ANDHRA PRADESH HIGH COURT

Jubilee Engineering Co. Ltd

Vs

Sales Tax Officer

(M.A Ansari , C.J. Jaganmohan Reddy, J.)

21.10.1955

JUDGMENT

Jaganmohan Reddy, J.

1. This is a petition for a writ of mandamus or any other appropriate writ under Article 226 of the Constitution for restraining respondents 1 and 3, the Sales Tax Officer and Commissioner of Sales Tax, from demanding sales tax and prohibiting them from collection on the turnover of works contract undertaken by the petitioner in completing maternity hospital at Mahboobabad and for the repair of a large tank at Rudrur.

2. The petitioner is registered as a dealer under the Hyderabad General Sales Tax Act, 1950 (hereinafter called "the Act") and is a limited company incorporated under the Indian Companies Act. It carries on business as building and construction contractors and has been recognised as such by the Public Works Department of the Government of Hyderabad. During the year 1951-52 this company had obtained from the P.W.D. two contracts, one for building the maternity hospital at Mahboobabad for Rs. 52,290 and the other for repairing a large tank at Rudrur for Rs. 1,11,660. It is alleged that the petitioner received a sum of Rs. 52,290 at various intervals between 2nd November, 1950, and 7th May, 1951. In so far as repairs to Rudrur tank is concerned, the petitioner received on 26th September, 1952, an amount of Rs. 74,691 after deduction of 71/2 per cent. With respect to these two contracts the petitioner was assessed for the year 1951-52 on a taxable turnover of Rs. 1,14,709-0-0 which consisted of Rs. 78,163-3-3 towards the repairs of the large tank and Rs. 36,603-6-4 with respect to building of the maternity hospital at after deducting 30 per cent. of the contract amounts under Rule 5(3) of the Sales Tax Rules on account of expenses of labour incurred in the execution of work. The petitioner alleges that the Sales Tax Officer had taken the entire amount tendered for the repairs of the Rudrur tank into account while the Executive Engineer's certificate shows that the work done was only for Rs. 81,303 less the further security deposit. The petitioner having been aggrieved by this order of the

Sales Tax Officer filed a revision before the Sales Tax Commissioner challenging the validity of the Sales Tax Officer's order to tax the turnover of works contract and also contended before him that the definition of dealer does not include a P.W.D. contractor, that it has paid sales tax while buying the material and it cannot therefore be subjected to tax under proviso (2) of Sub-section (1) of Section 5 of the Act and that tax should be levied only to the extent of costs of the material but not on the contract amount. The Commissioner rejected the revision on all the grounds urged before him and consequently this writ petition has been filed.

3. The two contracts which the assessee had executed have not been produced, but samples of the usual contracts for buildings and repairs and the schedule of rates which are attached to such contracts on tenders being accepted have been filed by the learned Advocate-General at the request of the assessee. From the contract for buildings it will be seen that it includes all labour, material, scaffolding, centering moulds, tools and every other thing necessary for carrying on and completing the works in conformity with the plans and specifications attached to it with such additional drawings, descriptions and instructions as from time to time be furnished while the work is in progress. The materials have to be the best and the Government reserved to itself the right to reject any of it, if it is defective and has even got the liberty to supply both the material and labour if the work is unsatisfactorily done. The risk of damage etc. is upon the contractor who under the agreement undertakes to statisfactorily execute and complete the work in strict accordance with plans, estimates and specifications and is subject to a penalty if he delays the completion of the work. The contractor is further prohibited from letting out the work on sub-contracts unless permitted in writing by the Engineer in charge. The sample agreement further deals with various matters which are not relevant for our purpose except clause 47 which is us under :

47. The Department is not responsible for the supply of any material except cement and steel for which permits will be arranged on receipt of requisition from the party.

4. From the above contract and the sample of the schedule of rates attached to it with respect to a building contract, it is clear that the materials such as bricks, lime, stone, cement, tiles, Shahabad stone, wood doors and windows, painting, white-washing, colour washing etc. have to be provided for or undertaken by the contractor himself and the work with all these materials is inclusive of all leads and lifts and complete in itself, such as where bricks are used, the rate is either for completing the superstructure with brick in mud or brick in lime and lime-plastering with rubbed finish, and where Shahabad stone is used for flooring the rate is complete with its fixing on morham with cement, painting etc. It may be noticed that no part of the contract prescribes any separate rate for the material itself without the attendant labour and fixing material resulting in the superstructure. Similarly with respect to the repair to the large tank at Rudrur,

according to the sample furnished, Exhibit P. IV, the only material which is utilised for this purpose is either mud work or cutting in earth.

5. Now it is necessary to examine the respective contentions of the parties in order to determine whether the provisions of the Sales Tax Act which authorise the levy of sales tax on the turnover of the material used in the construction of the building have been made in the proper exercise of legislative power conferred by Entry 54 of List II of Schedule VII. For purposes of the charging Sections 3 and 4 the relevant definitions given in the various clauses of Section 2 of the Act under which the turnover of materials used in the works contract is sought to be subjected to sales tax are as under :

(e) 'Dealer' means any person, local authority, company, firm, Hindu undivided family or any association or associations of persons engaged in the business of buying, selling or supplying goods in the Hyderabad State whether for a commission, remuneration or otherwise and includes...

6. A casual trader has been defined in Section 2(c) as one who in the period of assessment has not been regularly engaged in the business of buying, selling or supplying goods in the Hyderabad State, but has in such period or year been a party whether as principal or agent, to occasional transactions of a business nature involving the buying, selling, or supplying of goods in the said State.

(g) 'Goods' means all kinds of movable property other than actionable claims, stocks and shares and securities, and includes all materials, articles and commodities, including materials, articles and commodities designed to be used in the construction, fitting out, improvement or repair of movable or immovable property.

(k) 'Sale' with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge.

7. In the definition of "turnover" in Clause (m), explanation (i) relating to works contract is as under :

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

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

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

8. Again "works contract" has been defined in Clause (n) as meaning any agreement for carrying out for cash or for deferred payment or valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property.

9. In order to apportion what amount of goods have been used for purposes of their inclusion in the turnover in the 'works contract, the State Government by Sub-rule (3) of Rule 5 provided that for purposes of Sub-rule (1) the amount for which goods are sold by a dealer shall in relation to works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Commissioner, from time to time for different areas, representing the usual proportion in such areas, of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentage :

(a) in the case of an electrical contract 20 per cent.

(b) in the case of a structural contract 30 per cent.

(c) in the case of a sanitary contract 33-1/3 per cent.

(d) in the case of other contracts 30 per cent.

10. Having regard to the aforesaid definitions, it would appear that for the purposes of the charging sections all materials used in the works contract would be included in the turnover of a building contractor treated by the Sales Tax Department as either a dealer or a casual trader who according to the definitions is any person engaged in the business of buying, selling or supplying goods or has been a party whether as principal or agent to occasional transactions of a business nature involving buying, selling and supplying goods in the Hyderabad State.

11. Before a person can be assessed to sales tax he should do the business of buying, selling or supplying of goods or occasionally transact in buying, selling and supplying goods. Apart from the question whether a building contractor is doing a business or occasionally transacting the business of buying, selling or supplying of goods to the person with whom he has contracted to build a building or structure or repair of building or structure, to which we will advert later, it is contended by the learned Advocate for the petitioner that a works contract is not a contract of sale of goods and that the Legislature of the State has no power to levy sales tax for the materials used in the works contract as if it is a turnover and at any rate Rule 5(3) of the Hyderabad

General Sales Tax Rules prescribing the ratio between the material used and the labour spent in the construction for different contracts is arbitrary and illegal.

12. Taking the last point first, as far as the contract for repair of Rudrur tank is concerned, it is clear that no material has been used which can by any criterion be considered as goods. The whole of this contract, therefore, involves labour and cannot be the subject-matter of the levy of sales tax. The Sales Tax Officer rejected the contention of the assessee that the repairs to the Rudrur tank did not involve any material but consituted mainly earth work, on the ground that no evidence has been produced by the firm to the effect that the repairs constituted pure and simple labour charges. Ordinarily repairs connot be made without utilising any material whatsoever. In the revision the Commissioner did not deal with this aspect of the case.

13. In our view the very nature of the contract was such that under the law the Sales Tax Officer could only levy sales tax on the turnover of the materials used in the works contract as we will presently see ; and he could not therefore be justified in imposing sales tax on the assumption that materials liable to sales tax were used in it without any evidence before him. He could have quite easily called for the contracts from the P. W. D., which could have furnished the necessary basis for his assessment. In our view he failed to exercise his jurisdiction. The Sales Tax Officer, as we have already seen, after deducting 30 per cent, under Rule 5(3)(b) towards labour from the contract amount of Rs. 1,11,660 has included Rs. 78,166-3-0 as turnover of the assessee for payment of sales tax. This amount, therefore, has illegally been made the subject-matter of sales tax and the orders of both the Sales Tax Officer and the Commissioner in this behalf are ultra vires. Even otherwise the basis of Rule 5(3), as held on an analogous Rule 4 of the Central Provinces and Berar. Sales Tax Act, 1947, in the case of *Pandit Banarsi Das v. State of Madhya Pradesh*[1] at pages 106-109, to which a further reference will be made hereafter, is that "this artificial and palpably unnatural determination of the price of goods cannot be said to square with the powers given by the Constitution Act to levy a tax on the 'sale of goods', " and consequently for the reasons given by their Lordships of the Nagpur High Court, with which we respectfully agree, explanation (1)(i) to Section 2(m) of the Hyderabad General Sales Tax Act, 1950, and Rule 5(3) of the rules made thereunder are ultra vires.

14. Now adverting to the main contention that the Legislature has no power to bring within the net of taxation materials in a works contract, the relevant entry under which the State Government has passed the General Sales Tax Act is Entry 54 of List II of Schedule VII which is as under : "Tax on the sale or purchase of goods other than newspapers". The aforesaid entry is similar to item 48 of List II of the Government of India Act, 1935, which confers power to tax on "the sale of goods and on advertisements". There is however a slight difference in this item and Entry 54 in that Entry 54 excludes from the purview of the taxing power of the State newspapers,

and tax on advertisements has been made the subject-matter of a different entry, viz., Entry 55. Further, Entry 54 gives power to tax not only sale of goods but also purchase of goods.

15. It is contended by the learned Advocate for the petitioner that the legislative power under Item 54 extends only to enact a law taxing transactions of sale or purchase of goods and cannot bring which in the net of taxation such transactions as are not strictly sale or purchase of goods. Consequently the inclusion by the Legislature in the Act of works contracts within the definition of turnover and all materials used in the construction, fitting out or improvement or repair of movable or immovable property within the term "goods" is outside the scope and ambit of the legislative power conferred by Entry 54. This submission involves the question whether the sale and purchase of goods specified in Entry 54 should be construed in the sense in which these words were understood under law prior to the framing of the Constitution. There have been two direct decisions on this question, whether the inclusion by the Legislature in the net of taxation under the Sales Tax Act of a works contract is ultra vires of the State Legislature; one by the Madras High Court in *Gannon Dunkerley v. The State of Madras*[2] and the other by the Nagpur High Court in *Pandit Banarsi Das v. State of Madhya Pradesh and Anr*[3]. Both these cases were decided under the respective Sales Tax Acts made in exercise of the legislative power conferred under item 48 of List II of the Government of India Act, 1935. The provisions of the two Sales Tax Acts are not dissimilar to that of the Hyderabad Sales Tax Act and at any rate as far as the inclusion of the works contract are concerned there is no difference.

16. In the Madras case, Satyanarayana Rao, J., with whom Rajagopalan, J., agreed, after an exhaustive review of the case law and on a detailed examination and analysis of the various aspects of the matter held that the power of the Provincial Legislature to levy a tax on sale of goods is confined and restricted only to the transaction of sale as understood by the Parliament of the United Kingdom in the law relating to the sale of goods, and any attempt of the Legislature to tax under the guise or under the pretence of such a power transactions which are wholly outside will be ultra vires and must be declared invalid. In that case the assessee's main business was to execute contracts for construction of buildings, bridges, dams, roads and structures of all kinds. During the assessment year the return made by the assessee showed as many as 47 contracts most of which were building contracts executed by the assessee. Under the contract with the State Government the assessee was to execute the work specified in the plans and of the quantity as per particulars given in the Schedule for which they received lump sum payment according to their tender accepted by the Government. The State tried to tax they turnover of the contracts on the basis that the materials used were sale of goods within the meaning of Entry No. 48. His Lordship after considering the tests of construction laid down by Gwyer, C. J., in In the matter of C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 A.I.R. 1939 F.C. 1, and Crawford on Construction of Statutes, pages 738, 758 and 420 arid Weaver on Constitutional

Law, page 77, observed at page 226 :Bearing these principles in mind, we have to construe the relevant entry, items 48 of List II of Schedule VII, and give effect to the plain words employed in the expression 'taxes on the sale of goods'. It must be remembered that the Constitution Act was enacted by the British Parliament and the draftsmen and the Parliament must have been well aware that the expression, 'sale of goods' had acquired a legal import by that time, and it is legitimate therefore to presume that the expression was used in the sense in which it was understood by English lawyers and also in India. The draftsmen must have intended to define the power of the Legislature to tax only the transaction of sale of goods, which was understood in law as meaning and as constituting those composite series of acts beginning with an agreement of sale and ending with transfer of property for a price, which constitute sale of goods. That the expression sale of goods acquired a definite meaning in England under the Sale of Goods Act, 1893, and in India under the Sale of Goods Act, 1930, which was modelled on the English Act, does not admit of serious doubt.

17. In this view of the matter having regard to the presumption that the draftsmen must have been well aware that the expression "sale of goods" had acquired a definite meaning both in England and in India under the respective Sale of Goods Act, Satyanarayana Rao, J., went on to consider the elements which constitute a contract of sale under the Roman Law as well as under the English Law and as to whether a contract which involves labour and work is a contract for the sale of goods, or is a contract purely for the supply of labour and work. At page 240 he observed :It, therefore, follows that the building contracts, which the asses-sees entered into during the assessment year, on which the turnover was calculated, do not involve any element of sale of the materials and are not in any sense contracts for the sale of goods as understood in law. Having regard to the terms of particular contracts, there may be an intention to pass the ownership in the materials for a price agreed upon between the parties, in which case such contracts might contain an element of sale of goods, but that is not the case here. If the amendments introduced in 1947 by the Provincial Legislature are intended to catch in the net of tax contracts of the nature with which we are concerned, we should hold that to that extent the amendments introduced are ultra vires of the Provincial Legislature as they had no power to tax transactions which are not sales of goods.

18. The above referred Madras case, it may be noted, was decided in April, 1954, while in May, 1954, their Lordships of the Supreme Court in *Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash*[4] *R.* held a similar view with respect to the meaning to be given to the expression "sale of goods" in Entry 48 of List II of the Government of India Act. Their Lordships no doubt were considering a question whether forward contracts, that is, agreements to sell could be brought within the net of taxation under the powers conferred on the Provincial Legislature under item 48 of List II of the Government of India Act. In determining this question recourse was had

to the provisions of the Indian and the English Sale of Goods Act and of the Indian Contract Act and the difference as it existed in England under the English law between sale and agreement to sell. Their Lordships stated their view at page 197 as under :Thus, there having existed at the time of enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell, it would be proper to interpret the expression 'sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title.... The substance of the matter is that the sales tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should not be made, unless the stage has been reached when the seller can recover the price under the contract.

19. After this decision, in November, 1954, the Nagpur High Court in Pandit Banarsi Das v. State of Madhya Pradesh *[1955] 6 S.T.C. 93 (Supra)*, having considered Gannon Dunkerley's case A.I.R. 1954 Mad. 1130 and the observations of their Lordships of the Supreme Court in the case of Budh Prakash Jai Prakash A.I.R. 1954 S.C. 459, expressed the view that the Government of India Act, 1935, conferred on the Provincial Legislature powers of the widest amplitude to tax the sale of goods in all its aspects and forms. The necessary condition for the impost, however, was that there should be a sale of goods. The selection of the taxable event and the severance of transactions of sale from other transactions in which they might be embedded was a necessary part of the power. They disagreed with the view of the Madras High Court and confined the observations of their Lordships of the Supreme Court in Budh Prakash Jai Prakash's case A.I.R. 1954 S.C. 459, to the particular question in issue before them and only to the extent of considering whether the expression "sale of goods" included an agreement to sell. In the result it was held that if a building contract is not split up into its component parts, viz., into material and labour, in legislative practice relating to the ordinary regulation of sale of goods, there is no warrant for holding that it cannot be so split up even for purposes of taxation. Building materials are goods and there is payment for materials although it is not made separately, but as a part of a larger amount. The supply of goods, therefore, is tantamount to the sale thereof.

20. In that case Hidayatullah, J., with whom Sinha, C.J., agreed, after referring to several cases to see how far these cases had laid down legislative practice to be a test in determining the scope and ambit of the legislative power conferred by an entry in the legislative list came to the conclusion that it was not a conclusive test, though it is helpful within limits. Coming to the case of Budh Prakash Jai Prakash A.I.R. 1954 S.C. 459, his Lordship observed at page 105 :

Their Lordships were not limiting the scope of the entry for all purposes. Their Lordships only excluded from its operation matters which could not be brought within its ambit in any way. The word 'sale' involves a transfer of title for a price and the entry was held not to include a power to

tax a transaction in which there was at the moment of taxation no sale for a price at all. The decision of their Lordships, therefore, must be related to the facts then present and cannot be invoked to limit the operation of the entry in all circumstances.

21. Again at page 106, it was observed :

We are here concerned with a taxing measure and the power to levy the tax can only be determined by a fair consideration of the ambit of the entry by which the power is conferred. If the pith and substance of the Act come within that ambit, the power is there, otherwise not.... The reasoning in the Madras case does not take into account the fundamental fact that the Legislature could select out of a composite transaction the actual sale of materials and tax such sale in the exercise of undoubted plenary powers. The word 'supply' used in the definitions has not any sinister purpose and, read in the context of other definitions, is apt to describe the sale of building materials not directly but as part of a building contract.

22. In our view the true test must always be the actual language used, and though legislative practice is not conclusive, yet if it is helpful in determining the intention of the framers of the Constitution as to the scope and ambit of the power intended to be conferred on the Legislature, whether of the State or of the Centre, assistance can be taken from it. Where certain expressions have had a certain meaning given to them by a series of authoritative judicial pronouncements as to virtually make them terms of art or in the currency of legal language attach to them a special meaning when used in a legal instrument, then it would be difficult to assume, unless the context or other circumstances indicate otherwise, that the draftsmen did not use them in the sense in which those expressions have been understood in legal parlance.

23. In so far as we are able to gather on a very careful reading of the decision in Gannon Dunkerley's case A.I.R. 1954 Mad. 1130, there is nothing in it to militate against the aforesaid proposition which is also consistent with the view expressed by HidayatuDah, J., in Pandit Banarsi Das' case *[1955] 6 S.T.C. 93 (Supra)*, where he definitely says that legislative practice is helpful within limits but not conclusive and that it is also plain that judicial interpretation of words and expression is not necessarily conclusive unless those decisions are well-known and the Legislature is legislating upon the same matter for the same purpose and for the same object. Of course Hidayatullah, J., has limited the meaning of the expression used by the Legislature only to cases where it was legislating upon the same matter for the same purpose and for the same object, following the rule laid down by James, L.J., in *Greaves v. Totfield*[5] In other words, the rule laid down is the well-known rule of construction that statutes in pan materia are only relevant for the purpose of interpreting or ascertaining the meaning of words and phrases given in a subsequent statute. It is a rule whereby the language of one Act is utilised for the purpose of expounding another Act. As observed by Homer, J., dealing with what are statutes in pan

materiel in the case of *United Society v. Eagle Bank*[6]:The word pan must not be confounded with the word similis. It is used in opposition to it as in the expression mages pares sunt quam similis intimating not likeness merely but identity. It is a phrase applicable to the public statutes or general laws made at different times and in reference to the same subject.

24. Before calling in aid the above rule of construction both Acts must be in pari materia, i.e., must be substantially identical, for the reason that if the subject, purpose and object of the two statutes are different, the meaning of the expressions used in such Acts designed to achieve different ends may be different. This is the significance of the observations of James, L.J., in *Greaves v. Totfield*[7]. In that case Sir George Jessel, M.R., at page 568 clearly supports our view when he says :In order to ascertain whether those decisions are binding so as to prevent my giving effect to-what I consider the plain meaning of the present Act of the Parliament we must look at the ground or the principle of the decisions, because I agree, if the Legislature has, in pari materia, passed an Act in the same words and a construction has been put by the Courts of Justice on those particular words, the Court, in construing the section must have regard to those decisions.

25. In that case though the construction placed by Jessel, M.R., upon the words in the corresponding provisions in Middlesex Registry Act for purposes of interpreting Section 12 of the Act 18 & 19 Vict, c. 15 was dissented from by the Court of Appeal, it is clear that the rule of construction there involved was that relating to statutes in pari materia. Where, however, the words or expressions used in a legislative list have to be construed, in our view, the rule of construction of pari materia statutes is not strictly applicable nor is it a conclusive or infallible test. We must in such circumstances try to ascertain the scope and ambit of the power intended to be conferred by the entry and consequently, though we may resort to judicial pronouncements and legislative practice prevailing at the time when the Constitution was promulgated, the intention of the framers of the Constitution must be ascertained by reference to the plain meaning of the words and expressions used in it. But as we have already observed if the words or expressions have acquired legal currency and have been given a definite meaning in legal parlance it is safe to presume that the draftsmen or the framers could not but have intended to use them in the same sense. It is not easy to break away from the legal conceptions or meaning of certain legal phrases which are well-known under the law existing at the time when the Constitution was promulgated.

26. It is a matter of history that there were in the Constituent Assembly as well as in the drafting committee eminent lawyers of India. In these circumstances when we find Item 54-but for a few minimum changes to which we have already adverted-is substantially similar to and designed to confer the same powers as Entry 48 of List II of the Government of India Act, 1935, namely, to

tax sale of goods whether at the purchase point or at the sale point, we are entitled to have recourse to legislative practice relating to sale of goods. The Constitution was to a great extent modelled on the lines of the Government of India Act passed by the Parliament of England ; as such the words used must also be viewed in the light of the meanings given to them at the time and with particular reference to Entry 54 to the expression "sale of goods". This method of interpreting the Constitution is not a novel one, as indeed the Supreme Court of United States in interpreting the Constitution of the United States took note of the fixed technical meaning which the words and expressions used in the Constitution had acquired at the time when that document was drafted and promulgated. Weaver on Constituional Law at page 77 cites certain observations of Justice Brewer and Chief Justice Taft in support of the rule laid down therein. Justice Brewer had observed :The interpretation of the Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history.

27. To which statement Taft, C.J., has added :The language of the Constitution cannot be interpreted safely except by reference to the common law and to the British Institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the convention who submitted it to ratification of the conventions of the 13 States were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary.

28. While this is so we admit that in interpreting an instrument like the Constitution as Lord Wright has observed in James v. Commonwealth of Australia No. (2) [1936] A.C. 578, at page 614 :The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

29. The Privy Council in the above case were dealing with the interpretation of Section 92 by which a declaration of guarantee was given that trade, commerce and intercourse among the States shall be absolutely free. The language of the section which is quite general and was not in terms subject to any exception or limitation had necessarily to be considered on a generic interpretation which again brings us to the basic principle of interpretation to which we had already adverted, namely, that the true test must always be the actual language used from which the intention of the framers of the Constitution as to the scope and ambit of the power intended to be conferred on the Legislature has to be determined.

30. Of some of the other principles which govern the interpretation of the legislative lists as observed by Fazl Ali, J., who after an examination of the previous case law in *The State of Bombay and Anr. v. F. N. Balsara*[8]. , went on to determine the meaning of the word "liquor" in

Entry 31 of List II of the Government of India Act by reference not only to the Oxford Dictionary and the American Statutes but also to the various Abkari Acts passed in India up to 1935 and concluded at page 325 as under :The framers of the Government of India Act, 1935, could not have been entirely ignorant of the accepted sense in which the word 'liquor' has been used in the various Excise Acts of this country, and, accordingly, I consider the appropriate conclusion to be that the word 'liquor' covers not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. It may be that the latter meaning is not the meaning which is attributed to the word 'liquor' in common parlance especially when that word is prefixed by the qualifying word 'intoxicating', but in my opinion having regard to the numerous statutory definitions of that word, such a meaning could not have been intended to be excluded from the scope of the term 'intoxicating liquor' as used in Entry 31 of List II.

31. In the case of *Budh Prakash Jai Prakash A.I.R. 1954 S.C. 459 (SUPRA)*again Venkatarama Ayyar, J., determined the meaning of the expression "sale of goods" for purposes of item 48 of List II of the Government of India Act, 1935, on a reference to the well-established conceptions of the words "sale" and "sale of goods". His Lordship after a reference to the definition of contract of sale under the Sale of Goods Act, observed at page 197 thus: "the substance of the matter is that the sales tax is a levy on the price of the goods, and the reason of the thing requires that such a levy should not be mad, unless the stage has been reached when the seller can recover the price under the contract", and that the power conferred under Entry 48 to impose a tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of property in the goods.

32. These two cases of the Supreme Court as well as the observation of Bose, J., in the case of*State of Bombay v. United Motors (India) Ltd*[9]. and Bhagwati, J., in the recent case of *Bengal Immunity Co., Ltd. v. State of Bihar* [10]. clearly indicate that all things being equal, it is permissible to have recourse to the state of law as it existed at the time of the Constitution for purposes of determining the meaning of any expression used in any of the entries of the legislative list. In these circumstances, with great respect, we are unable to see how the approach indicated by the Supreme Court in the above cases is inapplicable to the present case or could justifiably be distinguished by only limiting it to "sale" as opposed to "agreement to sell.

33. Bearing the various aspects of the interpretation of the Constitution in mind, what we have to determine is whether in a works contract which has as its object the construction of a building as such, the contractor could be said to have sold any goods or materials used in the building in order to bring them within the power of taxation conferred on a State by Entry 54 of List II of Schedule VII of the Constitution. The Nagpur High Court, as we have already seen, took the

view that the selection of the taxable event and the severance of transactions of sale from other transactions in which they might be embedded was a necessary power and that there is always a sale if goods are transferred to another and paid for by him and that it cannot be gainsaid that there is a payment for materials though the payment is not made separately but as a part of a larger amount.

34. The question is to what extent the expression "tax on the sale or purchase of goods" could be deemed to include the incidental powers of dissecting a works contract into its various component parts and taxing those parts separately apart from the finished physical subject-matter or the main object of the works contract. In our view the expression "sale of goods" connotes a contract whereby goods are sold for a price and the property in them is transferred. The power of taxation conferred by Entry 54 is on the transaction of sale or purchase of goods, not on the seller or purchaser as such. As Bose, J., observed in his dissenting judgment in State of Bombay v. United Motors (India) Ltd. A.I.R. 1953 S.C. 252 at p. 264(Supra):The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject-matter of sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title.

35. The Advocate-General following the observations in the Nagpur case submits that the definitions given in the Sales Tax Act extend to reach the supply of materials used in the building contract and that if the definitions are incorporated in the charging sections and exclude therefrom all references to sale of goods as opposed to supply of goods, a true picture of the incidence of tax and its pith and substance is obtained. In our opinion, we are unable to accept this argument as sound. The preamble to the Hyderabad General Sales Tax Act makes it clear that the tax is one on the sale of goods in the Hyderabad State and the charging Sections 3 and 4 impose tax on the turnover of transactions in goods which turnover is defined in Section 2(m) as meaning "the aggregate amount for which goods are sold by or bought by a dealer whether for cash or deferred payment or for other valuable consideration.

36. The word "supply" which occurs in the definition of casual trader and dealer in Section 2(c) and (e) cannot be strictly interpreted in its literal and absolute sense, but must be given the qualified meaning which it deserves in the context according to the well-known rule of interpretation noscuntur a sociis. It is therefore obvious both on principle and on authority that the basic conception of sale or its essential condition which is necessary to be satisfied is the completion of the transaction of sale. Tax on sale of goods, as pointed out in In re C. P. and Berar

Sales of Motor Spirit and Lubricants Taxation Act, 1938 1939 F.C.R. 18, must necessarily be a tax imposed at the time of sale of goods and must exclude other forms of transfer like mortgage, lease etc.

37. Where therefore under a works contract a person undertakes to build a particular building or to make a particular thing, the materials involved in the building or making of the finished product, are not the subject-matter of a sale because there is no agreement to sell the materials nor is the price of the goods fixed nor is there a passing of the title in these goods as such, except as part of the building or the thing in which they are embedded. Therefore where as in this case bricks, rafters, beams, doors, windows etc. are embedded in a building or go to make the construction of a building as such, a contractor who has undertaken to build cannot by any stretch of the words in Entry 54 be said to have agreed to sell or is said to have sold bricks, rafters, beams etc., for a price on the date when he has completed the contract.

38. In actual fact if a sale of such material is deemed to have taken place, it would invariably take place earlier when he builds the walls, roof etc., and even before the building is constructed. Supposing the contract was to hand over possession of the completed building according to specifications and before that date it is destroyed by fire or falls down due to faulty construction, could it be said that there has been a sale of the material to the buyer and could the contractor on that assumption recover the price for the same? If a sale of the goods has taken place certainly he has a right to recover the price, but in law there has been no transfer of property of these materials, if such case for the sake of argument be conceded, until the building has been completed and transferred to the owner. It is the fixing of the stone arid the lime or brick in mud or brick in lime that is contemplated by the contract but at no stage can it be said that bricks or stones alone are transferred as such or contracted to be so transferred. To hold that the materials constituting the building are sold when the finished building is handed over at a price which is arrived at after deducting therefrom the cost of the labour expended thereon, is to make a new agreement for the parties which was not in their contemplation. In our view if in the discharge of a contract of service ownership of goods passes which is inseparably integrated with the contract of service, the transaction is not a sale, though the finished product may be the subject-matter of a sale, for, from the time of the Romans up to the present date, sale and contract of service have always been classified as distinct classes of contract, such as locatio conductio and emptio venditio.

39. To be more accurate the product of the work and material is locatio opens which is different from putting out off a place a work on contract, in that it is for a completed piece of work which practically has always a physical subject-matter, such as a house built, a slave to be trained, a coat to be dyed and so forth. Further under the Roman law where a man makes a thing out of his

own materials the contract was sale but there was an exception, that is, where one contracted to build a house finding the materials, he was a conductio opens perhaps because as Buckland in his Text Book of Roman Law says the site was part of the finished product so that he only produced part of the material or because the result of his work merged in the land and had, when the work was finished, no independent existence.

40. Inasmuch as the learned Advocate for the applicant as well as the learned Advocate-General have merely contended themselves by adopting the reasoning in Gannon Dunkerley's case A.I.R. 1954 Mad. 1130 and Pandit Banarsi Das' case *[1955] 6 S.T.C. 93 (Supra)* respectively as their arguments, we cannot in the view we have taken, with great respect, add to what has been said by Satyanarayana Rao, J., in Gannon Dunkerley's case A.I.R. 1954 Mad. 1130, after an exhaustive review and careful analysis of all the aspects of the matter and we agree with the conclusions arrived at by him. We also find support for that view in the weighty pronouncement of their Lordships of the Supreme Court.

41. There is yet another question to be determined namely, whether the assessee in this case can be termed to be a dealer or a casual trader within the definition of Sections 2(c) and 2(e) of the Hyderabad General Sales Tax Act. These terms-connote that a person either generally or occasionally is engaged or involved in the business of building and selling or supplying of goods in the State. The word "business" as employed in the definition requires that there should be a continuous exercise of an activity on the part of the person engaged in buying and selling and that the transfer of property in the goods by the seller to the buyer should be in the course of trade or business. The object of the Sales Tax Act is not to tax isolated sales and purchases of goods, and that is why the buying and selling are qualified by the expression "engaged in the business of". Therefore, the dealer or a trader who is engaged in the business of buying and selling or supplying goods must be engaged in a continuous or periodical activities in the year of assessment with a view to earn profit, for in a transaction of sale there is in contemplation the making of profit. Where a works contract is undertaken the materials which make up the finished product or building, are generally purchased from an outside agency, unless the builder or manufacturer is himself the producer of the material so used, and are not sold to the person for whom the building is being built or article is made for profit. In this view of the matter also the assessee cannot be said to be a dealer within the meaning of the Hyderabad General Sales Tax Act as to be taxed on the materials used in the works contract.

42. In the result we direct the issue of a writ of mandamus prohibiting respondents 1 and 3 from collecting sales tax on the two transactions namely, of building of maternity hospital and the repairs of the tank at Rudrur. The petitioner will have costs from respondents 1 and 3 which we assess at Rs. 100.

Cases Referred.

1[1955] 6 S.T.C. 93
2A.I.R. 1954 Mad. 1130
3[1955] 6 S.T.C. 93
4 AIR 1954 S.C. 459
5(1880) 14 Ch. D. 563 at page 571
6(1829) 7 Co. 457 at page 470
7(1880) 14 Ch. D. 563
8 AIR 1951 S.C. 318
9 AIR 1953 S.C. 252
10 AIR 1955 S.C. 661