise subject to the restrictions and conditions specified in that law. In exercise of the power conferred by Article 286(3)(a) Parliament has enacted Sections 14 and 15 of the Central Sales Tax Act, 1956. No law has, however, been made by Parliament in exercise of its power under Article 286(3)(b).

32. On behalf of the contractors, it has been contended that the legislative power conferred on the States under Entry 54 of the State List can be exercised only after Parliament has enacted a law under Article 269(3) formulating principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce and a law under Article 286(2) formulating principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286. The submission is that no law as envisaged by Article 269(3) and 286(2) has been enacted in respect of imposition of tax on transfer of property in goods involved in the execution of a works contract. It has been urged that Central Sales Tax Act, 1956 which formulates the principles under Articles 269(3) and 286(2) is not applicable because after the Forty-sixth Amendment the Central Sales Tax Act has not been amended so as to make it applicable to transfer of property in goods involved in the execution of a works contract. On behalf of the State, it is submitted that since the Central Sales Tax Act has not been made applicable and no law as envisaged under Article 269(3) and 286(2) has been enacted, limitation on the legislative power conferred on the States under Entry 54 in the State List on the basis of Articles 269 and 286 cannot be involved. We are unable to accept either of these contentions. With regard to imposition of tax sale or purchase of goods, after the Forty-sixth Amendment, legislation by Parliament in respect of following matters is envisaged:

- (i) formulation of principles for determining when a sale or purchase of consignment of goods takes place in the course of inter-State trade or commerce (Article 269(3));
- (ii) formulation of principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of Article 286 (Article 286(2)); and
- (iii) declaration of goods to be of special importance in inter-State trade or commerce and specification of restrictions and conditions in regard to system of levy rates and other incidence of tax in respect of a tax on the sale or purchase of such goods. (Article 286(3)(a)); and

(iv) specification of restrictions and conditions in regard to system of levy, rates and other incidents of tax in respect of a tax on the sale or purchase of goods being tax of the nature referred to in sub-clause (b), sub-clause (c) and sub-clause (d) of clause (29-A) of Article 366. (Article 286(3)(b)).

33. The Central Sales Tax Act is a law in respect of matters (i), (ii) and (iii) referred to above. It is a composite law which has been enacted under Entry 92-A of List I read with clause (1) of Article 269 as well as under clause (3) of Article 269, clause (2) of Article 286 and sub-clause (a) of clause (3) of Article 286. Chapter II (Sections 3, 4 and 5) bears the heading "Formulation of principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export." Section 3 lays down the conditions when a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce and it is referable to clause (3) of Article 269. Section 4 prescribes the conditions when a sale or purchase of goods is said to take place outside a State and Section 5 prescribes the condition when a sale or purchase of goods is said to take place in the course of import or export. Sections 4 and 5 are thus referable to clause (2) of Article 286. Chapter III (Sections 6 to 13) bears the heading 'Inter-State sales tax' and the said provisions are referable to Entry 92-A of List I and sub-clause (g) of clause (1) of Article 269. Chapter IV (Sections 14 and 15) bears the heading "Goods of special importance in inter-State trade or commerce" and the said provisions are referable to sub-clause (a) of clause (3) of Article 286.

34. The question is whether in the absence of an amendment in the Central Sales Tax Act specifically applying its provisions to a transfer of a property in goods involved in the execution of a works contract, the provisions of Section 3, 4 and 5 contained in Chapter II can be held applicable to such a transfer. In this context, it may be mentioned that prior to the Forty-sixth Amendment, a distinction was being made between a 'works contract' which was entire and indivisible and a works contract composed of two distinct and separate contracts—one, for transfer of materials and other, for payment of remuneration for services and for work done. The non-availability of the legislative power of States under Entry 54 of the State List, as construed by this Court in the Gannon Dunkerley case was confined, in its application, to works contracts falling in the first category, i.e., contracts which were entire and indivisible and it was permissible for the State to impose tax on sale or purchase of goods where the parties had entered into distinct and separate contracts one for the transfer of materials and other for payment of service and for work done. The provisions of Sections 3, 4 and 5 of the Central Sales Tax Act were applicable where there were two separate contracts. In Builders' Association case it has been observed: (SCC p. 672, para 36; SCR p. 351 F-G)

"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."

35. This would mean that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought on a par with a contract containing two separate agreements. Since the provisions of Section 3, 4 and 5 were applicable to such contracts containing two separate

agreements, there is no reason why the said provisions should not apply to a contract which, though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. Reference may be made in this context to the oft-quoted observations of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* ((1952) AC 109 : (1951) 2 All ER 587,599):

"If one are bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of the state of affairs."

36. If the legal fiction introduced by Article 366(29-A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

37. For the reasons aforesaid, we are of the view that even in the absence of any amendment having been made in the Central Sales Tax Act (after the Forty-sixth Amendment) expressly including transfers of property in goods involved in execution of a works contract, the provisions contained in Sections 3, 4 and 5 would be applicable to such transfers and the legislative power of the State to impose tax on such transfer under Entry 54 of the State List will have to be exercised keeping in view the provisions contained in Section 3, 4 and 5 of the Central Sales Tax Act. For the same reasons Section 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under Entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in the said provisions in respect of goods that have been declared to be of special importance in inter-State trade or commerce.

38. Since the question of levy of inter-State sales tax under Section 6 of the Central Sales Tax Act is not in issue in these cases which only relate to imposition of sales tax by the States, we do not propose to go into the question, whether such a tax can be levied on deemed sales resulting from transfer of property in goods involved in the execution of a works contract without amending the definition of 'sale' in Section 2(g) of the Central Sales Tax Act, so as to include such transfers within its ambit. It is, however, made clear that the absence of any amendment in the definition of sale contained in Section 2(g) of the Central Sales Tax Act, 1956 so as to include transfer of property in goods involved in execution of a works contract does not in any way affect the applicability of the Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act to such transfers.

39. On the basis of Article 286(3)(b) which has been introduced by the Forty-sixth Amendment, it has been urged on behalf of the contractors that till Parliament makes a law specifying the restrictions and conditions in regard to the system of levy, rates and other incidents of the tax referred to in Article 366(29-A)(b), it is not open to the State Legislatures to impose a tax on the transfers referred to in sub-section (b) of clause (29-A) of Article 366. In support of this submission, reliance has been placed on the decision of this Court in *Bengal Immunity Co. Ltd. v. State of Bihar* wherein it was held that until Parliament by law made in exercise of the powers vested in it by

clause (2) provides, no State could impose or authorise the imposition of any tax on sales or purchase of goods when such sales or purchases take place in the course of inter-State trade or commerce. The aforesaid observations made in the context of clause (2) of Article 286, as it stood at that time, can have no bearing on sub-clause (b) of clause (3) of Article 286. Under clause (2) of Article 286, as it stood at the time when Bengal Immunity case was decided, the States were precluded from imposing or authorising imposition of tax on the sale or purchase of any goods or sale or purchased of any goods in the course of inter-State trade or commerce except insofar as Parliament may by law or otherwise provide. In the absence of a law by Parliament so providing, it was not permissible for the State Legislatures to impose such a tax. The scheme of sub-clause (b) of clause (3) of Article 286 is, however, different. In view of sub-clause (b) of clause (29-A) of Article 366, the State Legislatures are competent to impose tax on transfer of property in goods involved in the execution of a works contract and under sub-clause (b) of clause (3) of Article 286 Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidence of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of a law under sub-clause (b) of clause (3) of Article 286 by Parliament. It only means that in the event of a law having been made by Parliament under Article 286(3)(b) the exercise of the legislative power of the State under Entry 54 in List II to impose a tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy rates and other incidents of tax contained in the said law. The existence of a law enacted under Article 286(3)(b) cannot, therefore, be regard as a condition precedent for the exercise of the taxing power of the State under Entry 54 in List II to impose a tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366. This does not, however, absolve Parliament from enacting a law as envisaged by article 286(3)(b). Keeping in view the grievance of the contractors that there is wide disparity in the sales tax legislation of the various States in the matter of imposition, mode of assessment, rate etc., of the tax on deemed sales resulting from transfer of property in goods involved in the execution of a works contract referred to in sub-clause (b) of clause (29-A) of Article 366, the need for the law envisaged by Article 286(3)(b) cannot be minimised.

40. On behalf of the States it has been seriously contended that a deemed sale resulting from transfer of property in goods involved in the execution of a works contract can never be a sale in the course of inter-State trade or commerce and it cannot be an outside sale or a sale in the course of import since the transfer of property in the goods take place only at the stage when the goods are incorporated in the goods takes place only in the State where the works is required to be executed. On behalf of the contractors, on the other hand, it has been urged that a works contract can involve transactions constituting a sale in the course of inter-State trade and commerce as well as an outside sale or a sale in the course of import and that is a matter which will have to be considered in accordance with the principles contained in Sections 3,4 and 5 of the Central Sales Tax Act keeping in view the terms and conditions of the particular contract. In this regard, the learned counsel have placed reliance on a number of decisions of this Court wherein the provisions of Sections 3 and 4 of the Central Sales Tax Act, 1956 have been considered. We do not propose to go into this controversy because the question whether a deemed sale resulting from transfer of property in goods involved in the execution of a particular works contract amount to a sale in the course of inter-State trade or commerce under Section 3 of the Central Sales Tax Act or an outside sale under Section 4 of the Central Sales Tax Act or a sale in the course of import under Section 5 of the Central Sales Tax act has to be decided in the light of the particular terms of the works contract and it cannot be decided in the abstract. As at present advised, we are not in a position to say the in no case, can there be a sale in the course of inter-State trade or commerce or an outside sale or a sale in the

course of import in respect of a deemed sale resulting from transfer of property in goods involved in the execution of a works contract falling within the ambit of sub-clause (b) of clause (29-A) of Article 366 of the Constitution.

41. It must, therefore, be held that while enacting a law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with sub-clause (b) of clause (29-A) of Article 366 of the Constitution, it is not permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of inter-State trade or commerce under Section 3 of the Central Sales Tax Act or an outside sale under Section 5 of the Central Sales Tax Act. So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in Section 15 of the Central Sales Tax Act.

42. Having thus defined the ambit of the field available to the State Legislature for enacting a law imposing a tax on transfer of property in goods involved in the execution of a works contract, we may now examine some aspects of such a law to which reference has been made during the course of arguments by the learned counsel for the contractors. We propose to deal with these aspects separately.

Definition of "Sale"

43. It has been contended on behalf of the contractors that while it is permissible for the State Legislature to define the expression 'sale' in sales tax legislation to include transfer of property in goods involved in the execution of a works contract it is not permissible for the State Legislature to locate the situs of such sale in a manner as to treat a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import and export, as a sale inside the State and thereby assume the power to impose a tax on sales which are actually sales in the course of import and export. In this regard, it may be stated that so far as sales in the course of inter-State trade or commerce are concerned, the position is well settled that the situs of the sale or purchase is wholly irrelevant as regards its inter-State character. (See: *Bengal Immunity Co. Ltd. v. State of Bihar.*) In *Onkarlal Nandlal v. State of Rajasthan* it has been observed: (SCC p. 413, para 7: SCR p. 1086)

"... There is, in our opinion, no antithesis between a sale in the course of inter-State trade or commerce and a sale inside the State. Even an inter-State sale must have a situs and the situs may be in one State or another. It does not involve any contradiction in saying that an inter-State sale or purchase is inside a State or outside it."

44. The location of the situs of the sale in sales tax legislation of the State would therefore, have no bearing on the charge ability of tax on sales in the course of inter-State trade and commerce since they fall outside the field of legislative competence of the State Legislatures and will have to be excluded while assessing the tax liability under the State legislation. The same is true of sales which are outside the State and sales in the course of import and export., The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import and export into a sale inside the State, The question whether a sale is an outside sale or a sale inside the State or whether it is a sale in the course of import or export will have to be determined in accordance with the principles contained in Sections 4 and 5 of the Central Sales Tax Act and the State Legislature while enacting the sales tax legislation for the State cannot make a departure from those principles.

Measure of Tax

45. On behalf of the contractors, it has been urged that under a law imposing a tax on the transfer of property in goods involved in the execution of a works contract under Entry 54 of the state List read with Article 366(29-A) b), the tax is imposed on the goods which are involved in the execution of a works contract and the measure for levying such a tax can only be the value of the goods sops involved and the value of the works contract cannot be made the measure for levying the tax. The submission is further that the value of such goods would be the cost of acquisition of the goods by the contractor and, therefore, the measure for levy of tax can only be the cost at which the goods involved in the execution of a works contract were obtained by the contractor. On behalf of the States, it has been submitted that since the property in goods which are involved in the execution of a works contract passes only when the goods are incorporated in the works, the measure for the levy of the tax would be the value of the goods at the time of their incorporation in the works as well as the cost of incorporation of the goods in the works. We are in agreement with the submission that measure for the levy of the tax contemplated by Article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. In Builders' Association case it has been pointed out that in Article 366(29-A)(b), "(t)he emphasis is on the transfer of property in goods (whether as goods or in some other form)". (SCC p. 669, para 32: SCR p. 347) This indicates that thought the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of works contract. We are, however, unable to agree with the contention urged on behalf of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works of and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer or property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by Article 366(29-A)(b).

46. With regard to the determination of the value of the goods which are involved in the execution of a works contract the submission of the learned counsel appealing for the States is that a more convenient mode for such determination is to take the value of the works contract as a whole and deduct therefrom the cost of labour and services rendered by the contractor during the course of execution of the works contract. The submission of the learned counsel is that this mode would prevent evasion of tax. The learned counsel for the contractors have submitted that in that event the following deductions should be made from the value of the entire contract in order to arrive at the value of the goods involved in the execution of a works contract:

- (i) labour charges for execution of the works;
- (ii) amounts paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire the machinery and tools used in the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel, etc.

(vi) transportation charges for transport of goods to the place of works;

(vii) overhead expenses of the head office and branch office including rents, salary, electricity, telephone charges, etc., and interest charges to banks and financial institutions;

(viii) profits expected on such contract.

47. Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labor and services, the value of the goods involved in the execution of works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works, (item No. (i)), amounts paid to a sub-contractor for labour and service (item No. (ii)), charges for planning, designing and architect's fees (item No. (iii)), charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract (item No. (iv)), and the cost of consumables such as water, electricity, fuel, etc., which are consumed in the process of execution of a works contract (item No. (v)) and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in dealer in goods in the execution of a works contract is not different from that of a dealer in the goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax., the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charge by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of materials and the part between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of material can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be exclude. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover -

(a) Labour charges for execution of the works;

- (b) amount paid to a sub-contractor for labour and services;
- (c) charges for planning, designing and architect's fees;
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (e) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
- (g) other similar expenses relatable to supply of labour and services;
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

48. We may, however, make it clear that apart from the deductions referred, to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view of Section 3, 4 and 5 of the Central Sales Tax Act and goods covered by Section 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

49. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and service by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for about and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of the works

contracts.

Rate of Tax.

50. A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366(29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even though different rates of tax are prescribed for sale of such goods. The learned counsel for the contractors have urged that it would not be permissible to impose two different rates of tax in respect of sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of a works contract. On behalf of the States it has been submitted execution of a works contract. On behalf of the States it has been submitted that it is permissible for the State to impose a particular rate of tax on all goods involved in the execution of a works contract which may be different from the rates of tax applicable to those goods when sold separately. In the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. (See *East India Tobacco Co. v. State of A.P.P.M. Ashwathanarayana Shetty v. State of Karnataka Federation of Hotel & Restaurant Association of India v. Union of India and Kerala Hotel & Restaurant Association v. State of Kerala*((1990) 2 SCC 502 : 1990 SCC (Tax) 309 : (1990) 1 SCR 516, 530.)) Imposition of sales tax at different rates depending on the value of the annual turnover was upheld in *S. Kodar v. State of Kerala* similarly imposition of purchase tax at different rates for sugar mills and khandsari units was upheld in *Ganga Sugar Co. Ltd. v. State of U.P.* In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods.

51. The aforesaid discussion leads to the following conclusions.

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of the State List read with Article 366(29-A)(b) the State Legislature, while imposing 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 is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Sections 3, 4 and 5 Sections 14 and 5 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29-A)(b).

(3) While defining the expression sale in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 266(29-A)(b) but it is not permissible for the State Legislature of define the expression sale in a way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29-A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29-A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works (ii) amount paid to a sub-contractor for labour and services (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning designing and architect's fees and (v) cost of consumables used in execution of the works contract (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services (vii) other similar expenses relatable to supply of labour and services and (viii) profit earned by the contractor to the extent it is relatable to supply of the labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article.

52. We would not proceed to consider the provisions of the Rajasthan Sales Tax Act in the light of the principles referred to above. In this context, we may briefly outline the general scheme of the said enactment. Section 2 contains the definitions wherein goods is defined in clause (h), 'sale' is defined in clause (o), 'sale price' is defined in clause (p), 'taxable turnover' is defined in clause (s) and 'turnover' is defined in clause (t). Section 3 provides for incidence of taxation. Section 4 provides for exemption from tax of goods specified in the Schedule to the Act. Section 5 provides for rate of tax. Section 6 provides for registration of a dealer. Section 7 relates to submission of returns. Sections 10 to 20 relate to assessment of tax. Section 23 deals with refunds. Section 26 confers the power to make rules.

53. After the Forty-Sixth Amendment, the Rajasthan Sales Tax Act was amended by the Rajasthan

Finance Act, 1987 (Act No. 7 of 1987) By the said Act, among other provisions, the definition of 'sale' contained in clause (o) of Section 2 was substituted, certain amendments were made in definition of 'sale price' contained in clause (p) of Section 2, the definition of 'turnover' contained in clause (t) of Section 2 was amended, and clause (cc) was inserted in sub-section (2) of Section 26 to confer power to frame rules to provide for the determination of the amount payable to the dealer for the transfer of property in goods (whether as goods or in some other form) made in the course of execution of a contract or works contract. By Rajasthan Sales Tax (Amendment) Act, 1988 (Act No. 9 of 1988) certain further amendments were made in the definition of sale contained in clause (o) and definition of turnover contained in clause (t) of Section 2. Clause (u) was introduced in Section 2 to define 'works contract' Sub-section (3) was Rajasthan Sales Tax (Second Amendment) Act, 1988 (Act No. 13 of 1988), the definition of 'works contract' contained in clause (u) of Section 2 was substituted. After the decision of this Court in Builder Association case Rajasthan Sales Tax (Amendment) Act, 1990 (Act No. 3 of 1990) was enacted whereby some minor changes were made in the definition of 'sale' contained in clause (o) and the last proviso which was inserted in the definition of sale price contained in clause (p) by Rajasthan Act No. 7 of 1987 was deleted.

54. In the Rajasthan Sales Tax Rules, 1955, by Notification dated May 28, 1987 sub-rule (2) was inserted in Rule 29 to provide for deductions of turnover relating to works contracts. After the Builders' Association case the said sub-rule (2) of Rule 29 was substituted by Notification dated June 28, 1989.

55. Before the High Court, the appellants had confined their challenge to sub-section (3) of Section 5 and sub-section (2-C) of Section 7 of the Act and sub-rule (2) of Rule 29 and sub-rule (2) of Rule 46 of the Rajasthan Sales Tax Rules. Sub-rule (2) of Rule 29 relates to sub-section (3) of Section 5 whereas sub-rule (2) of Rule 46 relates to sub-section (2-C) of Section 7 of the Act. During the course of arguments before this Court, the learned counsel for the appellants have also challenged the validity of Explanation 1 in definition of 'sale' contained in clause (o) of Section 2 of the Act.

56. Clause (o) of Section 2 which defines 'sale', as amended by the enactments referred to above, provides as under -

"(o) Sale with all its grammatical variations and cognate expressions, means every transfer of the property in goods (other than by way of mortgage, hypothecation, charge or pledge) by one person to another for cash, or deferred payment or other valuable consideration and includes -

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

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or other system of payment by installments;

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

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

(vi) a 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 intoxication), where such supply is for cash, deferred payment or other valuable consideration. -

and such transfer, delivery or supply shall be deemed to be a sale and the word 'purchase' or 'buy' shall be construed accordingly.

Explanation I. - The transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to take place within the State of Rajasthan if the goods are within the State at the time of their appropriation or application or use for the execution of the works contract irrespective of the place where the agreement for such works is made or from where the goods are transferred or delivered for use in the works contract.

Explanation II. - Where the work under a works contract is spread over many State including the State of Rajasthan, the proportionate work done within the State of Rajasthan shall be deemed to be the sale under this clause irrespective of the place of agreement or works or the point or movement of goods involved in the execution of that works contract."

57. The main part of the said definition incorporation the provisions contained in clause (29-A) of Article 366. Explanations I and II seek to fix the situs of the deemed sale in respect of goods involved in the execution of a works contract. The objection of the learned counsel for the appellants is that Explanation I widens the amplitude of the expression 'sale' so as to include deemed sale which are in the course of inter-State trade and commerce as well as sales which take place outside the State and enables even such sales being subjected to imposition of tax under the Rajasthan Sales Tax Act.

58. Sub-section (3) of Section 5 provides as under -

"(3) Notwithstanding anything contained in this Act, in the case of a works contract, the turnover of such contract shall be subjected to tax;

Provided that such deductions as may be prescribed may be allowed to a contractor while determining his tax liability."

59. The expression 'turnover' is defined in clause (t) as under -

"(t) 'turnover' means the aggregate amount of sale prices received or receivable for a sale, transfer, delivery or supply by a dealer in any of the ways referred to in clause (o):

(Provisos - Omitted)

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

(i) The amount for which goods are sold or supplied shall in relation to a works contract be deemed to be the amount payable to the dealer for carrying out such

contract less the cost of labour up to such extent as may be prescribed.

* * *###

60. In this context reference may also be made to the definition of 'taxable turnover' contained in clause (s) of Section 2 which provides as follows -

"(s) 'taxable turnover' means that part of turnover which remains after deducting therefrom the aggregate amount of the proceeds of sale of goods -

(i) on which no tax is leviable under this Act,

(ii) which have already been subject to tax under this Act,

(iii) which have been sold to persons outside the State of consumption outside the State, and

(iv) which are taxable at a point of sale within the State subsequent to the sale by the dealer and such sale is covered by a declaration as may be required under any provisions of this Act or the rules made thereunder.

* * *###

61. Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules, as substituted by Notification dated June 24, 1989 provides as under -

"(2) In case of a works contract, tax shall be computed on the turnover of the contractor after deducting -

(i) The value of the goods transferred in execution of works contract, whether as goods or in some other form which have already suffered tax at the rate prescribed under Section 5 or which are exempted from tax under Section 4 of the Act.

(ii) All sums towards labour charges, which are directly correlated with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form.

Provided that where the labour charges are not determinable from the accounts of the contractors, or are considered unreasonably high considering the nature of the contract, the deductions towards labour charges shall be allowed by the assessing authority according to the limits prescribed in column 3 for the type of contract specified in column 2 of the table given below -

(TABLE - Omitted)"

62. Sub-section (2-C) of Section 7 lays down -

"(2-C) Notwithstanding anything contained in this act, in the case of a works contract, the tax may be deducted in such manner and under such circumstances as may be prescribed from every bill of payment to a contractor."

63. Sub-rule (2) of Rule 46 of the Rajasthan sales Tax Rules provides as under -

"46. (2)(a) In a works contract, the awarder in case of its being a department of any Government, a Corporation, a Government undertaking, a Cooperative Society, a local body, a trust or a private or public limited company, responsible for paying any sum to a contractor for carrying out any works, shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, deduct an amount equal to three per cent of such sum towards the tax and shall amount equal to three per cent of such sum towards the tax and shall issue a certificate of deduction of tax to the contractor in Form ST. 45.

Provided that such deduction of tax shall be subject to adjustment at the time of assessment of the contractor.

(b) The tax deducted under clause (a) of this sub-rule by the awarder of a contract shall be deposited by such awarder in a single challan in Form ST-10 for all the contractors falling within the jurisdiction of one Assessing Authority in the account of such authority, within 15 days of the close of each month and a monthly statement of such deposits shall be furnished by him to such authority in Form ST-46, along with Part IV of the challan, within 15 days of the deposit.

(c) If the tax is not deducted from the bill as provided in clause (a) above, the awarder shall be liable to pay (as provided in the Act) and the contractor shall be liable to pay the said tax together with interest at the rate specified in the Act from the date of the receipt of the payment by him."

64. We will first examine the validity of sub-section (3) of Section 5 read with sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules. In this regard, it is necessary to mention that while making provision in relation to works contracts, Section 5(3) makes a departure from the other provisions inasmuch as in the case of a works contract the tax is to be levied on the turnover of such contract and not on the taxable turnover as provided in subsection (1) of Section 5 in respect of other sales. The proviso to sub-section (3) of Section 5 prescribes that the deductions, as may be prescribed may be allowed to the contractor while determining his tax liability.

65. The expression 'turnover' as defined in clause (t) of Section 2 of the Rajasthan Sale Tax Act, 1954 means the aggregate of the amount of sale prices received or receivable for a sale, transfer delivery or supply by a dealer in any of the ways referred to in clause (o) wherein the expression 'sale' is defined. With regard to works contracts, Explanation (i) to clause (t) of Section 2 lays down that the amount for which the goods are sold or supplied shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less the cost of labour up to such extent as may be prescribed. Section 5(3) read with clause (t) of Section 2 of the Rajasthan Sales Tax Act, thus, provides that in relation to a after deducting (i) the cost of labour up to such extent as may be prescribed in the rules framed under the Act in view of the Explanation (i) to Section 2(t), and (ii) such deductions as may be prescribed under the rules in view of the proviso to Section 5(3). The legislature has not made any express provisions of exclusion of transactions constituting deemed sales which take place in the course of inter-State trade or commerce or outside the State or in the course of import and export in relation to which the State Legislature lacks the competence to impose a tax under Entry 54 of the State List. Nor has any provision been made with regard to sales of goods which are declared to be of special importance in inter-State trade or commerce and are governed by Section 14 and 15 of the Central Sales Tax Act. The matter has been

left to the discretion of the rule-making authority to prescribe whether deductions in respect of such transactions should be allowed or not.

66. In this context reference may be made to sub-section (1) of Section 5 of the Rajasthan Sales Tax Act which applies to other transaction of sale that are taxable under the Rajasthan Sales Tax Act. Section 5(1) provides that the tax payable by a dealer under the Act shall be at such single point in the series of sales by successive dealers as may be prescribed and shall be levied at such rate not exceeding fifty per cent on the taxable turnover, as may be notified by the State Government in the Official Gazette. In this provision the legislature has used the expression 'taxable turnover', which has been defined under clause (s) of Section 2 to mean that part of turnover which remains after deducting therefrom the aggregate amount of the proceeds of sale of goods: (i) on which no tax is leviable under the Act, (ii) which have already been subjected to tax under the Act, (iii) which have been sold to persons outside the State for consumption outside the State, and (iv) which are taxable at a point of sale within the State subsequent to the sale by the dealer and such sale is covered by a declaration as may be required under any provision of the Act or the rules made thereunder. These provisions indicate that in respect of other sales the amount of the proceeds of sale of goods on which tax is not leviable under the Act has to be excluded from the turnover before it becomes chargeable to tax. This position is further clarified by the proviso to sub-section (1) of Section 5 which prescribes that the tax in respect of the sale of any goods which are not included in the Schedule, shall not be leviable (a) if such sale takes place in the course of inter-State trade or commerce within the meaning of Section 3 of the Central Sales Tax Act, or (b) if such sale takes place outside the State within the meaning of sub-section (1) of Section 4 of the Central Sales Tax Act; or (c) if such sale takes place in the course of import or export within the meaning of Section 5 of the Central Sales Tax Act. In the said proviso reference has also been made to sale of goods which have been declared by Section 14 of the Central Sales Tax Act to be of special importance in inter-State trade or commerce as well as to Section 15 of the Central Sales Tax Act and it has been directed that in respect of such goods the tax shall not exceed the limits laid down in clause (a) of Section 15 of the Central Sales Tax Act, and that tax shall not be payable on such goods if the sale takes place outside the State within the meaning of Section 4 of the Central Sales Tax Act and further that the tax shall not be leviable in the State at more than one stage. In view of the non-obstinate clause in sub-section (3) of Section 5, the said provisions contained in sub-section (1) are not applicable to works contracts and sub-section (3) of Section 5 alone is applicable.

67. A comparison of the provisions contained in sub-section (3) of Section 5 read with Section 2(t) and sub-section (1) of Section 5 read with Section 2(s) would indicate that in relation to works contracts the legislature has made a departure in the matter of chargeability of the tax and by using the expression "turnover" instead of "taxable turnover" in Section 5(3) it has enlarged the field of taxability to permit tax being levied on sales in the course of inter-State trade or commerce, sales outside the State and sales in the course of import and export and to ignore the conditions and restrictions placed by Section 15 of the Central Sales Tax Act in relation to imposition of tax on goods which are declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act. the proviso to Section 5(3) does not oblige the rule-making authority to frame a rule allowing deductions for the turnover of the amount of proceeds of sale of goods on which no tax is leviable under the Act so as to exclude the abovementioned sales from levy of tax. The rule-making authority would not be contravening the mandate of the statute if it does not allow deduction of the amount of proceeds for sale of goods on which no tax is leviable under the Act from the turnover.

68. The constitutional validity of a statute has to be determined on the basis of its provisions and on

the ambit of the operation as reasonably construed and it so judged, it does not pass the test of constitutionality it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. (See: Collector of Customs v. Nathella Sampathu Chetty) the rules framed under the Rajasthan Sales Tax Act would not, therefore, by of any assistance in resolving the question regarding the validity of Section 5(3). We have however, examined the rules that have been framed and we find that they do not improve the position. The relevant provisions in this regard are contained in sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules which makes provision for deductions from the turnover in the case of a works contract. The said sub-rule (2) contains two clauses. Clause (i) which is referable to the proviso to sub-section (3) of Section 5, provides for deduction of the value of the goods transferred in execution of works contract, whether as goods or in some other form, which have already suffered tax at the rates prescribed by Section 5 or which are exempted from tax under Section 4. Clause (ii) is referable to Explanation (i) of Section 2(t) and it provides for deduction of all sums towards labour charges, which are directly co-related with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form.

69. Shri Krishnamurthy Iyer, the learned counsel appearing for the State of Rajasthan, has submitted that the words "which have already suffered tax at the rates prescribed under Section 5" are wide enough to permit deduction in respect of goods on which no tax is leviable under sub-section (1) of Section 5 of the Act, namely, sales in the course of inter-State trade or commerce or sales outside the State or in the course of import and export as well as sales of goods which have been declared to be of special importance in the course of inter-State trade or commerce under Section 14 of the Central Sales Tax Act and are governed by Section 15 of the said Act. We find it difficult to accept this contention. The words "which have already suffered at the rates prescribed under Section 5" only refer to the goods which have already been subjected to tax under the Act at the rates specified under Section 5, and their value is to be excluded from the turnover. The goods on which no tax is leviable under sub-section (1) of Section 5 are not subject to any tax under the Act and there is no question of such goods having suffered tax at the rates prescribed under Section 5. In this context we may again refer to the definition of taxable turnover contained in Section 2(s) of the Rajasthan Sales Tax Act wherein provision is made under clauses (i) to (iv) for deduction from the turnover for arriving at the taxable turnover. Clause (i) refers to sale of goods "on which no tax is leviable under this Act" and clause (ii) refers to sale of goods "which have already been subjected to tax under this Act." These clauses show that the legislature has made a distinction between a sale of goods on which no tax is leviable and a sale of goods which has already been subjected to tax under the Act. Clause (i) of sub-rule (2) of rule 29 is a provision similar to that contained in clause (ii) of Section 2(s). It is therefore, not possible to construe clause (i) of sub-rule (2) of Rule 29 to mean that sales on which no tax is leviable under sub-section (1) of Section 5 are to be excluded from the turnover for the purpose of computing tax on such turnover in relation to a works contract.

70. The High Court has upheld the validity of sub-section (3) of Section 5 by taking into account the provisions of sub-rule (2) of Rule 29. But, while considering the said provisions the High Court has failed to notice that under clause (i) of sub-rule (2) of Rule 29, transfer of property in goods involved in the execution of a works contract, on which no tax is leviable under Section 5, are not required to be deducted from the turnover. The High Court also failed to attach importance to the use of the word 'turnover' (instead of word 'taxable turnover') in sub-section (3) of Section 5 as a result of which the amplitude of the incidence of tax has been widened so as to include transactions which are outside the sphere of taxation, available to the State Legislature under Entry 54 of the State List. We are, therefore, unable to uphold the decision of the High Court in this regard and it must be held that sub-section (3) of Section 5 transgresses the limits of the legislative power

conferred on the State legislature under entry 54 of the State List inasmuch as it enables tax being imposed on deemed sales resulting from transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract which take place in course of inter-State trade or commerce, or which take place outside the State or which take place in the course of import and export within the meaning of Sections 3, 4 and 5 respectively of the Central Sales Tax Act and it does not take into account the conditions and restrictions imposed by Section 15 of the Central Sales Tax Act on goods declared to be of special importance in inter-State trade or commerce under Section 14 of the Central Sales Tax Act. Clause (i) of sub-rule (2) of Rule 29 of the Rajasthan Sales Tax rules also suffers from the same infirmity. Section 5(3) of the Rajasthan Sales Tax Act and clause (i) of sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules must, therefore, be held to be unconstitutional and void.

71. Since the of Section 5(3) goes the root of the imposition of tax and in the absence of the said provision the tax cannot be levied, the appellants in the appeals are entitled to succeed. In the circumstances, it is not necessary to examine the other questions relating to the validity of Explanation 1 to clause (o) of Section 2 of the Rajasthan Sales Tax Act, Explanation (i) to clause (t) of Section 2, sub-section (2-C) of Section 7, clause (ii) of sub-rule (2) of Rule 29 and sub-rule (2) of Rule 46 of the Rajasthan Sales Tax Rules.

72. The appeals are, therefore, allowed. The judgment and order of the High Court is set aside, and it is declared that sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and clause (i) of sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules are unconstitutional and void. The parties are left to bear their own costs in these appeals.

73. In view of the declaration that Section 5(3) of the Rajasthan Sales Tax Act is unconstitutional and void, the assessment order dated September 1, 1990 passed by the Commercial Taxes Officer, Kota, which is under challenge in W.P. No. 197 of 1991, cannot stand. The said writ petition, insofar as it relates to the provisions of the Rajasthan Sales Tax Act and the said assessment order dated September 1, 1990 is allowed to the extent that the assessment order dated September 1, 1990 is quashed. We do not express any opinion on the questions raised in the writ petition with regard to the validity of the provisions of the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1984. Tamil Nadu General Sales Tax Act (Forth Amendment) Act, 1986, and the rules and orders issued thereunder and the proceedings for assessment of tax payable by the petitioner under the Andhra Pradesh General Sales Tax Act, 1957 and orders passed therein. The petitioner would be at liberty to institute appropriate proceedings for redress of its grievance in respect of those matters before the appropriate forum. The writ petition will and disposed of accordingly with no order as to costs.

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