(1995) 02 OHC CK 0019

In the Orissa High Court

Case No : O.J.C. No. 6773 of 1993

Bharat Heavy Electricals Ltd. APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 23-02-1995

Acts Referred:
Orissa Sales Tax Act, 1947 — Section 2, 5(2)(AA), 5(2A)

Citation : (1995) 1 OLR 567

Hon'ble Judges : S. Chatterji, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : B.K. Mohanti, Bibek Mohanti, H.K. Mohanti, B.K. Sahoo and K. Kar, for the Appellant; Ashok Mohanty, Standing Counsel, Commercial Taxes, for the Respondent

Judgement

S. Chatterji, J.—This case was heard analogously along with other writ applications, i. e. O. J. C. Nos: 6724 of 1991. 1522 and 1523 of 1992, 6773, 6774, 6793, 6794, 6796, 7561 and 7562 of 1993 filed by the petitioner and also 0. J. C No. 6895 of 1994 challenging the show-cause notices and three assessment orders and praying for quashing the same. This comprehensive Judgment disposes of art the writ applications.

2. The present writ application at the instance of M/S. Bharat Heavy Electrical Ltd. (for short ''BHEL'') against the State of Orissa and others including the Commissioner of Sales Tax of Orissa, Cuttack and the Sales Tax Officer, Dhenkanal Circle. Angul besides the Union of India, the States of Tamilnadu, Andhra Pradesh, Madhya Pradesh, Uttar Pradesh as also M/s. National Aluminium Company Ltd. and the National Thermal Power Corporation Ltd, seeks the reliefs as follows:

(1) For issue of a writ In the nature of certiorari or any other appropriate writ and/or order and/or direction, directing the opp. party Nos. 1 to 3 to certify and send up. to this Court all documents and papers in connection with Section 2 (c) (d) (ii). 5 (2) (A) (a) (i) and 5 (2) (AA) (i) of the Orissa Sales Tax Act, 1947 and

the notice in Annexure-1, so that they may be examined and quashed.

(2) For issue of a writ in the nature of mandamus quashing 4 Section 2 (c) (d) (ii), 5 (2-A) (a) (i) and 5 (2) (AA) (i) of the Orissa Sales Tax Act, 1947 and the notice in Annexure-1; and

(3) For allowing this application with costs and passing such other order and/or orders as this Court deems fit and proper.

3. Apart from challenging the vires of Section 5 (2-A) (a) (i) and 6 (2) (AA) (i) of the Orissa Sales Tax Act Inasmuch as the aforesaid two sections requiring a dealer to include in the gross turnover transactions which have inlet alls inter-State export and import elements since covered under Sees. 3 and 5 of the Central Sales Tax Act, I956 passed by the Parliament under Entry 92-A, List I of Schedule VII, there is challenge to the notice dated 28-5-1992 issued by the Sales Tax Officer, opp. party No. 3, calling upon the petitioner to submit returns for the assessment year 1991-92 and to make assessments under the said sections with specific prayer for quashing all such notices under Annexure-1.

The facts of the case of petitioner stated :

8. It is highlighted that in terms of the contract entered into between the petitioner company and NALCO/NTPC, the supply contract being executed from outside the State of Orissa and outside the territory of India and the goods being manufactured in pursuance of the pre-existing contracts between the parties and the goods being moved from other non-Orissa States into the State of Orissa, they are in the nature of inter-State sales/import sales and squarely covered under the provisions of the Central Sales Tax Act, 1956 and proper sales tax having been paid in the non-Orissa States and therefore being exempted under the provisions of the Central Sales Tax, Act, the local Sales Tax Act of Orissa will have no jurisdiction to levy any tax on the said supplies.

Further facts stated :

11. It appears further that the petitioner had filed an earlier writ petition before this Court and the judgment has since been reported in (1988) 71 STC 25 (BHEL and Ors. v. Union of India and Ors.). The said judgment was carried to the Supreme Court in SLP (Civil) Nos. 12291/88, 12840/88, 12367/88, 12482/88 and 12484/88 and in the meantime the, Supreme Court was pleased to dispose of a batch of cases from Rajasthan where it is alleged, parmateria provisions were introduced authorising imposition of tax on goods on transfer of goods "as goods or in some other forms" involved in the execution of works contract. The Supreme Court quashed the same provisions of the Rajasthan Act by the judgment reported in (1993) 83 STC 204 (supra).

12. It is further placed on record that on the same date, the Special Leave Petitions filed by the State of Orissa were also disposed of wherein the Supreme Court passed the following order :

"We have laid down the principles regarding the questions raised in these appeals Special Leave Petitions by our judgment dated 17th November, 1992 in C. A. No. of 1992 arising out of SIX Nos. 3365-68 of 1992. In these circumstances, we dispose of these appeals/Special Leave Petitions with an order that when the matters are taken up or remanded by the Assessing Authorities or Appellate Authorities, the cases will be disposed of in the light of what we have held in the connected matters which are decided by us. Any inconsistent or contrary direction by the High Court will not be binding.

It is clarified that any question determined by the High Court which is not covered by our judgment and regarding which the appellants have a grievance, it will be open to them to raise that grievance, in any appeal from the ultimate order passed in the matters concerned.

The appeals/Special Leave Petitions are disposed of with the aforesaid order. There will be no order as to costs."

13. The case as made out by the petitioner in the present writ petition is that in view of the aforesaid order of the Supreme Court, the judgment of the High Court of Orissa to the extents which were not keeping in with the direction of the Supreme Court was declared to be bad and virtually "taxable turnover" and "works contract "as provided u/s 5(2)(AA)(i) of the Orissa Sales Tax Act would get affected and would be ultra vires the State powers.

14. It is made clear before this Court that while the matters were thus disposed of, the Court after hearing two cases of the present petitioner for its Damanjodi site being OJC Nos. 5111/90 and 5112/90 quashed the orders of assessment, but held the provisions of the Orissa Sales Tax Act to be intra vires. Since the principle of law has been decided in (1993)88 STC 204 (supra), the points are still open to the petitioner to challenge the vires of Sections 5(2)(2-A)(a)(i) and 5(2)(AA)(i) of the Orissa Sales tax Act as ultra vires. In view of the challenge as above, the petitioner is aggrieved by the notice issued by the S.T.0. and the same is challenged as arbitrary, illegal and without jurisdiction.

Contentions of the counsel for petitioner stated:

23. The said Supreme Court decision indicates inter alia that since the invalidity of Section 5(3) goes to the root of the imposition of tax and in the absence of the said provision the tax cannot be levied, the assessees as appellants were found entitled to succeed. In the aforesaid circumstances; the Supreme Court found it necessary to examine the other questions relating to validity of Explanation to Clause (o) of Section 2 of the Rajasthan Sales Tax Act, Explanation (i) to Clause (t) of Section 2, Sub-Section (2-C) of Section 7, Clause (ii), of Sub-rule (2) of Rule 29 and Sub-rule (2) of Rule 46 of the Rajasthan Sales Tax Rules.

24. Mr. Mohanty argues that similar facts and circumstances arise so far as the provisions of Section 5(2)(A)(i) or 5(2)(AA)(i) of the Orissa Sales Tax Act. There is further emphasis on the point that Section 2(c)(d)(ii) of the Orissa Sales Tax

Act is also liable to be struck down In course of his argument Mr. Mohanty has strenuously taken us to go through the definitions of Sections 2(d), 2(dddd) as to "manu-'' facture", 2(g) as to "sale" and by referring to State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, the observation made at page 234 as to incidence of taxation. He has asked the Court to appreciate "works contract" in view of Sections 5(1) and and 5(2)(a) and "taxable turnover" and "gross turnover" as defined u/s 2(dd). By referring to a decision in 1993(1) AER 42 (Pepper (Inspector of Tax) v. Hart) and related appeals, the House of Lords had to appreciate the scheme of the Act, the aims and objects and the scope for appreciation of parliamentary materials as an aid to statutory construction. The House then heard submissions on the questions whether it would be appropriate to depart from previous authority prohibiting the Courts from referring to parlermentary materials in construing statutory provisions and whether the use of Hansard in such circumstances would be an infringement. Drawing such inspiration, Mr. Mohanti addressed the Court for enlarging the horizon for the purpose of scrutinising the statutory provisions for understanding the legislative power and its exercise as permissible under various Constitutional provisions demarcating the power of the State to levy such imposition of taxes and for transgressing the powrer beyond.

Contentions of counsel for opp. parties and decision of Supreme Court stated:

31. The Supreme Court has considered the provisions of the Rajasthan Sales Tax Act in the light of principles of law inasmuch as in exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of List II of Schedule VII to the Constitution of India read with Article 366(29A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a salt in the course of inter-State trade or commerce or a sale outside the Stats or a sale in the course of import or export. The legislative power of the State Legislature under Entry 54 of the State List is subject to two limitations-one flowing from the entry itself which make the said power "subject to the provisions of Entry 92-A of List", and the other flowing from the prohibition contained in Article 286. Under Entry 92-A of List 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 provisions, 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 authorising the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of Sub-clause (b) of Clause (29-A) of Article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute 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. The Supreme Court has further found that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. Since the provisions of Sections 3, 4 and 5 of the Central Sales Tax Act, 1956,are applicable to such contracts containing two separate agreements, there is no reason why the said provisions should not apply to a contract which, though single and indivisible by legal fiction Introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. If the legal fiction Introduced by Article 366(29A)(b) is carried to its logical one it follows that even in a single and indivisible, works contract there Is a deemed sale of the goods which are involved in the execution of a works contract Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services Even in the absence of any amendment having been made in the Central Sales Tax Act (after the Forty-sixth Amendment) expressly including transfers of property in goods involved in execution of a works Contract, the provisions contained in Sections 3, 4 and 5 would be applicable to such transfers and the legislative power of the State Legislature to impose tax on such transfers under Entry 54 of the State List will have to be exercised keeping in view the provisions contained in Sections 3, 4 and 5, For the same reasons Sections 14 and 15 would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under Entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed in those sections in respect of goods that have Been declared to be of special importance in interstate trade or commerce. The absence of any amendment in the definition of "sale" contained in Section 2(g) of the Central Sales Tax Act, 1956, so as to include transfer of property in goods involved in the execution of a works contract does not in any way affect the applicability of the Sections 3, 4 and 5 and Sections 14 and 15 to such transfers.

32. The ratio of the Supreme Court decision indicates further that 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 law specifying restrictions and conditions in regard to the system of levy, rates or incidence of such tax. This does not "mean that the legislative power of the State Legislatures cannot be exercised till the enactment of a law under Article 286(3)(b) by Parliament. It only means that in the event of a law haying been made by Parliament under Article 286(3)(b) the exercise of the legislative power of the State Legislatures under Entry 54 in List II to impose a tax of the nature referred to in Sub-clauses (b), (c) and (d) of Clause (29-A) of Art. 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax confined in (he said law. The existence of a law erected under Article 286(3) by cannot, therefore, be regarded as a condition precedent for the exercise of the taxing power of the State under Entry 54 in List II to impose a-fax of the nature referred to in Sub-clauses (b), (c) and (d) of Clause (29-A) of Article 366.

33. The question answered by the Supreme Court as to whether a demand safe resulting from transfer of property in goods involved in the execution of a particular works contract amounts to 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 or a sale in the course of import u/s 6 has to be decided in the light of the particular terms of the works contract and it cannot be decided in the abstract.

34. But so far as the Provisions of the Orissa Safes Tax Act are Concerned, the challenged provisions are quoted as follows:

"Section 2(c)-Dealer means any person who carries on the business of purchasing, selling, supplying or distributing goods (including goods used or involved in the execution of works contract, whether as goods or in some other form), directly or otherwise, whether for cash or for deferred payment or f6r commission, remuneration or other voluble consideration and includes -

(i) a local authority, a company, and undivided Hindu family, and society (including a Co-operative Society), club, firm or association which carries on such business

(ii) a Society (including a Co-operative Society), club, firm association or body of persons whether incorporated or not which purchases goods from, or sells, supplies or distributes goods to members thereof for cash, deferred payment or other valuable consideration;

(iii) a commission agent, a broker, a de-credere ageant, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of purchasing, selling, supplying or distributing goods on behalf of any principal whether disclosed or not;

(iv) 3 casual dealer;

(v) a person who transfers otherwise than in pursuance of a contract, property in any goods for cash, deferred payment or other valuable consideration.

(vi) a person who transfers property in goods (Whether as goods or in some other form) Involved in the execution of a works contract.

(vii) a person who delivers goods on hire-purchase or any system of payment by instalments.

(viii) a person who transfers the night to use in goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable Consideration;

(ix) a person who supplies by way of or in any service or in any other manner, goods, being food or any Other article of human consumption or any drink (whether or not Intoxicant), whether such supply or service is for Gash, deferred payment or other valuable consideration.

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"Section 2 (d).-''Goods'' means all kinds of movable property other than auctionable claims, stock, share or securities, and includes goods used or Involved in the execution of works contract whether as goods or In some other form all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed."

"Section 2(ii)-:Works Contract Includes any - agreement for carrying out, for cash or deferred payment or other valuable consideration the building, construction, manufacture processing, fabrication, erection, installation, fitting out improvement, modification, repair or commissioning of any movable or immovable property.

"Section 5(2-A)(a)(i).-The sale of any goods notified from time to time as tax free u/s 6 and of the packing materials if any, in respect of such goods."

"Section 5(2) (A).-In this Act, the expression taxable turnover'' means that part of a dealer''s gross turnover during any period which remains after deducting therefrom:

(a) his turnover during that period on-

(i) The sale of any goods notified from time to time as tax free under Section, 6 and of the packing materials. if any, in respect of such in goods.

"Section 5 (2) (AA)-Notwithstanding anything contained in Sub-section (2) (A) Taxable turnover in respect of-

(i) works contract shall be deemed to be the gross values received or receivable by a dealer for carrying out such contract, less the amount of labour charges and service charges incurred for the execution of the contract;"

35. The Supreme Court examining the provisions of the Rajasthan Sales Tax. as quoted above, has considered the provisions of the Rajasjhan Sales Tax Act in the light of the principles as referred to above by outlining the general scheme of the said enactment and in particular Section, 2 containing the definitions wherein, "goods" has been defined in Clause (h), "sale" as defined In Clause (p), "sale price" as defined in Clause (p), "taxable turnover as defined in Clause (s) and "turnover" as defined in Clause (t) Section, 3 provides for incidence of taxation. Section 4 provides for exemption from tax of goods specified in the Schedule to the Act. Section 5 provides for fate of tax. Section 6 provides for registration of a dealer. Section 7relates to submission of returns. Sections 10 to 20 relate to assessment of tax. Section 23 deals with refunds and Section 26 confers the power to make rufes. It was found that the definition of "turnover" contained in Clause (t) of Section 2 was amended, and Clause (cc) Was inserted In Sub-Section (2) of Section 26 to confer power to frame rules to provide for the determination of the amount payable to the dealer for the transfer of property in goods (whether as goods or in some other form) made In the course of execution of a contract or works contract. By Rajasthan Sales Tax (Amendment) Act, 1983 (9 of 1988), certain further amendments Were made in the definition of "sale" contained in Clause (o) and definition of "turnover" contained in Clause (t) of Section 2. Clause (u) was introduced in Section 2 to define "works contract". Section (3) was added in Section 5 and Sub-Section (2-C) was inserted in Section 7. By such Rajasthan Sales Tax (Second Amendment) Act, 1988 (13 of 1988), the definition of "works contract" contained in Clause (u) of Section 2 was substituted. After the decision of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, was enacted whereby some minor changes were made in the definition of "sale" contained in Clause (o) and the last provision, which was inserted in the definition of "sale price" contained in Clause (p) by Rajasthan Act No. 7 of 1987 was deleted.

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

37. Before the High Court at Rajasthan, the appellants had confined their challenge to Clause(3) of Section 5 and Clause (2-C) of Section 7 of the Act and Su,b-rule(2)of Rule 29 and Sub-rule(2)of Rule 46 of the Rajasthan Sales Tax Rules. Sub-rule (2) of Rule 29 relates to Sub-Section (3) of Section 5 whereas Sub-rule (2) of Rule 46 relates to Sub-Section (2-C, of Section 7 of the Act. During the course of arguments before the Supreme Court, the learned counsel for the appellants had also challenged the validity of Explanation in the definition of "sale" contained in Clause (o) of Section 2 of the Act.

38. Clause (o) of Section 2 which defines "sale" as amended by the enactments

referred to above, provides as under:

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

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

(ii) A transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract (iii) A delivery of goods on hire-purchase or other system of payment by installments;

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39. The Supreme Court on proper scrutiny found Sub-Section (3) of Section 5 provides that notwithstanding anything contained in the Act, in the case of a works contract, the turnover of such contract shall be subjected to tax; provided that such deductions, as may be prescribed, may be allowed to a contractor while determining his tax liability. As per the Supreme Court view, the expression "turnover" as defined in Clause (t) of Section 2 of the Rajasthan Sales Tax Act means the aggregate amount of sale prices received or receivable for a sale, transfer, delivery or supply by a dealer in any 6f the ways referred to in Clause (o) wherein the expression "sale" is defined. The legislature has not made any express provision for exclusion of transactions constituting deemed sales which take place in the course of inter-State trade or commerce or outside the State or in the course of import and export in relation to which the State Legislature lacks the competence to impose a tax under Entry 54 of the State List nor has any provision been made with regard no sales of goods which are declared to be of special importance in inter-State trade or commerce and are governed by Sections 14 and 15 of the Central Sales Tax Act. The matter has been left to the discretion of the rule-making authority to prescribe whether deductions in respect of such transactions should be allowed or not.

40. It has been specifically found by the Supreme Court that a comparison of the provisions contained in Sub-Section (3) of Section 5 read with Section 2 (t) and " Sub-Section (1) of Section 5 read with Section 2 (s) would indicate that in relation to works contracts the legislature has made a departure in the matter of chargeability of the tax and by using the expression "turnover" instead of "taxable turnover" in Section 5 (3) it has enlarged the field of taxability to permit tax being levied - on sales in the course of inter-State trade or commerce, sales outside the State and sales in the course of import and export and to ignore the conditions and restrictions placed by Section 15 of the Central Sales Tax Act in relation, to imposition of tax on goods which are declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act. The proviso to Section 5 (3) does not oblige the rule-making authority to frame a rule allowing deductions for the turnover of the amount of proceeds of sale of

goods on which no tax is livable under the Act so as to exclude the abovementioned sales'' from levy of ''tax. The rule-making authority would not be contravening the mandate of the statute if it does not allow deduction of the amount of proceeds for sale of goods on which no tax is leviable under the Act from the turnover.

41. With the same scale as found by the Supreme Court, we have scrutinised the entire, framework, the scheme and several provisions of the Orissa Sales Tax Act. The constitutional validity of a statute has to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed and if so judged, it does not pass the test of onstitutionality it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements as found by the Supreme Court." -Looking at the definitions as envisaged u/s 2 (c), (d) and (ii), we, do not find that such definitions are contrary to and inconsistent with the constitutional limits for exercising legislative power. Section 5 (2-A) (a)(i) is neither contrary to nor inconsistent with the other provisions of the Orissa Sales Tax Act. The power as given in Section 5 (2). (AA) is notwithstanding the provisions-contained in Sub-Section (2-A) of Section 5 as to taxable turnover. This section is neither de hors the Act nor is it unchecked or unguided by other provisions of the Orissa Sales Tax Act. This Section 5 (2) (AA) (i) is not same and similar as envisaged u/s 5 (3) of the Rajasthan Act. Section 5 (2) (AA) (i) of the Orissa Act has its own intrinsic merit and it is quite distinguishable. If this section is read along with other relevant sections of the Orissa Act, it would be appreciated that the leaislature has not sought to transgress its constitutional limits to levy taxes and if any such attempt is made, the aggrieved assessee may certainly canvass its point that the provisions of the Orissa Sales Tax Act cannot be interpreted and such powers cannot be exercised beyond the guidelines as found in the decision of the Supreme Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, The interpretation as given, and the law as laid down by the Supreme Court to define the legislative power to impose and levy tax, has to be borne in in mind in interpreting and explaining Section 2 as to various definition clauses of the Orissa Sales Tax Act and to appreciate the scope of Section 5 (2) (AA) (i). There are sufficient Checks and balance in the entire framing of the Orissa Sales Tax Act and in no way it may be observed that such provisions which were previously viewed are to be re-opened in the light of the judgment of the Supreme Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . On the contrary, we are of the view that looking at the provisions of the Orissa Sales Tax Act in view of the ratio of the decision in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, one will be convinced with the expression of the Supreme Court in the case of Sentinel (Rolling Shutters and Engineering Company Pvt. Ltd. v. The Commissioner of Sales Tax, (1978) 42 STC 409 where it has been found that the tests indicated in the several decisions of the Supreme Court to distinguish between a contract for sale and a contract for work and labour are not

exhaustive and do not lay down any rigid or inflexible rule applicable alike to all transactions. They do not. give any magic formula by the application of which one can say in every case whether a contract is a contract for sale or a contract for work and labour. They merely focus on one or the other aspect of the transaction and afford some guidance in determining the question, but basically and primarily, whether a particular contract is one for sale of goods or for work and labour depends upon the main object of the parties gathered from the terms of the contract, the circumstances of the transactions and the custom of the trade.

42. In such circumstances, it is premature to interfere with the right of the opposite parties to issue the show-cause notice. It is open to the petitioner assessee to file its show-cause and to make its stand clear and to satisfy the assessing authorities that its transactions are immuned in view of the decision of the Supreme Court reported in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, and if the assessee proves that the transactions are as such and the ratio of the decision of the Supreme Court in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, is squarely applicable to the facts, the revenue is certainly bound to grant such relief as warranted under law.

43. Although Mr. Mohanty for the petitioner has strongly argued that the States making laws on the subject matter in question provide a measure and reach it providing obtaining situations by defining "dealer", "goods", "sales", "sale price", "turnover of sales", "works contract", "incidence .of tax", "rate of tax" and indicating a modality for computation the tax, yet the State while providing for computing the tax of turnover, as a matter of policy, has classified "goods" into two classes, i. e. "goods involved in the execution of works contract". The Supreme Court, according to Mr. Mohanti, in considering Section 5(3) of the Rajasthan Sales Tax Act clearly observed that the legislature had not made any express provision for exclusion of offending materials over which the State lacks competence. This judgment, if read with the Builders Association case dealing with the Karnataka Act indicates inter alia that the legislature could include value of transfer of property in goods involved in execution of works contract into the turnover, but must exclude in the enactment the offen ding materials. With this scale, if the scope of the Orissa Act is considered, the offending sections cannot be sustained. It is, argued that Section 5 (2-A) (a) (i) cannot also be sustained as it does not exclude either In Itself or reading the entire Act as a whole the offending materials. The chaotic situation by the revenue will necessitate the Court to indicate that in a case of works contract when goods become involved in its execution, the taxable event takes place when it is involved in the contract and passes by way of accretion and whether such transfer can have inter-State character. The Supreme Court as suggested by Mr. Mohanti, has answered this question that even in absence of redefining "sale" in Section 2(g) of the Central Sales Tax Act to include such transfers it does not in any way affect the applicability of. Sees. 3, 4, 5 and Sections 14 and 15 of the Central Sales Tax Act

to such transfers.

44. We have examined the entire Orissa Sales Tax Act through the looking-glass as fixed by the ratio of the Supreme Court judgment in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, that unlike Section 5 (3) of the Rajasthan Sales Tax Act which begins with a non-obstante clause it comes to the surface de hors other provisions of the Act in order to include the obtaining situation. The other checks and balances, if any, to exclude such situation in other sections of the Act cannot be gone into whereas in the present case, Section 5(2) (AA) (i) is preceded by a non, obstante clause so far as Section 5 (2-A) (i) is concerned, but the preamble of the Orissa Sales Tax Act, the definition section and other provisions with provisos and explanations do not include such an obtaining situation what the petitioner apprehends. It has to be appreciated that by reading the offending sections the Court has to consider whether there is a transgressing of the legislative poweras warranted by the constitutional limitations. If the entire Orissa Sales Tax Act is considered in the proper perspective and on carrying on the sections in the proper context and sequence, we do not find that there is any genuine apprehension of the petitioner that the type of transactions which cannot be brought under the catch-net of State legislative competence have been so done by the State legislation. The answer of this Court is simple and clear that the Orissa Sales Tax Act and in particular the offending Sections 5 (2-A) (i) and 5 (2) (AA) (i) do not create any obtaining situation which was deprecated by the Supreme Court in the Rajasthan Act. There is no illegality irrationality or procedural impropriety in such statutory provisions as laid down by the Orissa Sales Tax Act. It is also made-clear by this Court that in the event the petitioner will be successful to show that the nature of transactions cannot be brought under the purview of the State''s legislative competence as demonstrated in the ''decision in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, the opposite party Sales Tax authorities cannot enlarge the ambit of the provisions of the Orissa Salea Tax Act to cover such transactions within its catch-net to make assessment and levy sales tax.

45. On close scrutiny we do not find that in the light of the judgment of the Supreme Court reported in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, the question as to vires of the challenged provisions of the Orissa Sales Tax Act is to be re-opened and in our view we do not find that such provisions of the Orissa Sales Tax Act as being challenged before us suffer from any inherent defect or infirmity as to constitutional limitations. Those succeed the tests as laid down under taw and the contentions raised by the petitioner have no merit in this regard We however find that the challenge to the show cause notice by the petitioner is premature. It is open to the petitioner assessee to file its show-cause replies by raising all the points permissible under law and it is equally open to the revenue to adjudicate the matter strictly in terms of the decision of the Supreme Court whether the State legislature cannot transgress its constitutional limitations. With such observation, the writ petition is disposed of.

No order as to costs.

G.B. Patnaik, J.

46. I agree.

