

**(1958) 12 AP CK 0007**

**In the Andhra Pradesh High Court**

**Case No :** Appeal No"s. 207 of 1950-51 and 267 of 1951-52 and Writ Petition No. 318 of 1952

Batchu Subba Rao and Company

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

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**Date of Decision :** 13-12-1958

**Acts Referred:**

**Citation :** (1958) 12 AP CK 0007

**Hon'ble Judges :** N. Kumarayya, J; Manohar Pershad, J

**Bench :** Division Bench

**Advocate :** K. Venkataramana, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

N. Kumarayya, J.—This petition under Article 226 of the Constitution of India for the issue of a writ of certiorari is directed against the order of the Commercial Tax Officer, Kakinada, East Godavari, passed in Appeal No. 267 of 1951-52 whereby he confirmed the order of assessment dated 27th November, 1951, made by the Deputy Commercial Tax Officer, Kakinada, in A-2-18 of 1951-52. The petitioner was assessed to sales tax for the year 1950-51 on a gross turnover of sales of Rs. 21, 23, 630-1-4. This consists of various items, but we are concerned with two items of (i) Rs. 4, 85, 877-6-3 and (ii) Rs. 1, 10, 630-1-4. The first of these relates to the sales by the petitioner firm to the merchants outside Madras State and the second to sales through commission agents. Though the levy of sales tax on both these items was called in question before the Commercial Tax Officer and also in this Writ Petition, learned counsel confined his argument to the first item alone obviously because, on the facts found, no objection as to the second could be legally sustained.

2. The facts, so far as necessary, may be shortly stated. The petitioner is a registered firm with its headquarters at Kakinada (which prior to the formation of Andhra State was included in Madras State) carrying on business in oils, pulses, tamarind etc., under the name and style of Messrs Bachu Subba Rao and

Company. During the period 1950-51 the firm entered into transactions of sale covered by the first item with merchants outside Madras State. The contracts of sale were entered into within the State. The goods contracted for were also in the State. The sales being on the F.O.R. basis, the goods were sent by rail and the railway receipts were obtained to self, the goods having been consigned to self. The railway receipts were negotiated through banks and the buyers in each case were to pay the hundi amount and take the railway receipts from the banks situate outside the State. The goods could then pass into the hands of the buyer. Thus, the actual delivery in each case took place outside the State. The transactions were however assessed to sales tax by virtue of explanation (2) to clause (h) of section 2 of the Madras General Sales Tax Act which was introduced by the Amending Act XXV of 1947. The petitioner raised demur to this on the ground that the property in goods in each case passed outside the state, that the Madras General Sales Tax Act neither in its original form nor even as it stood after the Amending Act XXV of 1947 did apply to such transactions and that even if the explanation introduced by the Amending Act could apply, it could not be availed of as it was repugnant to the provisions of the Sale of Goods Act which was a Central Act and consent of the Governor-General had not been obtained as required by section 107 of the Government of India Act, 1935. These objections did not find favour with the taxing authority and the Commercial Tax Officer in appeal also agreed with him. The petitioner did not take the matter to the Tribunal nor did he prefer any civil remedy. Instead, he has come direct to this Court invoking writ jurisdiction. It is worthy of mention that the assessment was originally impeached on the ground of inapplicability and unconstitutionality of Explanation (2) to section 2(h) of the Madras General Sales Tax Act, but the arguments before us wholly turned on the interpretation of Article 286 of the Constitution of India. The question posed is where the actual delivery of goods as a direct result of sale took place outside the Madras State was it competent for the State to tax such sales. It is not disputed that the delivery of goods took place outside the State. But it is not at the same time admitted that the delivery there was for consumption in that State. Indubitably, Explanation to Article 286(1) of the Constitution is attracted if the delivery is only for consumption in that State. The dispute in the present form therefore involves a question of fact requiring proof. Admittedly, no such evidence was adduced and the taxing authorities were not called upon to give a finding on this fact. The question therefore is, whether the taxing authorities could in law without such proof, assess the petitioner to sales tax for the goods delivered outside the State. The contention of the learned counsel for the petitioner is that they could not do so having regard to the provisions of Article 286 of the Constitution. On the other hand, what is contended for on behalf of the respondent is that the State has plenary powers to impose sales tax on all transactions of sale even if they be in some parts concluded outside that State provided only in that event there is sufficient territorial nexus and this power cannot be defeated unless the person claiming immunity establishes exemption or prohibition under the Constitution in his favour. Thus the controversy between the parties raises a substantial

question as to interpretation of Article 286 of the Constitution of India. But, before we consider how far and in what respect of powers of taxation in relation to sales enjoyed by the State Legislature are modified or abridged by Article 286 of the Constitution, we have to ascertain what exactly are the powers conferred on the State Legislature in relation to such taxes. Article 265 enacts that no tax can be levied or collected except by authority of law. Article 245 provides that the Legislature of a State may make for the whole or any part of the State. Article 246(3) of the Constitution, as it stood at the relevant date, reads thus :-

"Subject to clauses (1) and (2) the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such States or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List")."

3. Item 54 in List II of the Seventh Schedule which is relevant for our purpose, as it then was, reads thus :

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

4. Article 301 says that trade, commerce and intercourse throughout the territory of India shall, subject to the other provisions of Part XIII, be free. Article 286 which is not controlled by Article 304, as observed in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, , lays certain restrictions and this article as it stood at the relevant date reads thus :

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

(a) outside the State; or

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

5. Explanation. - For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State. (2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

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

(3) No law made by the legislature of a State imposing, or authorising the

imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

6. Thus it would appear the State Legislature has within its allotted field of legislature covered by item 54 has, by reason of Article 246(3), exclusive power to make laws for the State or any part thereof with regard to taxes on sales or purchases subject, of course, to the restrictions, if any, placed by Article 286 of the Constitution. It may be noticed that no such restrictions as are imposed by Article 286 were to be found in the Government of India Act. Though there was a provision [section 297(1)(b)] in the Government of India Act prohibiting the Provincial Legislature from imposing a discriminating tax for imported goods from other Provinces, there was no provision restricting the power of the Provincial Legislature to impose taxes on sales or purchases of an inter-provincial character. But, the power vested with the Legislature was only to be limited to making of laws for the State as it is now under the Constitution. It is well-settled that the expression "for the State or any part thereof" in Article 246(3) cannot be taken to import into entry 54 the restriction that the sale or purchase must take place within the territory of the State. As observed in *Poppatlal Shah Vs. The State of Madras, and State of Bombay v. United Motors (India) Ltd.* ( 1953 4 S.T.C. 133 ) all that is necessary is that the taxing law must be for the purpose of the State. That being the case, in the absence of any constitutional limitations, it was not necessary for the levy of sales tax that all the component parts of sale, such as the contract of sale, passing of title, payment of price and delivery of goods, must take place within the borders of the taxing State. The principle of sufficient territorial nexus within the dictum of Privy Council in (1948) 16 ITR 240 (Privy Council) , however constituted the test of jurisdiction in such cases. But it must be remembered that this concept is of a nebulous nature for there could be no hard and fast rule as to what constitutes sufficient territorial connection. So then acting on this principle of territorial nexus, Legislatures picked out one or more of the ingredients constituting a sale and made them the basis of their legislation. The choice being arbitrary it was open to doubt whether there would be sufficient territorial nexus in each case and the claims of States to tax in these circumstances led to multiple taxation of the same transaction by different Provinces. The Constitution-makers therefore intervened by imposing restrictions on the taxing powers on sales and purchases involving inter-State transactions and thus alleviated the tax burden on the consumer. Article 286 was calculated to serve this purpose placing restrictions as it does not the taxing power of the State by providing that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place - (i) outside the State, or (ii) in the course of the import of the goods into, or export of the goods out of, the territory of India, or (iii) except in so far as Parliament may by law otherwise provide, in the course of inter-State trade or commerce, and (iv) that no law made by the Legislature of a State imposing or

authorising the imposition of a tax, on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

7. These are the four bans imposed on the hitherto practically unrestricted power of taxation for State Legislature. These are the bans which were considered necessary having regard to different aspects of sales and purchases of goods. They are separate and independent restrictions. As has been observed in the majority decision of *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*,

"These several bans overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286 as the sale has taken place outside the territory by virtue of the Explanation to clause (1)(a); (2) it will also offend Article 286 as the sale has taken place in the course of inter-State trade or commerce; and (3) such law will also be contrary to Article 286 as the goods are essential commodities and the President's assent to the law was not obtained as required by clause (3) of Article 286. This appears to us to be the general scheme of that Article. "At page 680 it was further observed :

"The operative provisions of the several parts of Article 286, namely, clause (1) (a), clause (1)(b), clause (2) and clause (3), are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another. On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held on the present occasion we are definitely of the opinion that the Explanation in clause (1)(a) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2)."

8. Thus, in order that a tax on the sale or purchase may have its force it should be free from all these bans. The controversy in the present case is restricted to the ban under Article 286 for the tax imposed which is said to constitute inter-State elements so far as ban in Article 286 is concerned, has been protected by reason of the Sales Tax Continuance Order No. 7 of 1950 and the tax in question relates to the period covered by the proviso to Article 286(2). Article 286(1)(a) prohibits the taxation of all sales and purchases which take place outside the State. As already pointed out, a sale is a composite transaction involving several elements such as agreement to sell, transfer of ownership, payment of price and

delivery of goods which may take place in different places. The question in such circumstances whether a particular sale took place within or outside a particular State is not free from difficulty for each of the ingredients is as important as the other. In the absence of any constitutional provision, the theory of sufficient territorial nexus was resorted to but, as already pointed out, the degree of sufficiency being a varying factor it produced in certain cases results which could not be encouraged. In order to solve this difficulty, Explanation to Article 286 has been introduced which by means of a legal fiction provides that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is considered to have taken place notwithstanding that the property in such goods under the general law relating to sale of goods passed in another State. It may be seen that an outside sale in Article 286(1)(a) has been explained by defining what an inside sale is. As observed in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, : the test of sufficient territorial nexus was as a result of this explanation replaced by a similar or more easily workable test which is : "Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein ? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so."

9. The Explanation in unmistakable terms states that the goods should have actually been delivered as a direct result of such sale or purchase for consumption in that State. If the delivery is not, as a direct result of sale or purchase, for the purpose of consumption but for any other purpose such as re-sale and re-export etc., that State would not be the State in which the sale or purchase shall be deemed to have taken place. It is admitted that in the present case as a result of sale the delivery took place outside Madras State. But there is no evidence on record to show whether the delivery was for consumption. There is no presumption in law that the thing delivered is necessarily for consumption or use in that State and not for any other purpose. The language of the explanation does not necessarily raise any such presumption. Indubitably, the legal fiction introduced cannot be extended beyond its avowed purpose and intention.

10. It is plain that in the instant case, one of the essential elements to attract the operation of the explanation for determining the fictional situs is markedly absent. The case would not therefore come within the ambit of the explanation. It is evident at the same time that an outside sale is hit by Article 286. The question then is, when some of the constituent parts of sale did not take place inside the State whether despite the clear language of the taxing statute the sale would be regarded as an outside sale within the meaning of Article 286. "Sale" as defined in the Madras General Sales Tax Act (IX of 1939) as it stood on the date of the Constitution reads thus : - "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one

person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;

11. Explanation 1 - A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.

12. Explanation 2 - Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made -

(a) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made."

13. Explanation (2) was introduced by the Amending Act XXV of 1947. In *Poppatlal Shah v. State of Madras* (1952 3 S.T.C. 396), which was a case relating to the period prior to the introduction of explanation (2), the learned Judges of the Madras High Court held the view that the word "sale" has both a legal and a popular meaning, that in the legal sense it meant passing of property in the goods and it is in that sense the word is used in the Sale of Goods Act, that in the popular sense it signifies a transaction which results in the passing of property, that as the object of the legislature in the Sales Tax Act is to impose a tax on the occasion of the sale, it was immaterial whether a sale had been completed outside the Province, that the place where the property passed would not be a matter of concern to the taxing authority and that in such context the popular meaning of the word is more appropriate and should be adopted. In appeal before the Supreme Court (See *Poppatlal Shah Vs. The State of Madras*, : the argument advanced by the appellant was twofold. The first contention was that it was incompetent for the Provincial Legislature to enact a legislation which is capable of operating on sale transactions concluded outside the Province. The second argument was that on a proper construction of the relevant provisions of the Madras General Sales Tax Act, the imposition of sales tax in respect of transactions of sales where property in the goods sold passed outside the Province was illegal. On an interpretation of section 100(3) of the Government of India Act, 1935, corresponding to Article 246(3) of the Constitution of India the Supreme Court observed that it was not correct to say that a legislation imposing tax on the sale of goods can be made only in respect of sales taking place within the boundaries of the Province. All that section 100(3) enacts is that a law could be passed by a Provincial Legislature for purposes of the Province itself. Thus it would be quite competent to enact a legislation imposing taxes on transactions

concluded outside the Province provided there was sufficient and real territorial nexus between such transaction and the taxing Province. Declaring this to be the constitutional position, the Supreme Court then considered whether the Madras Sales Tax Act did provide for taxation for sales concluded outside the State. On the construction of the relevant provision in the Madras General Sales Tax Act their Lordships came to the conclusion that the word "sale" as used in the said Act gave no indication of its being used in the popular sense and that the legislature prior to the introduction of explanation (2) by Act XXV of 1947 had in mind only the transfer of property in the Province of Madras. It was also observed that as a result of explanation (2) a legal fiction was introduced and all sales or purchases were deemed to have taken place in the Province if the goods were actually in that Province when the contract of sale or purchase was made and if it was a transaction of future goods by description, if the goods were actually produced in the Province at any time after the contract of sale or purchase in respect thereof was made. Thus the presence of goods within the Province at the time of the contract or of future goods at any time after the contract even though the actual delivery of goods might have been effected outside the Province, would by reason of explanation 2 to section 2(h) of the Madras General Sales Tax Act (IX of 1939) render the sale as having taken place within the Province. This was the law at the time of the Constitution, the validity of which was placed beyond all controversy by the observations in the above-mentioned decision. The advent of the Constitution however has changed the position only so far as it has imposed certain bans in Article 286. But for these, no taxation made in compliance with the Madras General Sales Tax Act could have been challenged as illegal or unconstitutional. These bans, four in number, as already pointed out, are independent of each other though there may be cases wherein they overlap. Some of these are absolute while some others are conditional. The circumstances of this case can possibly attract only the bans under Article 286(1)(a) and 286(2), the latter being conditional. But, as contemplated by the proviso to Article 286 the President, under the Sales Tax Continuance Order of 1950, passed the following Order :

"In exercise of the powers conferred by the proviso to clause (2) of Article 286 of the Constitution of India, the President is pleased to make the following Order, namely :-

(1)(i) This Order may be called the Sales Tax Continuance Order, 1950.

(ii) It shall come into force at once.

(2) Any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution of India shall, until the 31st day of March, 1951, continue to be levied notwithstanding that the imposition of such tax is contrary to the provisions of clause (2) of Article 286 of the said Constitution. "Thus the ban on what was otherwise a lawful levy of tax on the sale or purchase of goods in the course of inter-State trade prior to the Constitution was unconditionally lifted by

this order for the period ending with 31st March, 1951. The only condition for its application is that it should have been lawful, if it is within the legislative competence. Of course in relation to sales that were completed outside the State the levy could not be lawful unless there was sufficient territorial nexus. As observed in the State of Bombay v. United Motor (India) Ltd. (1953 4 S.T.C. 133 at 142) by his Lordship the Chief Justice in the majority judgment :-

"Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed."

14. Explanation 2 to section 2(h) of the Madras General Sales Tax Act certainly satisfied this test of sufficiency of territorial nexus. It cannot therefore be said that the levy on that basis could not be lawful.

15. The only ban that remains for consideration is the one under Article 286. That relates to the taxation of sales outside the State and also on sales in the course of import or export of goods into or out of territory of India. For purposes of this case, we are concerned only with the former. Where all the component parts of sale take place outside the State beyond all doubt it is only an outside sale and as such cannot be taxed by that State. As pointed out at page 484 in the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, : an outside sale need not necessarily be an inter-State sale. But an outside sale sometimes contains only inter-State elements. The difficulty would arise only in such cases. Unfortunately, the explanation introduced by the Constitution fixing the situs in such cases does not effectually cover all cases of sales or purchases to which the States may set up their claims on the basis of nexus theory. The observations of his Lordship, the Acting Chief Justice, were in this behalf in The Bengal Immunity Company Limited Vs. The State of Bihar and Others, : "When Parliament will lift the ban imposed by clause (2), the Explanation will continue to operate, so that inter-State sales or purchases falling within it will still be deemed to have been place in the delivery State and, therefore, outside all other States none of which latter States will, by reason of the ban imposed by clause (1)(a), be entitled to tax such sale. The ban under clause (2) being lifted the delivery State will become free to tax such sales or purchases in exercise of the taxing power conferred on it by Article 246(3) read with Entry 54 in List II. Then, it is asked, what will happen to those sales or purchases which do not fall within the Explanation ? After Parliament lifts the ban under clause (2) which State will tax sales or purchases in which goods are actually delivered in a particular State, not for consumption in that State but, say, for re-export to another State for consumption ? One of the suggested answers was that those sales or purchases were not likely to be numerous, for ordinarily a dealer would not actually get the goods imported into a State only for re-exporting the same to another State for consumption in the last mentioned State but would find it more convenient and economical to arrange for the delivery of the goods straight to the last mentioned

State. A further suggestion was that it might well be that when Parliament would by law lift the ban on clause (2) it would, by the same law, provide which of the States would tax such inter-State sales or purchases which were not covered by the Explanation and on what basis. This suggested answer, in its turn, raises a question as to the scope and ambit of the legislative power conferred on Parliament by clause (2). The opening words of clause (2), namely "Except in so far as Parliament may by law otherwise provide" clearly indicate that the lifting of the ban may be total or partial, that is to say, Parliament may lift the ban wholly or unconditionally or it may lift it to such extent as it may think fit to do and on such terms as it pleases. It is to be remembered that under Entry 42 of List I Parliament alone may make law with respect to inter-State trade or commerce. It is, therefore, conceded that in exercise of its legislative powers under that entry read with Article 286 Parliament may make a law permitting the States to tax inter-State sales or purchases of certain commodities only. It is also not questioned that Parliament may, by way of regulating inter-State trade or commerce, fix a ceiling rate of tax on sales or purchases of goods which the law made by the States under entry 54 of List II, may not exceed. Can Parliament also override the Explanation ? If not, cannot Parliament at least provide which of the States may tax inter-State sales or purchases of goods which do not fall within the Explanation ? These are some of the questions which may arise as and when Parliament will choose to make a law in exercise of the powers conferred on it and it will then be time enough to discuss and decide those questions. "This passage makes it abundantly clear that the Explanation is not exhaustive of all the cases of outside sales involving inter-State elements and the question may therefore yet arise as regards the claims of States for taxation on such sales or purchases. The transactions of this kind being out of the ambit of the Explanation and also of Article 286, as that ban is for some time lifted unconditionally, the taxing power of the State Legislature stands unfettered by any consideration other than its powers of taxation under the provisions of the Constitution of India. In that case, having regard to the composite nature of the sale the nexus theory will be inevitably drawn for fixing the situs. It has been observed in *Bengal Immunity Company Ltd. v. State of Bihar* (1955 6 S.T.C. 446 ) by Das, Actg. C.J. :

"The situs of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of the judge-made law of the land, or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories : One, which is more popular and frequently put forward and is referred to and may, indeed, be urged to have been adopted by the Constitution in the non-obstante clause of the Explanation, favours the place where the property in the goods passes, another which is said to be the American view and which was adopted in *C. Govindarajulu Naidu & Co. v. The State of Madras* (1952 3 S.T.C. 405) fixes upon the place where the contract is concluded, a third which prevails in the

continental countries of Europe prefers the place where the goods sold are actually delivered, a fourth points to the place where the essential ingredients which go to make up a sale are most densely grouped. In this situation if the Explanation were not there and the ban under clause (2) were to be raised unconditionally it would become necessary for the Courts to reach a conclusion and choose between these conflicting views. Article 286(1)(a), it should be noted, does not say that an inside sale may be taxed. It only says that no outside sale shall be taxed. Now if a State claims that the sale is inside because part of its ingredients lies within its boundaries, by the same logic it is also an outside sale because the remaining parts are outside its territories and if it is an outside sale it cannot be taxed whether or not it can be deemed to be inside for some particular purpose. The prohibition of Article 286 is against taxing an outside sale and if the sale is outside even partially it may well be argued that no State Legislature can override the Constitution by deeming it to be an inside sale. Therefore, if the last of the aforesaid theories were to be adopted, then either no State would be able to tax, or all having the requisite nexus would be able to do so. But this, in our opinion, is the very mischief which the Constitution-makers wished to avoid and that, as we understand the majority judgment in the Bombay case, was their view also. So that view can be placed on one side. On any one of the other views the situs would have to be fixed artificially in one place and then one would have to apply the logic of the majority decision and hold that as soon as the situs is determined to be in one place by judicial fiction, i.e., a fiction enunciated by judicial decision, the inter-State character of the transaction must cease. The majority hold that this is the result when the situs is placed in only one State, namely, the delivery State, because of the fiction which the Explanation creates. The same result would have to follow logically if the situs were to be established by judicial fiction instead of by a constitutional one. "It is evident from this passage also that the restrictions placed on the taxing power of States in relation to outside sales determined by the fictional or notional situs in the Explanation do not go beyond what the Explanation contemplates. The cases not hit by the other bans and not falling within the Explanation are, of course, to be dealt according to the law of the State recognising the doctrine of sufficient territorial nexus.

It is, therefore, argued that since the assessee has failed to establish the exemption that he claims against taxation, his case should be governed by the Madras General Sales Tax Act and the goods being at the time of sale admittedly in the Madras State the case is covered by the Explanation (2) to section 2(h) of the Madras General Sales Tax Act and the tax levied is perfectly valid.

In support of the contention that the onus lies on the person claiming exemption under any general or special provision, reliance has been placed on the decision of this Court in *Tungabhadra Industries Ltd., Kurnool v. Commercial Tax Officer, Kurnool* (1955 6 S.T.C. 259). We are also referred to the decision in *Indian Steel and Wire Products Ltd. Vs. Superintendent of Commercial Taxes and Others*, : where the learned Judges while discussing the scope of Explanation to Article

286 observed that the assessee would be exempted from payment of tax only if there is proof that the goods were delivered and consumed in the State of first destination and that the sales would not be exempted if the goods are re-exported from the State of first destination to other States. It appears to us plain that when the ban is on outside sales, unless it is established that the particular sales come within the definition or meaning of outside sales, the legislative competence to tax transactions of sale which took place within its territory and eventually completed cannot be questioned. No doubt in order to define what is an outside sale, an explanation is introduced which by resort to a legal fiction determines what an inside sale is but that does not alter the situation, for in order to ascertain what an outside sale is, it has first to be ascertained where in fact actual delivery as a direct result of sale or purchase for purposes of consumption in that State has been effected. Unless and until this is done the sale in relation to any or all other States will not be deemed to be an outside sale within the meaning of explanation, so that the legislative power of taxation of that or any other State may be affected. The learned counsel on behalf of the petitioner argued that it was the duty of the taxing authority and not of the assessee to establish the essentials embodied in the Explanation and that, at any rate, a sale with inter-State elements cannot be taxed as though it was an intra-State sale in the Madras State itself. He further argued that the doctrine of sufficient territorial nexus which has been replaced by the Explanation under article 286 of the Constitution is no longer available for the taxing authority in such States. Reliance has been placed on *Sakhigopal Cocanutt Growers Co-operative Society v. State of Orissa* (1953 4 S.T.C. 372, 375), and *Rama Purchase & Sale Society v. State of Madras* (1958 9 S.T.C. 761; 1958 2 An. W.R. 428). In the first mentioned case it was held that the taxes on sales and purchases involving inter-State elements cannot be levied by any State other than the State in which the goods are delivered for purposes of consumption and that this conclusion is based on the following passage in the majority judgment in *State of Bombay v. United Motors (India) Ltd.* (1953 4 S.T.C. 133) "We are, therefore, of opinion that Article 286 read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above."

16. But it would appear from the passage in *Bengal Immunity Company Ltd. v. State of Bihar* (1955 6 S.T.C. 446) cited by us in an earlier part of our judgment only such cases of outside sales as are covered by the Explanation fall within the ban of Article 286. Needless to say that the ban under Article 286 was intended for only such sales as were within the taxing powers of the States as contemplated by Articles 245 and 246(3) read with Entry 54 in List II of the Seventh Schedule because the sales which are not at all amenable to taxation because of all their component parts having taken place outside did not require any such ban. It is also plain that whatever the ban that may be imposed, will be operative only to the extent warranted by its clear language and its necessary

implication. It follows therefore that if all the conditions of Explanation are not satisfied the nature of the sale involving inter-State elements would have to be determined on the language of the valid enactment fixing the situs of sale.

17. In *Rama Purchase & Sale Society v. State of Madras* (1958 9 S.T.C. 761; 1958 2 An. W.R. 428) a Division Bench of this Court has differed from the view taken by the Patna High Court contained in the following passage :-

"The Explanation provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption is to be considered the State in which the sale or purchase took place, although the property in the goods passed elsewhere. The State in which such delivery is made, otherwise called the delivery State, is the only State which can impose taxation. The sale or purchase shall be deemed to have taken place inside that State and outside all other States. The object of the Explanation is to define an outside sale or purchase by stating what an inside sale is. Unless a sale could be shown to be a sale inside a particular State within the meaning of the Explanation, it cannot be predicated what States are debarred from taxing on specific transactions. In order that the prohibition embodied in Article 286(1)(a) may apply, it is necessary to show that there is a State within which the sale or purchase could be said to have taken place in accordance with the legal fiction embodied in the Explanation. "While expressing their inability to accede to the view taken, the learned Judges of this Court observed :

"There can be little doubt that under the general law, normally a sale takes place in the State in which the property in the goods passes. That general rule is by the Explanation cut into to the extent specified and no more; but, it does not seem to us that there cannot be an outside sale or purchase with reference to a particular State unless it can be postulated that there is a State in respect of which a particular transaction is an inside sale by reason of the Explanation."

18. These observations do not negative the contention that the Explanation is not exhaustive of all cases of outside sales and that there can be outside sales which though incapable of being ascertained on account of the inapplicability of the constitutional fiction they may as well be determined with the help of the general law. If by general law their Lordships intended the law fixing the situs on the basis of nexus theory in cases of doubt or difficulty we respectfully agree with them. The law governing such situation must ordinarily be the law in respect of taxes on sales and purchases of goods and if besides being within the legislative competence it fixed the situs in conformity with the well-established doctrine of sufficient territorial nexus its application is certainly inescapable. It must be noted that the Constitution has not given a go-by to this doctrine. Subject to the provisions of the Constitution it is still available for appropriate cases. As observed in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, : the doctrine of territorial nexus is well-established and there is no dispute as to the principle. All that is necessary is that there should be sufficient territorial nexus between the person sought to be taxed and the State seeking to tax. Sufficiency involves

considerations that the connection must be real and not illusory and the liability sought to be taxed must be pertinent in that connection. As already observed section 2(h) of the Madras General Sales Tax Act read with Explanation 2 fixes the situs of sale in the Madras State if the goods are within that Province at the time the contract was made. Sufficiency of this nexus cannot be disputed having regard to the broad principle laid down by the majority judgment in *State of Bombay v. United Motors (India) Ltd.* ( 1953 4 S.T.C. 133 ) The decision of the Madras High Court in *Louis Drefus's case* (1954 5 S.T.C. 307) is direct on the point. It also establishes the constitutionality of the provisions. At any rate, the decision in *Poppatlal Shah Vs. The State of Madras*, places the matter beyond controversy. Thus it is clear to our mind that in cases beyond the restrictions of Article 286 of the Constitution, the Sales Tax Act will have its complete operation. It is argued that the Division Bench of this Court in the case referred to above had by the expression "general law" intended to mean the Indian Sale of Goods Act and not the Sales Tax Act. It admits of no doubt that the provisions of the Sales of Goods Act only relate to the time when the property in the goods passes from the seller to the buyer and do not fix the locality where sale takes place. That is the view taken by the Madras High Court in *Louis Dreyfus & Co. v. State of Madras* (1954 5 S.T.C. 307). The following observations of the Supreme Court in *State of Bombay v. United Motors* (1953 4 S.T.C. 133) are to the same effect : "Neither the Sale of Goods Act nor the common law relating to the sale of goods has anything to say as to what the situs of sale is though certain rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer."

19. The following observation of Bose, J., as well at page 157 which deals with the non-obstante clause in the Explanation to Article 286(1)(a) may be referred to in this connection :-

"I agree with the construction which my Lord has placed upon Entry No. 54 of List II. I also agree that the object of the Explanation is to fix the locus of a sale or purchase by means of a fiction but with respect I cannot agree with my brother Bhagwati, J., that the non-obstante clause enunciates the general law on this point. I know of no general law which fixes the situs of a sale, not even the Sale of Goods Act. What the general law does is to determine the place where the property passes in the absence of a special agreement, but the place where the property passes is not necessarily the place where the sale takes place, nor has that ever been regarded as a determining factor."

20. It is therefore clear that in matters of taxation the provisions of the Sales Tax Act, subject to the constitutional limitations, if any, shall determine the situs of sales and not the Indian Sale of Goods Act which is not concerned with the place where the sale takes place. It is argued that the Divisional Bench of this Court in the case cited above has virtually held that the situs of sale in such cases shall be determined by the provisions of the Indian Sale of Goods Act and that since that view is in conflict with the view that we take of the case the matter should

go before the Full Bench. We do not think that their Lordships laid down any such broad principle as would extend beyond the particular facts of that case in holding that the case concerned was one of outside sale. That does not appear to be the intention of their Lordships either, as they appear to address themselves only with the question whether there could be outside sales even though they may be beyond the provision of Explanation to Article 286(1)(a). But even assuming that the learned counsel is right, having regard to the settled view of the Supreme Court that the Sale of Goods Act is not concerned with fixing the situs, to which we have already referred, the matter need not go to the Full Bench. That is the necessary consequence of Article 141 of the Constitution. That also is the well-established principle of law as followed in England. We may in this connection refer to *Young v. Bristol Aeroplane Company* (1944 2 A.E.R. 293 ). We are then referred to *State of Madras v. Venkataramaniah and Sons* (1958 9 S.T.C. 54) but that is not on the point and further it refers to pre-Constitution period.

21. The learned counsel then argued that inasmuch as the party was under a mistaken impression that the onus did not lie on him and as a result thereof he did not adduce evidence he may now be allowed an opportunity to do so and a direction be issued to the taxing authority so that the assessment may be made and finalised after giving an opportunity for adducing necessary evidence. We do not think that the writ jurisdiction extends to giving such direction by remanding the case. When it is clear that the taxing authorities were not in breach of any duty cast on them, nor guilty of any contravention of law or form of procedure so that their order may be vitiated, we do not see any justification for quashing such an order. The learned counsel has failed to cite any compelling authority which would warrant the course that he proposes in the circumstances of the case. The petitioner had time and opportunity to resort to civil remedy. He has not even approached the Tribunal. The relief that he claims might have been effectively given in one of these forums. He failed to avail of those opportunities and has invoked the writ jurisdiction instead, but has not made out a case of defect or excess of jurisdiction.

22. This petition must therefore fail, and it is dismissed with costs. Advocate's fee Rs. 100.