CALCUTTA HIGH COURT

Dukhineswar Sarkar

Vs.

Commercial Tax Officer

Matter No. 18 of 1955

(Sinha, J.)

18.01.1957

ORDER

Sinha, J.

1. The petitioner is a company incorporated under the Indian Companies Act and is a registered dealer under the Bengal Finance (Sales Tax) Act 1941 (hereinafter called the 'Act'). It carries on business inter alia as builders and contractors. It has been regularly submitting returns as required under the provisions of the said Act. For the Bengal year 1357 (corresponding to the period April 1950 to April 1951) the petitioner company submitted returns and paid sales tax to the extent of Rs. 3,568/4/. On May 11, 1954 the respondent No. 2 as the Commercial Tax Officer, made an assessment for the year 1357 holding that the petitioner was liable to pay a tax of Rs. 15,756/1/- and also imposed a penalty of Rs. 2,000/-upon the petitioner.

2. For the Bengali year 1358 (April 1951 to April 1952), the petitioner likewise submitted returns and paid sales tax to the extent of Rs. 120078/3 for the first quarter, Rs. 4,798/1/- for the second quarter and a further payment of Rs. 354/9/. On November 24, 1954 the respondent No. 2 as the Commercial Tax Officer made an assessment in respect of the Bengali year 1358 holding that the petitioner was liable to pay a tax of Rs. 39,182/9/. He also imposed a penalty of Rs. 1,000/- upon the petitioner. Against both the orders of assessment the petitioner has filed appeals to the Assistant Commissioner, Commercial Taxes. In spite of the appeals being pending the respondents have proceeded under the Public Demands Recovery Act and a certificate has been filed in respect of Rs. 14,187/13/- said to be due on the basis of the assessment order dated May 11, 1954 and this certificate is being enforced against the petitioner. This Rule has been issued on February 22, 1955 upon the respondents to show cause why an order in the nature of a writ or certiorari should not be made quashing the assessment orders dated 11-5-1954 and November 24, 1954 mentioned above, and why an order in the nature of a writ of certiorari should not be made quashing the certificate filed in the office of the Certificate Officer of 24 Perganas mentioned in the petition, and why the respondents should not be prohibited from taking any further steps under the said assessment orders and/or the said certificate and/or why the respondents should not be ordered to deal with the assessment of the petitioner for the Bengali years 1357 and 1358 in accordance with law. I might mention here that the Rule also asked for certain reliefs in respect

of declaration forms but that has not been pressed.

3. The objection of the petitioner to the assessment orders mentioned above, arises in the following way. As stated above, the petitioner is a builder and contractor. As such builder and contractor it entered into the following contracts of building and repairs :-

(1) On or about December 5, 1947 the petitioner entered into a contract of repairs with the Official Receiver appointed as Receiver in *(Sri Sri Iswar Gopinath Jiew v. Krishna Kumar Sett*[1]*).* This contract related to repairs of certain old buildings in the possession of the Official Receiver and certain moneys were received in respect thereof during the relevant period and entered under the heading "Building Repair Accounts" in the petitioner's ledger.

(2) Sometime in 1948, the petitioner entered into a contract with the Union of India for carrying out the work of construction of 198 units of 'B' type quarters and 94 units of 'A' type quarters at Kharagpur for the then Bengal Nagpur Railway.

(3) On or about April 7, 1951 the petitioner entered into a contract with the Union of India for executing certain concrete works in connection with the structures built for the Bank and City Telephone Exchange at Dalhousie Square, Calcutta.

(4) On or about May 16, 1951 the petitioner entered into a contract with the Commissioners for the Port of Calcutta for the purpose of constructing certain buildings at Kidderpore. The said works are referred to as the "Kidderpore Works" in the petitioner's ledger,

(5) On September 27, 1951 the petitioner entered into a contract with the Union of India for certain super-structural works in connection with the said Bank and City Telephone Exchange.

4. These contracts were all contracts for construction of structures or for repairs of structures. In the contract No. (1) mentioned above, the petitioner had to supply the materials. In contract No. (2), the Union of India was to supply a number of materials, the remaining materials being supplied by the petitioner. The contract itself requires the contractor to undertake works like filling earth, carting cinders, laying boulders, excavating cinders, cleaning certain stores etc. In contract No. (3), the Union of India was to supply the necessary bricks, cement, steel etc., while the contractor was to supply sand, gravel etc. In contract No. (4) the Commissioners of the Port of Calcutta were to supply certain materials the remainder being supplied by the contractor. In contract No. (5) the Union of India was to supply cement, steel, bricks etc., while the contractor was to supply sand, lime etc. In all these contracts, the contractor, besides supplying materials, was to supply work and labour. In the petitioner's books, the contract No. (1) is entered under the heading "Building Repair Accounts"; contract No. (2) is entered under the heading "Kharagpur Works"; contracts Nos. (3) and (5) are entered under the heading "Bank City Concrete Works" and contract No. 4 is entered under the heading Kidderpore Works, Calcutta Port Commissioners". The bricks required for the above constructions and repairs are entered under the heading "Brickfield Job Account". The Commercial Tax Officer has considered all the materials supplied for the purposes of construction and/or repairs by the petitioner, as sale of goods. In the assessment order dated November 24, 1954 he has specifically held that the

petitioner was liable to pay tax on the following

[1] Suit No. 534 of 1932

sums appearing in the ledger of the petitioner under the following heads :-

"Kharagpur Works"	....
	Rs. 1,15,713-3-0
"Building Repair Accounts"	....
	Rs. 10,466-1-9
"Bank City Concrete Works"	....
	Rs. 7,06,756-3-0
"Kidderpore Works"	
(Calcutta Port Commissioners)	....
	Rs. 7,431-4-0
Brick field job account	....
	Rs. 2,00,174-5-0
	_____
	Rs. 12,99,225-0-9.

5. Accordingly, he has assessed the petitioner to tax for the sum of Rs. 39,182-9-0 for the period covered by the said assessment. The short point therefore arises as to whether these are/or can be considered as sale of goods upon which the petitioner can be made liable to pay sales tax. The Bengal Finance (Sales Tax) Act 1941, (Bengal Act VI of 1941) came into force on July 1, 1941. Section 2(b) defines the word "contract"; Section 2(d) defines the word "goods"; Section 2(g) defines the word

> "sale" and Section 2 (h) defines the word "sale-price". These definitions have been changed from time to time by successive amendments: It will be useful to set out the definitions as they stood under the 1941 Act and as they have been affected by the 1950 amendment which came into force on January 17, 1952, and the 1954 amendment which came into force on July 22, 1954.

6. It will be observed that Section 2 (h) calls for the prescribing of rules for the purposes of ascertaining the sale price in the case of contracts where materials are supplied as also labour. The method has been prescribed by rules framed in exercise of the powers conferred by sub-section (1) of Section 26 of the Act. Rule (2) is as follows :

> "For the purpose of sub-clause (i) Clause (h) of Section 2, the portion of the amount of the money consideration for a contract representing the price of goods supplied in the execution of the contract shall be :-
> (1) In the case where the dealer produces to the satisfaction of the assessing authority evidence showing the cost of materials and the cost of labour involved in the execution of the contract

X

X + Y where X and Y are respectively the cost of materials and the cost of labour so involved; or

(2) In other cases -

(b) 70 per cent., where the contract is a structural contract....."

7. The short point that arises for consideration is this: The contractor entered into a contract for the construction of a building and/or its repair. Either it supplies the entire material required, or part thereof. It, of course, supplies work and labour in any case. The Act provides that the supply of materials is to be considered as a sale of goods, and the consequence is that the contractor has to pay sales tax on all such materials supplied. It is argued that as a matter of law, these are not sale of goods and the State Legislature, and its predecessor the Provincial legislature, had no power or jurisdiction to declare such transactions as sale of goods, or to make them taxable as such. It is consequently argued that these provisions in the Act, in so far as they construe goods supplied in the execution of a contract for the construction and fitting out or repair of any building, road, bridge or other immovable property, as sale of goods liable to sales tax, are ultra vires and void. It is further argued that the rule which has been prescribed in order to calculate the price of goods in a contract which includes price of goods as well as work and labour, is arbitrary and that the State Legislature had no power to delegate the function of laying down the principle of calculation to the State Government.

8. I might explain here why it is said that the State Legislature or its predecessor the provincial legislature had not the power or jurisdiction to make such a law. In the Government of India Act 1935, Schedule VII List II Item 48, the provincial legislature was empowered to legislate in respect of "taxes on the sale of goods and on advertisements." It had no exclusive right or legislation in respect of sale of goods, which came under the concurrent list, i.e., List III. The corresponding provision in the Constitution is in the 7th Schedule List II item 54, which confers on the State Legislature power to legislate on "taxes on the sale or purchase of goods other than newspapers." Under the Constitution also, the State Government has no exclusive right of legislation with regard to sale of goods, which would come under List III, i.e., the concurrent list. The Indian Sale of Goods Act 1930 (Act IX of 1930) was passed by the Indian legislature. Under Article 254 of the Constitution, if any provision of law made by the legislature of a State is repugnant to any provision of law made by Parliament which the Parliament is competent to enact, or to the provisions of any existing law with respect to one of the matters enumerated in the concurrent List, then the law made by Parliament or the existing law shall prevail unless it has received the assent of the President, in which case it will prevail in the State concerned. Under Section 107 of the Government of India Act, the assent of the Governor General or His Majesty was required under similar circumstances. It is, therefore, argued as follows: It is said that the word "sale of goods" is not defined in the Constitution or the Government of India Act, 1935 but at the time that the Government of India Act, 1935, came into operation or the Constitution came into operation, the words had a definitive meaning in law and were governed by the Indian Sale of Goods Act which is based on the English Sales of Goods Act. In other words, it was clearly understood what in law amounted to a sale of goods, and the intention in conferring power on the State Legislature or the Provincial Legislature to legislate and thereby impose taxes on the sale of goods, meant no more than conferring power to impose taxes on what

was then understood in law as the sale of goods. As the existing law has laid down what amounted to sale of goods, the State legislature or the provincial legislature could not for the purposes of taxation, enlarge the scope thereof, which it could only do with the assent of the Governor General. His Majesty or the President, which admittedly have not been obtained. The first question therefore to which we have to address ourselves is the question as to whether in a contract of building or repair, materials supplied by the contractor could be considered as sale of goods under the existing law. It is not only in the State of West Bengal than an attempt has been made to declare the supply of materials by contractors in such cases as sale of goods for the purpose of imposing sales tax. Attempts have been made in other States, e.g., Madras, Mysore, Madhya Pradesh and others. In several States such attempts have been resisted. We have legal decisions on this very point, although unfortunately, they are not uniform. I shall now proceed to consider some of the decisions relevant on the point. The first decision to be cited is the judgment of a Division Bench of the Madras High Court. - '*Ramaswami v. State of Madras*[2]*',* It is not a case of a building contract but the reason why I am citing it is because reference has been made to it in a later case. The judgment of Raja Gopalan, J., is a very short one. It appears that the petitioner was the proprietor of a printing press. He carried out certain printings and ancillary works for Government, in course of which he supplied paper. He was held liable to pay tax on items which included the value of the paper, together with such items as printing, perforating, numbering and binding charges. It was of course held that so far as printing, perforating, numbering and binding charges were concerned, they were only work and labour. With regard to the paper supplied, the learned Judge said as follows : "The Tribunal apparently did not consider the possibility of a sale of paper by the printer himself as a dealer. When paper purchased from others and turned over to the printer can be undoubtedly the purchaser's property i.e., customer's property, we fail to see why a sale of paper by the printer himself cannot make that paper the purchaser's property i.e., customer's property. If it was the customer's paper that was used, and if that paper was sold by the printer himself, that sale would be liable to tax if the total turnover of these sales amounted to over Rs. 10,000."

9. It was however held that the value of the paper did not reach the minimum which was liable to taxation and therefore the petitioner was not liable to tax.

10. In a later case, which will be presently noticed, it was thought that this decision threw some light on the question as to whether building materials supplied by the contractor could be treated as sale of goods. I shall advert to this point at the proper time.

11. The next case to be cited, and which is the most important one to be considered, is that of a Division Bench of the Madras High Court : '*Gannon Dunkerley and Co. (Madras) Ltd. v. State of Madras*[3]*',* Raja Gopalan J., was himself a member of the Bench which decided this case. In this case, there was an exhaustive consideration of all aspects of the matter and it has to be carefully considered. This was a revision petition under Section 12B of the Madras General Sales Tax Act, challenging the constitutional validity of certain of the provisions of the Madras General Sales Tax Amendment Act (XXV of 1947), by which "works contracts" were included within the ambit of the Mad. General Sales Tax Act and were made subject to the levy of sales tax within the limitations provided in the said Act. The assessees. Messrs. Gannon Dunkerley and Co. (Madras) Ltd., carried on business as engineers and contractors. In the execution of contracts materials were supplied and were held to be taxable as sales tax. It was argued that the amending Act was beyond the legislative competence of the provincial legislature, as the works contracts

executed by the assessees were not contracts for sale of goods, and

[2] AIR 1954 Mad 980

[3] AIR 1954 Mad 1130

therefore the provincial legislature had no jurisdiction or power to enact the impugned provisions with a view to bring 'works contracts' of such nature into the net of taxation. This contention was upheld. Rao J., in an elaborate judgment has considered the various aspects of the case and a large number of authorities. The findings of the learned Judge may be summarized as follows :-

1. The legislative power of the province to enact the General Sales Tax Act and provide for the levy of the general tax on the sale of goods in the State of Madras was derived under the Government of India Act, 1935, the Constitution Act then in force. Under Section 100, sub-section (3), the provincial legislature was empowered to legislate for the province with respect to any of the matters enumerated in List II and the 7th Schedule to the Act and item 48 in the List is "tax on the sale of goods and on advertisements." The corresponding item in List II (State List) of the Constitution of India is item 54, the language of which is somewhat different. Item 54 is "taxes on the sale or purchase of goods other than newspapers."

2. Prior to the Madras General Sales Tax Amendment Act XXV of 1947, works contracts were not subject to the levy of sales tax in any form, the amending Act introduced inclusive definitions of "sale", "works contracts" and "turnover" whereby tax was payable on transfer of property in goods involved in the execution of a works contract.

3. The contracts were in a form very much similar to what we have in the present case, and mainly consisted of Government contracts, for the purposes of construction or repairs, in consideration of lump sum payments carried out according to an agreed Schedule. While the Government supplied some of the materials, e.g., cement, the contractor supplied the rest of the materials.

4. The main argument on behalf of the assessee was that works contracts of this nature are not contracts for the sale of goods, and that the legislature of the province had no power to levy sales tax, treating them as involving sale of goods, to bring them within the ambit of the General Sales Tax Act. The legislative power under item 48, it was contended, extended, only to the enactment of laws for levying a tax on a transaction known to the law as "sale of goods" and no others. The legislature had no power to include within the definition of "sale" a transaction which is not a sale, and thereby extend its powers to tax transactions which are wholly outside the legislative field. This argument necessitated an examination of the import and fundamental essentials of the transactions which might legitimately be described as a sale of goods, in order to determine the extent and the limit of the legislative power of a province, and also to see whether building contracts or contracts which were carried out by the assessees during the assessment year, were in any sense transactions for the sale of goods.

5. The Government of India Act. 1935, (S. 311) defines the word "goods" as including all materials, commodities and articles. This corresponds to Article 366 (12) of the Constitution. But there is no definition of the words "sale of goods."

The transaction denoted by the expression "sale of goods" had a well-defined meaning in law as it existed before Parliament enacted the Government of India Act of 1935, and

even thereafter. The transaction denoted by a sale of goods as commonly understood under the law, is that which is defined in Section 1 of the English Sale of Goods Act and Section 4 of the Indian Sale of Goods Act. The essential element in a sale of goods is the transfer of property in the goods to the buyer for a price. It is a consensual act and it requires an agreement to transfer property in the goods for a price. The goods may be existing goods or future goods. They may be ascertained or unascertained goods, but in any case, the transfer of property contemplated is in the goods which are the subject matter of the contract.

6. The power of the Legislature could not extend to anything other than a transaction of sale which is well-known to lawyers. If the transaction in question does not constitute in law a sale of goods, then the legislature has no power to levy a tax upon such a transaction, and if it purports to do so, it does something which is forbidden. It is open to the legislature to impose a tax at any point on any of the elements which constitute the composite ideas of sale of goods but it could not extend its power of legislation by declaring a transaction as sale of goods which was not so. For example, attempts to construe an agreement for sale of goods as sale of goods have been repelled and held ultra vires. *Sales Tax Officer v. Budh Prakash Jai Prakash*[2]*, Bharat Sabai Grass Ltd. v. Collector of Commercial Tax, Orissa*[3]*,*

7. Until building materials are actually affixed to the building, in the absence of agreement to pass the property in the materials on delivery, the property therein remained in law with the builder, notwithstanding that they may have been approved by the employer or his agent or brought on the site. It therefore follows that unless there is a contract intending specifically to pass the property in the materials as and when they are brought to the site, the property passes only when they are fixed to the building. The contract is treated as an entire contract to build and the price is to be paid either on a lump sum basis or the amount ascertained according to the schedule of rate after measuring the quantity. There is therefore no element of sale of the materials in such a contract, as the contract is not in substance and, in effect a contract of sale of materials as goods for a price stipulated between the parties, ownership in which is, or passes, in accordance with the principles applicable to them and laid down in the Sale of Goods Act. The ultimate result of executing such a contract is to bring into existence immovable and not movable property and a contract therefore does not become a contract relating to sale of goods if it is only a contract to build. There is no element of sale of the materials in a building contract, the contract being one and entire and therefore indivisible. Unless the works were completed, the builder is not entitled to the price fixed under the terms of the contract. It does not imply or involve a contract for the sale of the materials for a price stipulated. Property in the materials passes to the owner of the land not by virtue of the delivery of the materials as goods under and in pursuance of an agreement for sale which stipulates a price for the materials, but the property in the materials passes to the owner of the land because they are fixed in pursuance of the contract to build and along with the corpus which ultimately results by the construction of the super-structure, the materials also pass to the owner of the land. It therefore follows that building contracts which the assessees entered in to during the assessment year in

[2] AIR 1954 SC 459

[3] AIR 1953 Orissa 23

which the turnover was calculated, did not involve only element sale of the materials and are not in any sense contracts for the sale of goods as understood in law.

The amendments introduced were therefore ultra vires of the provincial legislature and they had no power to tax the transactions which were not sale of goods.

12. With great respect to the learned Judge, I agree with the reasoning and the conclusions arrived at by him, and in my opinion, the facts of the present case and the nature of the transactions which we are considering in this case, are similar to that which was being considered by the learned Judge, and there is no observable difference. In the present case also there was no contract for the sale of the materials. The contracts were for erection of buildings or for repairs therein. The property in the goods passed only when the building was erected and/or repaired. This brought into existence immovable property and there was no intention of transferring the materials as such. There being therefore no sale of goods, it was not, in my opinion, competent for the State Legislature to bring into the net of taxation the transactions for the supply of materials in relation to the contracts above mentioned. I shall however have to consider several other decisions, some of which have not agreed with the above conclusions.

13. The next case to be considered is a single bench judgment of the Mysore High Court, in the criminal jurisdiction, *Mohamed Khasim v. State of Mysore*[4], The prosecution was under Section 20 of the Mysore Sales Tax Act. The accused was a building contractor who drew consolidated Bills tendered to the Corporation for having constructed buildings. The contractor failed to adduce evidence of the labor expended and was allowed 30 per cent as value of labour and the balance was adopted as basis for fixing the turnover for purpose of determining the value of materials supplied and used in the contracts, which were charged with sale tax. The contractor failed to pay and hence the prosecution. Balakrishnaiya, J., held that a criminal court could not adjudicate upon the validity of the tax under the provisions of the Sales Tax Act. The learned Judge followed the decision of *Rama Iyer v. Government of Mysore*[5], Having held so, the learned Judge proceeded to consider and comment upon the case of *Gannon Dunkerley v. State of Madras* (Supra) although it is stated that the complete report of that case was not yet available. The learned Judge finds it difficult to reconcile this decision with the earlier decision of *Ramaswami v. State of Madras* (Supra). Firstly, having held that the court could not decide the liability to pay Sales tax, in a criminal case, the rest of the observations must be considered as mere obiter dictum. Secondly, I have no doubt that if the learned Judge had before him the complete report of the Gannon Dunkerley case (supra) he would have come to a different conclusion. In Gannon Dunkerley's case, it was held that the supply of materials for a construction was not a sale of the materials, and it was explained how the property in the goods passed. But it was conceded that it might be a sale if the parties agreed to treat it as a sale. All that was said in Ramaswami's case (supra) was that a "sale" of paper by the printer could make it liable to sale tax. The particulars of the contract with the printer who supplied the paper were not set out and there is nothing to show that it was of the kind that falls to be considered where a building contractor agrees to construct a building and supplies materials for the purposes thereof. The judgment is a very short one and the points raised and discussed in Gannon

[4] AIR 1955 Mys 41

[5] AIR 1951 Mys 70

Dunkerley's case (supra) were neither raised nor discussed. I am unable to rely on either Ramaswami's case (supra) or Mohamed Khasim's case (supra) for the purpose of deciding the present case.

14. The next case to be considered is a divisional bench judgment of the Nagpur High Court :

Banarsi Das v. State of Madhya Pradesh[6], In this case, the assessment of sales tax was made on the supply of building materials used in the execution of building contracts for the P.W.D., M.E.S., and private parties. The facts were therefore very much like the facts in the present case. Also, like the present case, the artificial rule whereby the price of materials was to be separated from the work and labour supplied, came under attack. Upon the main point, namely, whether the supply of materials in such a case amounted to a sale of goods, and was thus assessable to sales tax, the learned Judges considered Gannon Dunkerley's case (supra) and differed from it. They however declared the definition of "Sale price" in Section 2 (p) (ii) of the C. P. and Berar Sales Tax Act 1947 and Rule 4 of the rules framed under it, as founded upon an artificial basis and beyond the competence of the Legislature. Hidayatullah, J., says as follows:-

> "While it cannot be doubted that a limited legislature which possesses a mere supremacy of 'enumerated entries' cannot by fiction create a power for itself which does not flow naturally from the entry, the power itself is otherwise unlimited and of the widest amplitude possible. The natural and full scope of the entry cannot be cut down by anything not found in the Constitution Act 1935. Lord Selbourne's dictum in *The Queen v. Burah*[7] has often been quoted in this connection. When entry No. 48 was framed it conferred on the provincial Legislature powers of the widest amplitude to tax the sale of goods in all its aspects and forms. The text being explicit, the text is conclusive, alike in what it directs and what it prohibits. The necessary conditions for the import, however, were that there should be sale of goods. The selection of the taxable events and the severance of transactions of sale from other transactions in which they might be embedded was a necessary part of the power. The Legislature could not say that a contract of service amounted to a sale of services, but it could tax a genuine transaction of sale of goods whatever from it took.

The task of the builder is to supply materials and to execute work on them to produce a completed object. The Madras decision with all due respects seems to suggest that the expression 'Sale of goods' received its full and final meaning by 1935 through legislation and decided cases. The cases cited there do not refer to taxation but deal with other matters. So also the Statutes. That building contracts are entire, that property in the building materials passes when they are part of immovable property and that payment is in a lump sum and not separately for the materials may be matters of consequence in some contexts. But there is always a sale if goods are transferred to another and paid for by him. It cannot be gainsaid that there is payment for materials, though the payment is not made separately but as part of a larger amount.....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. If a

[6](1955) 6 STC 93

[7](1878) 3 AC 889

building contract was not split up into its component parts, that is to say, material and labour, in legislative practice relating to the ordinary regulation of sale of goods, there is no warrant for holding that it could not be so split up even for purposes of taxation. 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 provincial legislature was competent to sever from a complex transaction any sale involved in it and to tax such sale.....the supply of goods is tantamount to the sale thereof."

15. The decision may be summarized as follows :-

1. There is always a sale, if goods are transferred to another and paid for by him.
2. The supply of materials for purposes of building or repair is therefore a sale.
3. A legislature which has power to tax sale of goods can break up a composite transaction like a building contract and tax that part which relates to sale of goods.

16. There can be no doubt that proposition (3) is quite correct. But with great respect, I think that propositions (1) and (2) require close consideration. We are not here concerned with sale in general, but only with the sale of goods. In order that there may be a sale of goods, undoubtedly there must be a transfer of property in the goods for a price. But the question here is as to whether there has been a transfer of property in the materials for a price by virtue of the contract between the parties, which is a contract, not to supply the materials but to construct the house. It is true that the owner of the building ultimately becomes the owner of the materials with which it is built, but it is an oversimplification to say that there must therefore have been sale of the materials to him. We are not dealing with a question of sale in its wider significance, but in its restricted connotation as sale of goods. To say that when we purchase a whole, we purchase the components of which it is made, may be a true mathematical concept, but it is not necessarily an accurate proposition of law. A contract of sale of goods depends upon the intention of the parties. When a contractor enters into a contract to build a house, it must follow that somebody must supply the materials. In so far as he agrees to supply the materials himself, he does so because he has to build a house. The other contracting party has not asked the contractor to sell him the bricks, or the mortar or any other component. If the contractor brings them and dumps them upon the land and does nothing more, be has performed no part or the contract. The contract is to build the house, and when he affixes the brick and mortar to the land, the property therein passes by accession and not by sale. The contractor is not entitled to any payment, until he completes the structure which he has agreed to build. Interim payments are only by way of advances and the contracts specifically make this point clear. If the learned Judge was right, then surely at any given moment the contractor might refuse to do any further work and say that he must be paid for the materials supplied so far. If it is a sale of goods, the other party will have no answer. This however is far from being the correct legal position.

17. The position therefore is as follows. The State legislature has the power to tax sale of goods. Where there is a composite transaction, it can assuredly break it up so as to separate that portion which constitutes sale of goods and proceed to tax it. But the question inevitably arises as to who is to decide what constitutes the sale of goods. If there is a valid law which defines what is sale of goods, then for the purposes of taxation, the State legislature will be bound by that definition, until it is competent to change that definition itself and changes it.

18. This has clearly been laid down by the Supreme Court in ' AIR 1954 Supreme Court 459'. In that case, it was found that for purposes of taxation, the U. P. Sales Tax Act proposed to treat agreements for sale of goods as sale of goods. Ayyar, J., said:-

"Thus, there having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression 'Sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title ..... 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 and not when there is a mere agreement to sell. The State legislature cannot by enlarging the definition of 'Sale' as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act, and the definition of 'Sale' in Section (2) (h) of Act XV of 1948 must to that extent be declared 'ultra vires'."

19. In *'The Bengal Immunity Co. Ltd. v. The State of Bihar*[8]*',* Bhagwati, J., having discussed the legislative practice in India and England regarding sale of goods, says: (at p. 700 of SCR) : tat p. 701 of AIR).

"This being the legislative practice in India as well as in England at the time when the power to tax sales or purchase of goods was conferred on the State legislature, the scope of that power would have been ordinarily determined by the definition of the sale of goods to be found in these respective Sales of Goods Acts....."

20. The learned Advocate General has strongly relied on the Supreme Court decision in - '*Navin Chandra Mafatlal v. The Commissioner of Income Tax Bombay City*'[9]*,* and argues that Das, J., (as he then was) has not supported this view. In this case, the appellant was assessed upon certain capital gains under Section 12B of the Indian Income Tax Act. Section 12B was inserted in the Act by the Indian Income Tax Act and Excess Profits Tax (Amendment) Act 1947 (XXII of 1947) which was a Central Act. The question arose whether this was a proper exercise of legislative power under entry 54 of List 1 of the 7th Schedule of the Government of India Act 1935 which empowered the Central legislature to make laws relating to "Taxes on income other than agricultural income". It was argued that 'income' did not signify capital gains, either according to its natural import or common usage or according to judicial interpretation of relevant legislation both in England and in India, and therefore the Central legislature could not enlarge its taxing power by treating capital gains as income. This contention was negatived. Das, J., said as follows:-

"Our attention has not, however, been drawn to any enactment other than fiscal statutes like the Finance Act and the Income-tax Act where the word 'income' has

[8](1955) 2 SCR 603: AIR 1955 SC 661

[9](1955) SCR 829: AIR 1955 SC 58

been used and, therefore, it is not possible to say that the critical word had
acquired any particular meaning by reason of any legislative practice. Reference has been made to several cases where the word 'income' has been construed by the Court. What is, therefore, described as legislative practice is nothing but judicial interpretations of the

word 'income' as appearing in the fiscal statutes mentioned above. A perusal of those cases, however, will reveal at once that those decisions were concerned with ascertaining the meaning of that word in the context of the

Income-tax legislation. ..... If we hold as we are asked to do, that the meaning of the word 'income' has become rigidly crystallized by reason of the judicial interpretation of that word appearing in the Income-tax Act then logically no enlargement of the scope of the Income-tax Act by amendment or otherwise will be permissible in future. A conclusion so extravagant and astounding can scarcely be contemplated or countenanced."

21. The distinction is therefore quite clear. There was no definition of 'income' in any law apart from the taxing Statutes themselves. Hence, the meaning to be ascribed must be the natural and grammatical meaning of the words, and the words must be construed widely and liberally. Here however, the operation known as sale of goods is the subject-matter of a Statute and a Central Statute at that. The question is as to whether, in considering those very operations in connection with a power of taxation vested in the provincial or State legislature, it can alter or ignore the Central Statute and evolve its own definition. This is entirely a different matter, and the answer must be in the negative.

22. Although the above case does not appear to have been cited or considered, my view is supported by a Division Bench judgment of the Hyderabad High Court: - '*Jubilee Engineering Co. Ltd. v. Sales Tax Officer, Hyderabad City*'[10], In this case, the petitioner was a registered dealer under the Hyderabad General Pales Tax Act, 1950. It carried on business as building and construction contractors and carried out two P. W. D. contracts for building and repairs. The contracts were in the usual P. W. D. forms with schedules of rates, as we have in the present case, and the terms were very much similar. The P. W. D. department was to supply steel for which permits were to be arranged. The rest of the materials were to be supplied by the contractor. The case involved an interpretation of the Hyderabad General Sales Tax Act, which by its definition sought to treat works contracts as sales of works liable to sales tax. Two points were taken as have been taken in this case : Firstly, 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 secondly, that R. 5 (iii) of the Hyderabad General Sales Tax Rules prescribing the ratio between the materials used and the labour spent in the construction for different contracts is arbitrary and illegal. On the first point, the learned Judges agreed with the decision of the Madras High Court in - *Gannon Dunkerley and Co. v. State of Madras*'. (supra) and disagreed with the decision of the Nagpur High Court in (1955) 6 STC 93. Reddy, J., quotes Weaver on Constitution Law, p. 77 - '*James v. Commonwealth of Australia*'[11], (per Lord Wright at p. 614); - '*State of Bombay v. F. N. Balsara*[12]', - '*State of Bombay v. United Motors* [13]

[10] AIR 1956 Hyderabad 79

[11](1936) AC 578

[12] AIR 1957 SC 318 (per Fazal Ali, J., at p. 325)

[13] AIR 1954 SC 459, AIR 1954 SC 661 AIR 1953 SC (per Bose, J., at p. 264)

(India) Ltd., and came to the following conclusion :-

"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 attached to them a special meaning when used in a legal instrument, then it will be difficult to assume, unless the context or other circumstances indicate otherwise, that one draftsmen did not use them in the sense in which those expressions have been understood in legal parlance..... 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 conception or meaning of certain legal phrases which are well-known under the law existing at the time when the Constitution was promulgated ..... 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."

23. In the result, the learned Judges held that Sales Tax could not be charged in respect of the materials used for building.

24. I have now considered the authorities dealing on the point and will proceed to summarise my own conclusions :-
1. The Bengal Finance (Sales Tax) Act 1941 was promulgated by the Provincial legislature of Bengal under powers given to it by entry 48 of List II in Schedule VII of the Government of India Act 1935. Amendments have been made in it, in 1950 and 1954 by the State Legislature of West Bengal, under powers given to it under entry 54, of List II of Schedule VII of the Constitution. Both of these entries inter alia relate to taxation of sale of goods.

2. Both under the Government of India Act 1935 and the Constitution of India, the word 'goods' has been defined (S. 311 and Article 366 (12)) but not 'sale of goods'.
3. In India, sale of goods arid the incidences thereof are governed by the Sale of Goods Act, being Act IX of 1930 passed by the Indian Legislature. It is based on the English Sale of Goods Act.
4. Both under the Government of India Act, 1935 and under the Constitution, the province and/or the State could make a law in respect of taxation of sale of goods but had no exclusive right to make a law in respect of sale of goods which is a concurrent subject. Such a law, if it is repugnant to the provisions of an existing law would now require the assent of the President. In any event, no such law has been passed in respect of the sale of goods.

5. Under the Sale of Goods Act (S. 4), the contract of sale of goods is a contract whereby the

seller transfers or agrees to transfer the property in goods to the buyer for a price. Where under a contract of sale the property in goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement for sale.

6. The expression "sale of goods" is a composite expression consisting of various ingredients or elements. Thus, there are elements of a bargain, or contract of sale, payment, or promise of payment of price, the delivery of goods and the actual passing of title; and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property. - '*Popatlal Shah v. State of Madras*[14]',

7. The cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning, subject to this rider that in construing words in a constitutional enactment conferring legislative power, the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. (1955) 1 SCR 829: AIR 1955 Supreme Court 58: (1951) SCR 682.

8. But if the words or expressions used 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.

9. In the case of a legislative entry conferring power of taxation, if the subject-matter is enacted but there exists no legal definition of it, it would be competent on the part of the State Legislature to give it a wide meaning and it would not necessarily be governed by mere judicial decisions or interpretation of any and every fiscal statute: - '*Navin Chandra Maffatlal v. Commissioner of Income-tax*, (supra). It will be different, however, if the subject-matter itself has been defined by some statute; that definition should prevail. - '*Jubilee Engineering Co. Ltd. v. Sales Tax Officer Hyderabad City', (supra) (1936) AC 578* . - '*State of Bombay v. P. N. Balsara*, (supra); - '*Sales Tax Officer v. Budh Prakash Jai Prakash* (supra) : - '*Bengal Immunity Co. Ltd. v. State of Bihar*', (supra); - '*State of Bombay v. United Motors*', (supra).

10. Thus, there having existed at the time of the enactment of the Government of India Act, 1935, or the Constitution, a well established definition of the transaction known as sale of goods, in the Indian Sale of Goods Act, which in its turn is based on the English Sale of Goods Act, it would be proper to interpret the expression "sale of goods" in entry 48 of the Government of India Act, 1935, as also in entry 54 of the Constitution of India,

[14] AIR 1953 SC 274 at p. 276

in the sense in which it was used in the Sale of Goods Act, See cases cited under (9).

11. Judged from this point of view, in the absence of a contract to the contrary, the supply of materials by a contractor, who agrees to build a house (or any other structure) or repair the same, does not amount to a sale of such materials and such supply does not come within the concept of the transaction known as sale of goods.

12. Contracts of building may be generally classified into four categories. The first and the most simple form is a contract to do the whole work, the consideration for which is a payment in lump-sum, the second is a contract to do whole work in consideration of the payment of different

sums for different parts of the work, the third is a contract to do the whole work, no mention of the price being made, and the fourth is a contract to do the whole work for a price to be ascertained, for example, by a schedule of price. The most common form of these are the first and the last, Hudson on Building Contracts 7th Edition, page 165. The contracts in question are lump-sum contracts with drawings, specifications, bill of quantities and general and special conditions of contract agreed to between the parties.

13. In such a building contract, the contractor agrees to build a house (or any structure). The operation of building necessarily involves the supply of materials, which may be supplied by the contractor or the owner, or partly by the contractor and partly by the owner. But unless there is a contract to the contrary, the contractor cannot be said to have entered into a transaction for the sale of such goods to the owner. There is no agreement between the parties for a transfer of property in such goods for a price. It is not that a transfer of property does not take place in course of construction. The transfer takes place by virtue of a different legal principle, namely, accession. Until building materials are actually affixed to the building, in the absence of an agreement to pass the property in the materials on delivery, the property therein remains in law in the builder, notwithstanding that they may have been approved by the employer or his agent or brought on site. The property in the materials will pass only when they are affixed to the building, whether it is bricks, doors or door-frames or other materials. The contract is treated as an entire contract to build, and the price is to be paid on a lump-sum basis or the amount ascertained according to the schedule of rates after measuring the quantity. There is, therefore, no element of sale of the materials in such a contract, as the contract is not in substance or in effect a contract to sell the materials as goods for a price stipulated between the parties, the ownership in which is to pass in accordance with the principles applicable to them and laid down in the Sale of Goods Act. The ultimate result of executing a contract is to bring into existence immoveable property and not moveable property and the contract therefore has not become a contract relating to sale of goods but is a contract to build. *Tripp v. Armitage*[15], *Reeves v. Barlow*[16], *Cotterell v. Apsey*[17], *Clark v. Bulmar*[18] *Chanter v. Dickinson*[19],

A contract whereby a chattel is to be made and affixed by a workman to land or to another chattel before the property therein is to pass, is not a contract to sell but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such: Benjamin on Sale, 6th Edition, page 190.

[15](1839) 150 ER 1597
[16](1884) 12 QB 436
[17](1815) 6 Taunt 322
[18](1843) 11 M and W 243
[19](1843) 5 M and G 253

Thus, if the contractor fails to implement his contract to build, he has no right to recover the price of the materials as such. If before the building is completed it is destroyed by fire, or falls down due to faulty construction, the contractor could not recover the price of the same. Thus, all the elements of the transaction known as sale of goods are lacking.

14. In a composite transaction, the legislature for purposes of taxation can break it into its components, but under the circumstances prevailing in this case, the provincial or the State legislature could not after having done so, declare a transaction as sale of goods which is not so under the Sale of Goods Act. It could do so after having promulgated a legislation altering the Sale of Goods Act itself, and after obtaining the requisite assent under Section 107 of the Government of India Act 1935 or Article 254 of the Constitution.

25. I now come to the second point taken in this case, namely, that the artificial and arbitrary rule contained in the definition of "sale price" in the Act and in Rule 2 of the Rules is bad and ultra vires. The corresponding definition and the rules in their respective States have been declared as void and ultra vires by the Nagpur High Court in the case of (1955) 6 STC 93 and by the Hyderabad High Court in AIR 1956 Hyderabad 79 (K). I agree with these conclusions. As stated in the Nagpur decision, the contracts we are concerned with, do not ordinarily provide separately for cost of material and consideration for carrying out the contract. They are not what are called 'cost plus' contracts. The definition and the rule seeks to split up the consideration for an entire contract into the cost of materials and the work and labour supplied. Under the definition of "sale price" this is to be done in a, manner which is to be prescribed by Government. The impugned rule seeks to do so. First of all, the dealer is required to produce before the assessing authority evidence showing cost of materials and cost of labour involved. If he does so, then the splitting up is done by using a formula which has been set out above. It is obvious that this is not a formula which is mathematically correct. It will give a result which may be approximately correct but not fully correct. The learned Advocate General has tried to give me specific instances and to argue that if we work it out, then in most cases a very nearly accurate result will be obtained. If, however, the dealer does not produce the necessary materials, then the calculation is made on a rule-of-thumb basis, namely, that the money consideration for a contract representing the price of goods was to be 70 per cent where the contract was a structural contract. It is not manifest that these calculations are arbitrary. The learned Advocate General does not argue that it is possible to arrive at a mathematically correct answer. He, however, says that if a contractor does not do his duty by submitting the proper materials before the assessing authority, what else can be done but to calculate it upon a rule of thumb basis? It is clear, however, that in either case, the calculation is on an arbitrary basis. It may be that from experience of working these matters, the Government has discovered that by using the prescribed formula, results are obtained which are very nearly accurate. Assuming that this is so, how does the matter stand? It is conceded that the State Legislature can only tax what is sale of goods and cannot tax what is work and labour. If we have an arbitrary method, which however approximate is not wholly correct, then the inevitable result is that the calculation of the money value of what is called the price of goods supplied, will in the majority of instances contain, or include, a part of the consideration for work done and labour supplied. In so far as this will be so, the State legislature will be taxing something which is beyond its competence and this could never be allowed. It is no good saying that the unauthorised portion is only a small part of the taxes that have been so collected. If even an iota of tax so collected is outside the law, the whole must be invalid because under the Constitution no citizen is liable to pay taxes except in accordance with law. In view of this finding it is unnecessary to deal with the question of the delegation of powers by the State legislature to Government.

26. The result, therefore, is that I must hold that the provisions of the Bengal Finance (Sales Tax) Act 1941 in so far as it seeks to bring within the net of taxation goods including materials commodities and articles supplied in the execution of the construction, fitting out, improvement or repair of any building, road, bridges, or other immoveable properties, and in so far as it declares it to be a sale of goods and in so far as it seeks to realise taxes upon what is called the "sale price" thereof is ultra vires of the provincial and the State legislatures and is void. I must further declare that Rule 2 of the Bengal Finance (Sales Tax) Act 1941 prescribed by Government for the fixation of the money consideration for what is called the price of goods supplied in the execution of the building contract is in excess of the powers of the legislature and

the Government and is ultra vires and must be declared to be void. The impugned assessments have admittedly been done in accordance with the provisions of law which have been declared ultra vires and void and must, therefore, be set aside and/or quashed. The rule must, therefore be made absolute and there will issue a Writ in the nature of Certiorari quashing the assessment orders dated May 11, 1954 and November 24 1954 mentioned in the petition as also the Certificate No. 152 S. T. (B. D.) 53-54 mentioned in the petition. There will be issued a Writ in the nature of Mandamus directing the respondents not to give effect to either the said assessment orders or the said Certificate or to continue any further Certificate proceedings in respect thereof. The respondents are directed to deal with the assessment of the petitioner for the Bengali years 1357-58 in accordance with law.

27. There will be no order as to costs.

28. In this matter the respondents ask for a certificate in terms of Article 132 of the Constitution to the effect that it involves substantial question of law as to the interpretation of the Constitution so that they may file an appeal direct to the Supreme Court. The petitioner does not object. I give the necessary certificate.
Rule made absolute.