

(2014) 03 KAR CK 0273
In the Karnataka High Court
Case No : S.T.A. No. 23 of 2010

Asea Brown Boveri Ltd.

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 19-03-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 2(g), 3, 3(a)
Constitution of India, 1950 — Article 14, 19(1)(g), 246(2), 269, 286
Karnataka Sales Tax Act, 1957 — Section 12(3), 2, 2(1)(u1), 2(1)(u2), 21(2)

Citation : (2014) ILR 3346 : (2014) 79 KarLJ 241 : (2014) 70 VST 84

Hon'ble Judges : Dilip B. Bhosale, J; B. Manohar, J

Bench : Division Bench

Advocate : R.V. Prasad assisted with Surendran Thumboochetty for M/s. Vasan Assts, Advocate for the Appellant; T.K. Veda Murthy, High Court Government Pleader, Advocate for the Respondent

Judgement

Dilip B. Bhosale, J.—This sales tax appeal u/s 24(1) of the Karnataka Sales Tax Act, 1957 (for short, "the Act") is preferred against the order dated March 2, 2010 rendered by Additional Commissioner of Commercial Tax (for short, "the second revisional authority") whereby, the second revisional authority in exercise of the powers u/s 22A(1) of the Act revised the order dated September 30, 2006 passed by the Joint Commissioner (for short, "the first revisional authority") u/s 21(2) of the Act for the assessment year 2002-03 and confirmed the proposals made earlier vide notice dated June 15, 2009.

2. The Deputy Commissioner of Commercial Tax (Assessment)-21, Bangalore (for short, "the Assessing Authority") passed an order of assessment dated June 9, 2005 u/s 12(3) of the Act granting exemption in respect of the turnover pertaining to inter-State purchases of goods used in the execution of works contract. The first revisional authority, in exercise of the powers u/s 22(2) of the Act, initiated suo motu proceedings to revise the order of assessment dated June 9, 2005 on the ground, inter alia that the exemption in respect of the turnover representing inter-State purchase of goods utilized in the works contract was

erroneously allowed in the absence of documentary evidence. The first revisional authority, however, dropped the proposal to levy tax under the Act, in respect of purchase of goods from outside the State and used in execution of the works contract.

3. The second revisional authority, u/s 22A(1) of the Act issued notice dated June 15, 2009, proposing to revise the order dated September 30, 2006 passed by the first revisional authority, on the ground that the turnover pertaining to inter-State purchases and used in the execution of the said project was liable to tax u/s 5B of the Act. The respondent-M/s. ASEA Brown Boveri Ltd. (for short, "the assessee") in response to the notice filed a detailed reply, objecting to the proposals made by the second revisional authority. The second revisional authority vide its order dated September 10, 2009 allowed the revision and revised the order dated September 30, 2006 passed by the first revisional authority. The objection raised by the assessee was, however, rejected by this order.

4. The assessee preferred an appeal before this court against the order dated September 10, 2009 passed by the revisional authority in STA No. 134 of 2009. This court vide order dated November 19, 2009 allowed the appeal and remanded the matter to the second revisional authority since the order dated September 10, 2009 was passed without giving an opportunity of being heard to the assessee. After remand, the order dated March 2, 2010, which is impugned in the present appeal was passed by the second revisional authority in exercise of its powers u/s 22A(1) of the Act and confirmed the proposals made vide notice dated June 15, 2009. The second revisional authority enhanced the quantum of tax payable under the Act, by bringing to tax the turnover pertaining to inter-State purchase of goods submitted by the assessee and used in the execution of works contract.

5. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and a dealer registered under the provisions of the Act. The assessee is engaged in the manufacture and sale of electrical and electronic goods as well as in execution of works contract.

6. M/s. Karnataka Power Transmission Corporation Limited (for short, "KPTCL") came about with a bid enquiry dated May 14, 2001 for Accelerated Power Development Programme in Bijapur and O & M Division on total turnkey basis consisting of supply of all equipments/materials, erection, testing and commissioning (for short, "the project"). As per one of the clauses in bid enquiry document/general conditions of contract, (for short, "the bid document") the contractor was obliged to procure from the manufacturers, who comply with certain qualified requirements, the materials such as transformers, ACSR conductors, insulators, CC/PCC Poles, 11 KV G.O.S., fuse units, lighting arrestors 9KV, LT fixed capacitors, electronic trivector meters and metering boxes. It also stipulated the qualified requirements. Clause 1.06.00 in the bid document pertains to general requirements under Chapter "general information and scope

of works" which provided that all the equipments/materials to be submitted for inspection by a duly authorised representative of the KPTCL. It further provided that inspection would be at any stage of manufacture, dispatch or at site, at the option of the engineer, or when the equipments were dispatched/about to be dispatched and if found unsatisfactory as to workmanship or quality, the same were liable to be rejected. It further stated that a successful bidder/contractor would grant free access to the places of manufacture to the authorised representative of the engineer at all times when the works related to the manufacture were in progress.

7. The assessee had participated in the bidding process and was declared successful bidder and accordingly, awarded the contract vide letter dated April 19, 2002 for execution of the project on total turnkey basis consisting supply of all equipments/materials, erection, testing and commissioning. As per the letter of award dated April 19, 2002, the assessee submitted its acceptance vide their letter dated April, 24, 2002 and proceeded to execute the contract agreement with KPTCL on April 26, 2002.

8. The contract agreement that was executed between the assessee and the KPTCL, made a specific reference to the terms and conditions which were to be adhered to by the assessee in accordance with the bid document dated May 14, 2001. As per the terms and conditions, as stated earlier and stipulated in the bid document, the assessee was supposed to procure the equipments/materials only from vendors/manufacturing units who satisfied the requirements as stated therein. The assessee, had accordingly identified the vendors/manufacturers, many of whom were located outside Karnataka, at the places such as, Baroda, Chennai, Hyderabad, Mumbai, etc. After seeking approval, as stipulated in the bid document and the contract agreement, in respect of vendors/manufacturers, they delivered the goods so purchased at the said development programme, namely, Bijapur, O & M Division and were not meant to be diverted elsewhere. In other words, the goods so procured were purely for employment in the said project at Bijapur. There does not appear to be any dispute that the works contract allotted to the assessee was completed by them as per the terms and conditions stipulated in the contract agreement which were to be adhered to by the contractor in accordance with the bid document dated May 14, 2001.

9. We have heard learned counsel appearing for the parties at considerable length and with their assistance gone through the orders passed by the assessing authority as well as the first and second revisional authorities and so also the judgments relied upon by them in support of their contentions.

10. At the outset, Mr. R.V. Prasad, learned counsel for the assessee, submitted that in view of the provisions contained in section 5B read with the definition of "taxable turnover" as occur in section 2(1)(u1), the assessee is not liable to pay tax on the goods procured by him from outside the State. He submitted that the goods, which the assessee procured in the course of inter-State trade, the tax was paid by the assessee, under the Central Act to the States from which the

goods were purchased. In short he submitted that under any circumstances, the assessee is not liable to pay any tax u/s 5B of the Act.

11. Mr. R.V. Prasad, further submitted that for the purpose of section 3(a) of the Central Sales Tax Act, 1956 (for short, "the Central Act") it is not necessary that the contract of sale must itself provide for and cause the movement of goods; but such movement should be the result of a covenant in the contract or is an incident of that contract. In support he placed reliance upon the following judgments: K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, , Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others, , State of Maharashtra Vs. Embee Corporation, Bombay, , Larsen and Toubro Limited Vs. Commissioner of Commercial Taxes, , The Indure Ltd. and Another Vs. Commercial Tax Officer and Others, , ABB Limited Vs. The Commissioner, Delhi Value Added Tax, , Mitsubishi Corporation Vs. State of Karnataka and Others, and State of Karnataka and Others Vs. ECE Industries Limited, .

12. The expression "occasions the movement of goods" occurring in sections 3(a) and 5(2) of the Central Act he submitted, has the same meaning. He then submitted that the deemed sale resulting from transfer of property in goods involved in execution of works contract, the principles contained in sections 3, 4 and 5 of the Central Act will have to be considered, and therefore, sale in the course of inter-State trade, among others, would be outside the purview of the Act. In support he placed reliance upon the following judgments of the Supreme Court (i) Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, , (ii) Larsen and Toubro Limited Vs. Commissioner of Commercial Taxes, . He further submitted that merely because property in goods passes in one State it does not matter so long as the movement of goods is in the course of inter-State trade and hence the situs of sale is not relevant. He also made submissions based on the definition of "sale", "taxable turnover" and "total turnover" as occur in section 2(1)(u1), section 2(1)(u1) and section 2(1)(u2), respectively and so also section 5B of the Act. We will make further reference to his submissions at appropriate stage of the judgment.

13. Lastly, he submitted that the goods purchased by the assessee in the course of inter-State were not meant to be delivered elsewhere but purely for employment in the development programme of the KPTCL. He invited our attention to several documents to contend that the suppliers outside the State were approved by the KPTCL and after inspecting the goods at the manufacturers' site they were transported and delivered at the project site.

14. Per contra, Mr. Veda Murthy, learned counsel for the Revenue, at the outset, submitted that the second revisional authority, by exercising powers u/s 22A(i) of the Act rightly revised the, order passed by the first revisional authority dated September 30, 2009 for the assessment year 2002-03 vide order dated March 2, 2010. The assessee being a contractor, purchased the goods and then used in execution of works contract awarded by the KPTCL. He submitted, the assessee

purchased the goods from different States and stored at his place and, therefore, the second revisional authority has rightly, held that the purchase of goods from outside the State for the purpose of execution of works contract as per the specification given by KPTCL and storing at his godown is not amounting to inter-State sale falling u/s 3(a) of the Central Act. He submitted that the works undertaken by the assessee amount to works contract which was exigible to tax u/s 5B of the Act since the assessee only purchased the goods and thereafter incorporated the said goods in execution of the, works contract at Bijapur for KPTCL.

15. He submitted that the goods in the instant case were not moved from out of the State as a result of the, contract and movement of goods was not incidental to the contract, since in the bid enquiry document, there was no mention of inter-State vendors. It, therefore, cannot be said that the goods were moved in pursuance of the contract. He submitted that the inter-State turnover of Rs. 14 crores and odd was, therefore, not entitled to be exempted from taxing provision, namely, section 5B of the Act. He then submitted that under the terms and conditions of the contract the dealer was supposed to purchase goods from manufacturing units within the State of Karnataka and it further provided that if this condition is violated by procuring goods from outside the State, the KPTCL would deduct 9.5 per cent of the amount out of the value for such goods and hence there was no stipulation in the order of award that the commodity may be secured from any corner of the country. In support of his contention he invited our attention to paragraphs 13.0 and 2.47.10 in the general conditions of the contract. In support of his contentions, Mr. Veda Murthy placed reliance upon the judgment of the Bombay High Court in *Sudhakar S. Pangol Vs. State of Maharashtra and Another*, and the judgment of the Kerala High Court in *Dosal Ltd. Vs. State of Kerala*, .

16. The short question that falls for our consideration is whether on the facts and in the circumstances of the case and in law the turnover pertaining to inter-State purchases of goods and its use in execution of the works contract (the said project) was liable to tax u/s 5B of the Act. In other words, whether the assessee is entitled for grant of exemption in respect of the turnover pertaining to inter-State purchases of goods used in the execution of the said project (works contract).

17. Before we deal with the question raised for our consideration we would like to make reference to the judgments relied upon by the parties in support of their contentions.

18. The learned counsel for the assessee placed heavy reliance upon the judgment of the Supreme Court in *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, . In this case, the question that was considered by the Supreme Court was whether the sales by the assessee to the Government Departments were in the course of import and exempt from taxation u/s 3(a) of the Central Act. The assessee therein was entirely responsible for the execution

of contract and for the safe arrival of the goods at the destination. Under the contract, the consignee was entitled to reject the goods. The manufacturers consigned the goods to the assessee by ship from Belgium under bills of lading and the goods were cleared at Madras harbour by the assessee's clearing agent and despatched for delivery to the Southern Railway in Madras and Mysore. In this backdrop, the Supreme Court answered the question holding that the expression "occasions the movement of goods" occurring in section 3(a) and section 5(2) of the Central Act had the same meaning. The Supreme Court then observed that the movement of goods from Belgium into India was incidental to the contract. In that case, there was no possibility of the goods being delivered by the assessee for any other purpose and therefore, the sales took place in the course of import of goods within section 5(2) of the Central Act and exempted from taxation.

19. In *The Indure Ltd. and Another Vs. Commercial Tax Officer and Others*, , the questions that fell for consideration of the Supreme Court were whether import of MS pipes by the respondents was pursuant to term of contracts between appellant No. 1 and National Thermal Power Corporation Limited (for short, "NTPC"), and whether import of the said M.S. pipes and supply thereof by appellant No. 1 to NTPC constitutes integral and inseparable part of contracts between them. NTPC had awarded contract to the assessee for completion of ash handling plant package for its thermal power project. The scope of work involved in such package included designing and engineering manufacture, inspection and testing at suppliers works, packing, transportation to site, unloading storage and handling at site, erection, testing and commissioning of complete ash handling plant for steam generating units of the power specified. Along with M.S. pipes, the disputed goods in that case, the assessee had also imported 11 other component/items to be used in the plant for its erection and commissioning. Other 11 imported goods, utilized by the assessee in the erection of the plant, have been held to be sales in the course of import made by the assessee to NTPC and accordingly benefit u/s 5(2) of the Central Act had been granted by the concerned State Government. In this backdrop, the Supreme Court, held that there was no reason why it was denied in respect of M.S. pipes. In that case, it is necessary to notice that import had been occasioned only on account of the covenant entered into between the assessee and NTPC and the imported pipes were used exclusively for erection and commissioning of the plant. The Revenue, in that case, had failed to establish that those pipes were not used in the plant of NTPC.

20. In *Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others*, , the question that was considered by the Supreme Court was whether the sales made by the respondents were made at Faridabad in the course of inter-State trade or whether they were intra-State sales effected within the Union Territory of Delhi. In that case, contracts of sales were finalized at Delhi and specific goods were manufactured at Faridabad in pursuance thereof. After the goods were manufactured to agreed Specifications they were dispatched to the

head office at Delhi for being forwarded to the respective customers at their instance and pursuant to the contracts with whom goods were manufactured. The goods could as well have been despatched to the respective customers directly from the factory but they were sent in the first instance to Delhi, perhaps, as matter of convenience since there were better godown and rail facilities at Delhi as compared with Faridabad. In this backdrop, the observations made by the Supreme Court in this judgment, which are relevant for our purpose, read thus (pages 462 and 463 in 43 STC):

It is true that in the instant case the contracts of sale did not require or provide that goods should be moved from Faridabad to Delhi. But it is not true to say that for the purposes of section 3(a) of the Act it is necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. The true position in law is as stated in *Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others*, , wherein Shah, J., speaking for the majority, observed that clauses (a) and (b) of section 3 of the Act are mutually exclusive and that section 3(a) covers sales in which the movement of goods from one State to another "is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State" (page 391) (page 667 of 11 STC). Sarkar, J., speaking for himself and on behalf of Das Gupta, J., agreed with the majority, that clauses (a) and (b) of section 3 are mutually exclusive but differed from it and held that "a sale can occasion the movement of the goods sold only when the terms of the sale provide that the goods would be moved; in other words, a sale occasions a movement of goods when the contract of sale so provides" (page 407) (page 679 of 11 STC). The view of the majority was approved by this court in *The Cement Marketing Co. of India Ltd. and Another Vs. The State of Mysore and Another*, , *The State Trading Corporation of India Ltd. and Others Vs. The State of Mysore and Another*, and *Singareni Collieries Co., Ltd. Vs. State of Andhra Pradesh and Others*, . In *K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes*, , counsel for the Revenue invited the court to reconsider the question but the court declined to do so. In a recent decision of this court in *Oil India Ltd. Vs. The Superintendent of Taxes and Others*, , it was observed by Mathew, J., who spoke for the court, that: (1) a sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in the goods passes; (2) it is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement; and (3) it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale (page 801) (page 449 of 35 STC). The learned judge added that it was held in a number of cases by the Supreme Court that if the movement of goods from one State to another is the result of a covenant or an incident of the contract of

sale, then the sale is an inter-State sale.

(emphasis Here italicised supplied)

21. In *Larsen and Toubro Limited Vs. Commissioner of Commercial Taxes*, , the Andhra Pradesh High Court was considering the case having similar facts and circumstances as occur for our consideration. The assessee in that case was engaged in manufacturing fabrication, supply, erection and commissioning of various projects. The assessee had entered into contracts with Vishakapatnam Steel Plants and other public sector undertakings for designing manufacturing, fabrication, installation and commissioning of specified projects in Andhra Pradesh. The contracts had specified various items required for execution of the project. In execution of the contracts works goods/equipments despatched in the contract were either manufactured in the assessee's Mumbai factory and dispatched directly in favour of the contractees after inspection and approval by them or purchased from vendors outside the State and transfer of documents of title effected in favour of contractees who furnished C forms to the assessee. The assessee undertook the installation/erection of goods/equipments, handed over by the contractees along with other goods required for commissioning the project. The assessee claimed exemption from payment of local tax under the Andhra Pradesh General Sales Tax Act, 1957, on the ground that the transactions were inter-State transactions, but the assessing authority subjected the transit sales to tax under the Andhra Pradesh Act holding the transaction intra-State transactions. The High Court of Andhra Pradesh while allowing the appeals held that the entire project had to be completed by the assessee which included installation of machinery and supervision up to certain point of time, that is to say, the contract was composite in nature. By merely supplying material to the contractee, the responsibility arising out of the agreement did not cease, the appellant had to install the machinery and watch the performance for a period of 15 months. The movement of goods, after being satisfied with the quality of goods, clearance was given, was occasioned pursuant to the contract. They had reached the destination. Central sales tax was paid to the State of Maharashtra. Having regard to the fact that there were two facets of the contract supply of goods and installation of machinery with the labour of the assessee, the contract was a divisible contract. Transaction was an inter-State transaction and not an intra-State transaction and the turnover arising on that transaction could not be brought under the net of the Andhra Pradesh Act.

22. The Delhi High Court, in the case of very same assessee, in *ABB Limited Vs. The Commissioner, Delhi Value Added Tax*, , considered the questions whether the sale transaction in the present case were in the course of inter-State trade so as to attract the provisions of Central Sales Tax Act, 1956; whether an inter-State trade is deemed to have taken place in the course of movement of goods into and outside the country; and whether the sale made to the Delhi Metro Rail Corporation is in the course of import and consequentially exempt from the Delhi VAT Act, 2004, especially section 7(c) of the said Act read with section 5(2) of

the Central Act. The High Court after considering several judgments of the Supreme Court made the following observations which are relevant for our purpose (page 19 in 55 VST):

... In the opinion of this court, the Tribunal fell into error in assuming that to attract section 3(a) of the Act, the agreement has to expressly stipulate for inter-State movement of goods, and the fact that in performance of the contract, the appellant would have to move the goods from other States to Delhi would not suffice. In this context, in *Oil India Ltd. Vs. The Superintendent of Taxes and Others*, where it was very pertinently held that "It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale".

23. In *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, the Supreme Court considered whether a deemed sale resulting from the transfer of property in goods involved in the execution of a particular works contract amounts to sale in the course of inter-State trade or commerce u/s 3 of the Central Act or outside sale u/s 4 or a sale in the course of import u/s 5. The Supreme Court decided the question in the light of a particular terms of works contract, and observed that it cannot be decided in the abstract. The Supreme Court observed that so far as sales in the course of inter-State trade or commerce are concerned, the position is well-settled that the situs of the sale or purchase is wholly irrelevant as regards its inter-State character. The location of the situs of the sale in sales tax legislation of the State would, therefore, have no bearing on the chargeability of tax on sales in the course of inter-State trade or commerce since they fall outside the field of legislative competence of the State Legislatures and will have to be excluded while assessing the tax liability under the State legislation. The same is true of sales which are outside the State and sales in the course of import and export. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import and export into a sale inside the State. The further observations of the Supreme Court are also relevant, which read thus (page 231 in 88 STC):

It must, therefore, be held that while enacting a law imposing a tax on sale or purchase of goods under entry 54 of the State List read with sub-clause (b) of clause (29A) of article 366 of the Constitution, it is not permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of inter-State trade or commerce u/s 3 of the Central Sales Tax Act or an outside sale u/s 4 of the Central Sales Tax Act or sale in the course of import or export u/s 5 of the Central Sales Tax Act. So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in section 15 of the Central Sales Tax Act.

24. In *Sudhakar S. Pangol Vs. State of Maharashtra and Another*, , the constitutional validity of the Works Contract Act, 1989, was challenged contending that it is ultra vires the provisions of articles 14 and 19(1)(g) as well as article 246(2) read with entry 54, List II in the Seventh Schedule read with article 366 of the Constitution of India. While dealing with the challenge, the Bombay High Court, after considering the *Builders Association of India and Others Vs. Union of India (UOI) and Others*, upheld the validity of the Act. The Bombay High Court, in that case, observed that section 2(p) read with section 2(m) of the Works Contract Act, 1989 only provides a mechanism of determining the value of goods which have been purchased outside the State and used in a works contract in the State. By doing so, the Legislature has not taxed the sale transaction which has taken place outside the State but only provide for a mechanism as to how the value of goods, property in which is transferred by the contractor/dealer in execution of works contract, is to be determined. It was further observed that this definition is introduced to obviate any dispute in ascertaining the price of the goods which form the total turnover of the contractor/dealer. In our opinion, this judgment is of no avail to the Revenue.

25. In *Dosal Ltd. Vs. State of Kerala*, , the Kerala High Court upheld the order of the Tribunal having found that the assessee therein, brought the goods on stock transfer basis from Mumbai, Coimbatore, etc., to Kerala, stocked them in the State and used them in the execution of works contracts. It is in this backdrop and having considered overall facts and circumstances of the case, the Kerala High Court observed that the Tribunal had rightly held that the transfer of materials in the course of execution of work in Kerala does not amount to inter-State sale of goods from outside the State to Kerala. This judgment also, in our opinion, is of no avail to the revenue in view of the peculiar facts and circumstances of that case. In the instant case, it is not the case of the Revenue that the assessee brought the goods on stock transfer basis from other States to Karnataka and used them in the execution of works contract.

26. This court in *State of Karnataka and Others Vs. ECE Industries Limited*, had an occasion to deal with the questions whether the Tribunal could hold that the movement of goods was occasioned as an incident of sale even though the contract was silent on this aspect and whether the Tribunal was right in holding that the movement of goods were on account of inter-State sale when in fact the property/goods passes only after erection and commissioning of the lifts and elevators and the sale transaction is completed only after such erection and commissioning. In this case, honourable Mr. Justice H.L. Dattu (as he then was) speaking for the Bench observed that "where the description of the goods is clear and goods of that description are dispatched then the goods so despatched can be taken as appropriated to the contract unconditionally and despatches from one State to another to an identified customer result in inter-State sale. Merely, because the lifts and the elevators are installed and commissioned in the State, it cannot be said that it is a local sale exigible to levy u/s 5B of the Act on the ground that the actual transfer of property used in the works contract took place

in the State of Karnataka and, therefore, the Tribunal was justified in coming to the conclusion that the transaction in question was not exigible to levy of tax u/s 5B of the Act".

27. Before we advert to the submissions advanced by the learned counsel appearing for the parties, in the light of the judgments of the Supreme Court and High Courts referred to in the foregoing paragraphs, it would be advantageous to make brief reference to the relevant provisions of the Act. Section 5B was inserted by Act No. 27/1985 with effect from April 1, 1986. This being a charging section and relevant for our purpose, we would like to reproduce the same which, reads thus:

5B. Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts.--Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3C) of section 5, but subject to sub-section (4), (5) or (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule.

28. Under this provision, every dealer is obliged to pay for every year, a tax under the Act on his "taxable turnover" of transfer of property in goods involved in the execution of works contract. The Act defines "taxable turnover" by sub-section (u1) of section 2 of the Act. The definition of "taxable turnover" reads thus:

2(u1) "Taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India.

29. From bare perusal of this definition, it is clear as crystal the turnover of purchase or sale in the course of inter-State trade or commerce is not included in the taxable turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed. "Total turnover" is also defined by sub-section (u2) of section 2 of the Act. The definition of "total turnover" reads thus:

2. (u2) "Total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of the inter-State trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India.

30. It means, the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of inter-State trade or commerce.

31. The word "sale" has been defined by clause (t) of sub-section (1) of section 2 of the Act. From bare perusal of definition of "sale" it is clear that it includes, among others, the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract. In view thereof, in our opinion, the principles applicable to a sale including the provisions of sections 3, 4, 5, 14 and 15 of the Central Act would equally apply in case of works contract.

32. In *State of Maharashtra Vs. Embee Corporation, Bombay*, the Supreme Court was considering the definition of "sale" as occurs in section 2(g) of the Central Act. The question that fell for the consideration of the Supreme Court was whether the expression "sale or purchase occasions such import" occurring in sub-section (2) of section 5 of the Central Act requires that completed sale should precede import. It also considered the expression "sale occasions" or "purchase occasions" such import in section 5(2) of the Central Act to hold that it has to be interpreted in the same manner in which the expression occasions the movement of goods occurring in section 3(a) of the Central Act. The Supreme Court, in that case, observed that the definition of "sale" in the Central Act shows that the word "sale" has been given a very wide meaning so as to include not only the sale of goods but also the transactions, namely, transfer of goods on higher purchase systems. Further, the use of words "sale of goods" in section 3 of the Central Act and the words "contract of sale" occurring in section 4(2) of the Central Act have been assigned the same meaning which is wider to the meaning of sale in general law. In such situation, it was further observed, the word "sale" defined in section 2(g) of the Central Act and employed in section 3 and other sections of the Central Act would embrace not only completed contract but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provided for movement of goods or movement of goods is not incident of contract of sale.

33. The power to impose tax on the transfer of property in goods involved in the execution of works contracts became available to the State Legislatures as a result of the amendments introduced in the Constitution by the Constitution (Forty-sixth Amendment) Act, 1982 (for short, "Forty-sixth amendment"). The validity of the said amendment had been upheld by the Supreme Court in *Builders Association of India and Others Vs. Union of India (UOI) and Others*. After the Forty-sixth Amendment various State Legislatures amended their sales tax legislation to make the provision for imposition of sales tax in relation to works contract. In so far as the State of Karnataka is concerned, such amendment was made by which sections 5B and 5C were inserted by Act No. 25/1985 with effect from April 1, 1986. The question whether as a result of the Forty-sixth Amendment an independent taxing power has been conferred on the

States had arisen for consideration before the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, . The Supreme Court while dealing with the question rejected the contention urged on behalf of the dealers/assessee that sub-clause (b) of clause (29A) of article 366 of the Constitution has conferred on the Legislatures of States, the power to levy tax on works contract which is independent of the power conferred on the Legislatures of the State under entry 54 of the State List. The observations made in the Builders Association of India and Others Vs. Union of India (UOI) and Others, to this effect shall be relevant for our purpose, which read thus (pages 396 and 397 of STC; 347 and 348 of SCR):

... The object of the new definition introduced in clause (29A) of article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29A) of article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution...

34. The Supreme Court has further observed as follows (pages 402 and 403 in STC; 354 of SCR):

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

of the State List.

(emphasis Here italicised supplied)

35. Entry 54 of List II of the Seventh Schedule to the Constitution of India read with article 366(29A)(b) fell for consideration of the Supreme Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, . The Supreme Court observed that "the State Legislature, while imposing a tax on the transfer of properties in goods, (whether as goods or in some other form), involved in the execution of a works contract is not competent to impose tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export. The legislative power of the State Legislatures under entry 54 of the State List is subject to two limitations--one flowing from the entry itself which makes the said power "subject to the provisions of entry 92A of List I", and the other flowing from the prohibition contained in article 286. Under entry 92A of List I, Parliament has the power to make a law in respect of taxes on sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by article 269. This shows that the legislative power under entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Similarly article 286(1) prohibits the State from making a law imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State, or (b) in the course of the import of goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorizing the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29A) of article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State Legislature to frame the legislative enactment in exercise of the legislative power conferred by entry 54 in State List in such a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations."

36. Thus, as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at par with the contract containing two separate agreements. If the legal fiction

introduced by article 366(29A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. In view of article 366(29A)(b), the State Legislatures are competent to impose tax on transfer of property in goods involved in the execution of a works contract and under article 286(3)(b) Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidence of such tax.

37. The Forty-sixth Amendment of the Constitution does not confer on the States a larger freedom than what they had before in regard to their power to levy tax under entry 54 of the State List. The legislative power of the State Legislature under entry 54 of the State List is subjected to limitations which is evident from perusal of entry 92A of List I and article 286 of the Constitution. This entry and the provision show that the legislative power under entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Levy and collection of such tax is governed by article 269. Similarly, article 286(1) prohibits the State from making a law imposing or authorizing the imposition of a tax on the sale or purchase of goods whether such sale or purchase takes place outside the State or in the course of import of goods into or export of goods out of the territory of India. In view of the aforesaid limitations imposed by the Constitution, in our opinion, it is beyond the competence of the State Legislature to make a law imposing or authorizing the imposition of tax on transfer of property in goods involved in execution of a works contract with the aid of sub-clause (b) of clause (29A) of article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitutes sales or purchase outside the State or sales in the course of import or export. Thus, in the backdrop of these provisions of the Constitution, a conjoint reacting of the charging section 5B and the definition of the expression "taxable turnover" would show that the State cannot impose tax on transfer of property in goods involved in execution of a works contract with the aid of article 366(29A)(b), in respect of transactions which take place in the course of inter-State trade and commerce.

38. The assessee, in the present case, was engaged in the manufacture and sale of electrical and electronic goods as well as in execution of works contract. The works contract was executed between the assessee and KPTCL for the project in Bijapur on total turnkey basis consisting of supply of all equipments/materials, erecting testing and commissioning. As per the contract/general conditions of the contract the assessee was obliged to procure from the manufacturers certain goods/materials such as transformers, ACSR conductors, insulators, CC/PCC poles, 11KV GOS, fuse units, lighting arresters 9KV, LT fixed capacitors, electronic trivector meters and metering boxes. The assessee was supposed to procure the goods/materials (such equipments) from the manufacturers who comply with certain qualified requirements. The general conditions of the contract also stipulated several conditions, such as to submit/provide all the equipments/materials for inspection by the engineer/representative of KPTCL, at

every/any stage of manufacture, dispatch or at the site, at the option of the engineer and the equipment dispatched/about to be dispatched, if found unsatisfactory as to the workmanship or quality were liable to be rejected. The assessee had to complete the entire project including installation of equipments and provide all other services till testing and commissioning of the project to the satisfaction of KPTCL. There does not appear to be any dispute that the assessee completed the project and while doing so to complied with all conditions to the satisfaction of KPTCL.

39. The assessee approached KPTCL, since it did not find manufacturers of certain equipments/goods in the State of Karnataka, who were complying with the criterions/requirements stipulated in the general terms and conditions of the contract, seeking permission to purchase such equipments/goods from the manufacturers outside the State. Such permission was sought by the assessee in writing and KPTCL granted the permission in writing stating that some of the manufacturers from whom the assessee proposed to purchase goods/equipments from outside the State were their regular suppliers. The permissions were granted by KPTCL by letters dated April 30, 2000, May 24, 2000, May 28, 2002, May 30, 2002 and June 27, 2002. Accordingly, the assessee procured about 12 different items/goods/equipments from different manufacturers from 3-4 States. The equipments/goods purchased from such manufacturers were duly approved by KPTCL, as aforementioned. In other words, the movement of goods, after being satisfied with the quality, occasioned pursuant to contract. They reached destination, though a serious dispute was raised, in the course of hearing, that the goods were not delivered directly at the site of the project. It is not in dispute that the tax under the Central Act was paid to the States from where they were brought to this State. We have perused the invoices and delivery challans placed on record. They all show the assessee as consignee, but on account KPTCL and the consignment was delivered at the site of the project in Bijapur. It is not in dispute that KPTCL did not deduct 9.5 per cent of the amount out of the value for such goods/equipments, as provided for in the contract, perhaps in view of the fact that no manufacturers were available in the State who could have supplied such goods/equipments, and who were complying with the requirements stipulated in the general conditions of the contract, apart from the fact that they granted such permission to the assessee in writing.

40. It is in this backdrop, the assessee claimed exemption from payment of tax u/s 5B of the Act on the ground, that the transactions were inter-State transactions. As observed earlier, the entire project was to be completed by the assessee which included installation of machinery/equipments and supervision up to certain point of time. Thus, the contract though was single and indivisible, had been altered into a contract, which was divisible into one for sale of goods/equipments and other for supply of labour and services and as a result, the contract which was single and indivisible had been brought at par with a contract containing two separate agreements/contracts. Since the provisions of sections 3, 4 and 5 of the Central Act, are applicable to such contracts containing two

separate agreements, in the present case, there is no reason why the said provisions should not apply to the contract though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, into a divisible contract, i.e., one of sale of goods and other for labour and services. As observed by the Supreme Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, if the legal fiction introduced by article 366(29A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract when the contract is divisible into, one for sale of goods and the other for supply of labour and services. State Legislature has power to impose tax on transfer of property in goods involved in the execution of a works contract in view of article 366(29A)(b) of the Constitution. But, it is subject to the powers under article 286(1) of the Constitution, which prohibits the State from making a law imposing or authorizing the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. As a result of the said provision, the legislative power conferred under entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State. It is, therefore, beyond the competence of the State Legislature to make a law imposing or authorizing the imposition of a tax on transfer of property which takes place in the course of inter-State trade and commerce. The State Legislature, therefore, cannot impose any tax on such transaction, as is clear from bare perusal of section 5B of the Act and the definition of "taxable turnover".

41. As observed earlier, under the contract, the KPTCL was entitled to reject the goods. Admittedly none of the goods was rejected by the KPTCL. The goods were procured from Outside the State with the permission of KPTCL, though in the contract document, paragraph 2.47.20 it clearly mentioned that the assessee would procure the goods only from within the State. The general conditions of contract, in particular, condition No. 2.37.00 stipulated certain qualifying requirements for procuring goods from vendors or manufacturers such as, five years experience of supplying such equipments. It is the case of the assessee and it is not in dispute that since there were no suppliers, complying with the qualifying requirements, available in the State the assessee had to approach the KPTCL and seek their permission as mentioned earlier to procure the goods from outside the State. In view thereof it was contended on behalf of the Revenue that the contract (general conditions) did not stipulate for movement of goods from outside the State. In other words, it was submitted that movement of goods from outside the State was not a result of the contract or incidental to the contract, since the general conditions of contract did not mention about inter-State vendors and, therefore, it cannot be stated that the goods were moved in pursuance of the contract.

42. It is now well-settled that if a contract of sale contains a stipulation for such movement, the sale would, of course, be an inter-State trade. But it can also be

inter-State sale even if the contract of sale does not itself provide for movement of goods from one State to another but such movement would be result of a covenant in the contract of sale or is an incident of such contract. (See Union of India (UOI) and Another Vs. K.G. Khosla and Co. Ltd. and Others,). It is true, in the instant case, the contract of sale did not require or provide that goods should be moved from other States to the State of Karnataka at Bijapur. But it is not true to say that for the purpose of section 3(a) of the Central Act it is necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. A sale which occasions movement of goods from one State to another is a sale in the course of inter-State trade, no matter in which State the property in goods passes. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement, and it is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be sufficient if the movement was in pursuance of and incidental to the contract of sale. In the present case the movement of goods from one State to another may or may not be as a result of a covenant but definitely it was an incident of the contract.

43. In the result, the appeal is allowed. The order of the second revisional authority is set aside. The order of the first revisional authority, dropping the proposal to levy tax u/s 5B of the Act, in respect of the purchases of goods from outside the State and used in execution of the works contract, is confirmed. However, there shall be no order as to cost.