

(1959) 11 MP CK 0034
In the Madhya Pradesh High Court
Case No : L.P.A. No. 55 of 1958

Burhanpur Tapti Mills Ltd

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-11-1959

Acts Referred:

Sales of Goods Act, 1930 — Section 39, 4

Citation : (1961) J LJ 1011

Hon'ble Judges : T.P. Naik, J; K.L. Pandey, J

Bench : Division Bench

Advocate : R.S. Dabir, for the Appellant; M. Adhikari, Advocate-General for State, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Naik, J.—The order in this appeal shall also govern the disposal of Miscellaneous Petition Nos. 412 of 1956, 20 of 1957, 102 of 1957, 235 of 1957 and 268 of 1957.

2. All these cases arise out of assessment proceedings under the C. P. and Berar Sales Tax Act, 1947 (hereinafter referred to as "the Act") and raise some common questions of law. They are, therefore, being disposed of together. In all of them, assessment orders have been made and appeals from the said orders are pending before the appellate authorities under the Act. The petitioners in all these cases are challenging the assessment orders and the notices of demand made thereunder, under Article 226 of the Constitution, inter alia, on the ground that the assessments in all of them violated Articles 286 and 301 of the Constitution. In Letters Patent Appeal No. 55 of 1958 Miscellaneous Petitions No. 412 of 1956 and No. 20 of 1957, it was also contended that the Sales Tax Laws Validation Act, 1956 (Act No. VII of 1956) was "void and ultra vires".

3. As considerable confusion prevailed during the arguments of these petitions, it may be advantageous to recapitulate the legal position as it obtains today for the

application of the Act to the various situations arising in the cases before us.

4. The Act levies a tax on goods, the taxing event being their sale. "The tax on the sale of goods", said Gwyer, C J. in *The Province of Madras Vs. Messers Bodhni Paidarma and Sons* AIR 1942 P.C 33 at p. 35" is a tax levied on the occasion of the sale of the goods". Similarly, P. Sastri C. J., delivering the judgment of the majority in the *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, said:

"..... sales taxis, in substance, a tax on the goods imposed, no doubt, on the occasion of the sale as a taxable event".

5 The legislative entry under which the State Legislature has been empowered to legislate on this tax is, "tax on the sale of goods..." (Schedule VII, List II, item 48, Government of India Act, 1935), or "taxes on the sale or purchase of goods..." (Seventh Schedule, List II, entry No 54, Constitution of India). Consequently, the tax can be validly levied only in the event of there being a sale. In *Poppatlal Shah Vs. The State of Madras*, the Supreme Court observed that the object of the Legislature in the Sales Tax Act is to impose a tax on the occasion of the sale, though it was immaterial where the sales was completed whether within or without the province seeking to tax. It further said that:-

"A contract of sale becomes a sale under the Sale of Goods Act only when the property in the goods is transferred to the buyer under the terms of the contract itself" (p. 685).

Further elucidating the position, the Supreme Court in *The Sales Tax officer, Pilibhit Vs. Messrs Budh Prakash Jaiprakash* (1955) 2 S.C.R. 243 at p. 249, said:

"The power conferred under entry 48 to impose a tax on the sale of goods, can therefore be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of "sale" as including forward contracts, arrogate to itself a power which is not conferred upon it by the Constitution Act."

6. A "completed sale, is a complex legal concept. It consists of a contract and a conveyance. u/s 4 of the Sale of Goods Act, where under a contract of sale, the seller transfers the property in goods to the buyer for a price, the contract is called a sale. It thus comprises various integrated activities which together result in a "completed sale". Some of these essential component ingredients of a "completed sale" are: agreement to sell, passing of title, delivery of goods, and payment of price, etc. All these events need not necessarily take place at one place or within a particular territory, and consequently it is not always easy in any given case to determine within what particular territory the sale could be located No difficulties were, however, felt in the administration of the Act so long as all that we were concerned with was a "completed sale", and we were not required to give a "situs" to the sale.

7. Under the Government of India Act, 1935, there was no legislative fetter to legislate extra-territorially. The Provincial Legislature could, therefore, pick out any one or more of the aforesaid ingredients to enable it to impose a tax on the transactions of "sale", even though the said sale was completed outside the Province. All that was needed was a very slight connection or nexus between the taxing State and the sale or purchase it sought to tax.

8. It was pointed out by the Privy Council in (1948) 16 ITR 240 (Privy Council) that in determining the constitutional validity of a provision in the Income Tax Act seeking to tax income arising abroad to a non-resident foreign company, what was required was not the possession of the extra-territorial power but "a sufficient territorial connection between the person sought to be charged and the country seeking to tax him". Reiterating this principle, Sastri, C. J., in the United Motors case (supra, pp. 1978-79), said:

"In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. 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."

9. On the coming into force of the Constitution, Article 245 (1) in terms prohibited a State Legislature to legislate extra-territorially, so that it could not enact laws imposing taxes on persons not resident within the State as also in respect of property which had no "proximate territorial connection" within the State.

10. Article 286 of the Constitution put further fetters on the powers of the State Legislature to tax "a sale or purchase" of goods. These fetters were, that it shall not impose a tax on a sale or purchase of goods where such sale or purchase takes place-

(1) outside the State, (2) in the course of import of the goods into, or export of the goods out of, the territory of India,

(3) in the course of inter-State trade or commerce (except in so far as Parliament may by law otherwise provide), and

(4) in respect of essential commodities, unless it was assented to by the President

11. The Supreme Court has held that though these limitations do somewhat overlap, they are cumulative and independent of one another: [see *The Bengal Immunity Co. Ltd. Vs. The The Bengal Immunity Company Limited Vs. The State of Bihar and Others*,

12. The question then arose whether there was any discoverable principle on the

basis of which one could determine whether a "sale" took place" inside the State", "outside the State", "in the course of import into, or export out of, the territory of India", or "in the course of inter-State trade or commerce", i. e., whether there was any principle for fixing a "situs" for the sale. No difficulty arose where all the essential ingredients of a "sale" took place either within the State or outside the State, for, in the first case, it would be an "inside sale", and, in the latter case, an "outside sale". But, if some of the ingredients took place in one State and some others in another State, the consensus of judicial opinion was that the State Legislature had plenary powers to tax such sales by giving them an artificial "seat" within its legislative sphere, provided there existed sufficient territorial nexus between it and the transaction it sought to tax. It is true that this permitted the same transaction of sale being taxed by more than one State, but that could not be avoided. Bose J. in a minority judgment, in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, at pp. 1379-1385, has protested against the continuance of the nexus theory and urged the adoption of any one of the various methods (though he has indicated his preference for the cheshire viue of locating the sale in the State where its essential elements were most densely grouped) for giving an artificial situs to the sale by the Supreme Court so that the State where the situs was thus located could alone tax.

13. It has to be remembered that, as observed by Sastri C. J. in the *United Motors* case (supra), 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 a sale is, although certain rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in goods is to pass to the buyer. In the *Bengal Immunity* case (supra) various alternatives were suggested. "The "situs" of an intangible concept like a sale" said Das, Ag. C. J. (at p. 649).

"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 and Co. Vs. State of Madras* and Another, 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 point to the place where the essential ingredients which go to make up a sale are most densely grouped."

14. In this state of uncertainty with regard to any definite principle governing the fixation of "situs" of a sale, and in view of the historical background, when

during the pre-Constitutional period, existence of sufficient territorial connection between the taxing State and what it sought to tax gave constitutional validity to the legislation, the provisions of Article 286 of the Constitution first came to be interpreted in the *United Motors* case (supra). The majority judgment of the Supreme Court in that case noticed that the State Governments in exercise of their legislative powers and acting on the principle of territorial nexus, enacted sales tax laws of the widest range so that it was difficult in each case to sustain the taxing power as existence of sufficient territorial nexus was a matter of doubt. Consequently, the Constitution makers wanted to restrict the taxing power of the States in respect of sales and purchases involving inter State elements. This they did by enacting Articles 286, 301 and 304 of the Constitution. By the latter two Articles, the Constitution provided for the freedom of inter State trade and commerce, subject to the qualification that the commercial unity of India is made to give way before the State power of imposing "any" non discriminatory taxes on goods imported from sister States and by Article 286 (1) (a), Explanation, and 268 (2) it-

"devised a formula of restrictions to be imposed on the State power of taxing sales or purchases involving inter State elements which would avoid the doubts and difficulties arising out of the imposition of sales tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution."

(see *United Motors* case (supra), p. 1081).

The object of Article 286 (1) read with the Explanation, and Article 286 (2) was thus to avoid multiple taxation which considerably hampered and discouraged free trade, as also to reduce the burden on the consumer as multiple taxation raised the prices unduly.

15. The method adopted by the Constitution, however, gave rise to considerable doubts and difficulties. By sub-clause (a) of clause (1) of Article 286 it took away the right of a State to tax sales or purchases taking place outside its territory, and by the Explanation appended to that clause it created a legal fiction by deeming an inter-State sale under certain circumstances prescribed in the Explanation to be an "inside sale". In the *United Motors* case, the purpose of the Explanation was stated to be:

"Clause (1) (a) prohibits the taxation of all sales or purchases which take place outside the State, but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as an agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. How, then, is it to be determined whether a particular sale or purchase took place within or outside the State ? It is difficult to say that any one of the ingredients mentioned above is more essential to a sale or purchase than the others. To solve the difficulty an easily applicable test for determining what is an outside sale had to be

formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption there in is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. Why an "outside" sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factor's in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test. 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. Multiple taxation of the same transaction by different States is also thus avoided."

(pages 1081-1082).

16. The State of the law after the decision in the United Motors case was:

(1) (a) The State Legislature was free to tax "inside sales" by virtue of the powers conferred on it by Article 246 (3) read with entry 54 of List 11 in the Seventh Schedule of the Constitution, so that all sales or purchases of which all essential ingredients were completed within a State could be taxed by it.

(b) The State Legislature was also free to tax all "fictional inside sales" which did not partake of the inter-State element.

(2) All sales of which all the essential ingredients took place outside the State and which for that reason were "outside sales" could not be taxed by it.

(3) All inter-State sales which were fictionally "inside sales" by virtue of the Explanation could be taxed by the State of delivery where goods had been actually delivered for consumption as a result of such sale, notwithstanding the fact that they were inter-State sales to which the bar created by Article 286 (2) of the constitution would have applied.

(4) All residuary inter-State sales not covered by the Explanation could yet be taxed by the States on the theory of territorial nexus, provided the bar under Article 286 (2) was removed.

17. Then came the Bengal Immunity case, where by a majority decision, the interpretation (the one detailed in paragraph 16 (3) above) put by the Supreme Court on the Explanation in its earlier majority decision was set aside. Das Ag. C. J, giving the judgment for the majority in the case (Bengal Immunity case), said:

"Legal fictions are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what outside sale referred to in sub-cl.

(a) On a careful and anxious consideration of the matter in the light of the

arguments advanced and discussion held on the present occasion we are definitely of the opinion that the Explanation in cl. (1) (a) cannot be legitimately extended to cl. (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of cl (2). Indeed, in *State of Bombay Vs. United Motors (India) Ltd.* (supra) at pp. 1083-1084 and again at p. 1086 the majority judgment also accepted the position that the Explanation was not an exception or proviso either to cl. (1) (a) or to Cl. (2). It, therefore, the Explanation cannot be read into cl. (2) because of the express language of the Explanation and also because of the difference in the subject-matter of the operative provisions of the two clauses, then it must follow that, except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or do not fall within the Explanation."

(pages 646-647).

18. Reaffirming the law on the point, the majority judgment of the Supreme Court in *Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others*, at pp 492-493 said:

"So far as Article 286 (1) (a) is concerned, the Explanation determines by the legal fiction created therein the situs of the sale in the case of transactions coming within that category and when a transaction is thus determined to be inside a particular State it necessarily becomes a transaction outside all other States. The only relevant enquiry for the purposes of Article 286 (1) (a), therefore, is whether a transaction is outside the State and once it is determined by the application of the Explanation that it is outside the State it follows as a matter of course that the State with reference to which the transaction can thus be predicted to be outside it can never tax the transaction. This ban is effective independently of the fact that the transaction may also have taken place in the course of inter-State trade or commerce or with reference to goods as have been declared by Parliament by law to be essential for the life of the community. The ban imposed under Article 286 (2) is an independent and separate one and looks at the transactions entirely from the point of view of their having taken place in the course of inter-State trade or commerce. Even if such transactions may also fall within the category of transactions covered by Article 286 (1) (a) and the Explanation thereto or Article 286 (3), the moment Article 286 (2) is attracted by reason of the transactions being in the course of inter-State trade or commerce, the ban under Article 286 (2) operates and such transactions can never be subjected to tax at the instance of a State Legislature except in so far as Parliament by law may otherwise provide or such power of taxation is saved by the President's order contemplated in the proviso. The ban under Article 286 (2) may be saved by the President's order but that does not affect or lift the ban under Article 286 (1) (a) read with the Explanation."

19. The position, therefore, now is that "fictional inside sales" are not touched.

But, where the sales or purchases partake of the nature of inter State, sales, some sales only would be covered by the Explanation, and these being inside sales for the State of delivery would be outside sales for all other States. Being outside sales for the other States, they could not be taxed by them. As regards the State of delivery also, it could not tax these fictional inside sales because of the limitations contained in Article 286 (2) of the Constitution. With regard to sales which are not inside sales for any State because they do not satisfy all the requirements to bring the fiction into operation, the taxing State would be free to tax them on the basis of territorial nexus provided the bar created by sub-clause (2) of Article 286 was removed. This appears to be clear from the observations of Das, Ag. C. J. at pp. 642-643 (Bengal Immunity Case, *supra*) where the existence of such residuary sales was clearly envisaged, though the answer to the question which may then arise was left open:

"The criticism that has been levelled against this strict view of the Explanation is that it will not entirely eliminate the claims of the States to tax sales or purchases on the basis of the nexus theory. Suppose, it is said, Parliament lifts the ban placed on inter-State trade or commerce by clause (2), all States will, in that situation, claim the right to tax sales or purchases if any one of the ingredients or events making up the sale is to be found to exist or to have happened in that State. It has been suggested in reply to this criticism that this apprehension is not at all well founded. 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 taken 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 of 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), "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 (2) 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 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 these questions. It is not for the Courts to advise Parliament in advance as to the scope of its legislative competency under clause (2) and, therefore, we only note these questions and leave them here."

20. The legal position which now emerges may be represented thus:-

Inside sales; (i) Real:-All the essential ingredients took place within the State
The State Legislature can validly tax them,

(ii) Fictional: Where all the essential ingredients took place outside the State, but actual delivery of goods for consumption as a direct result of such sale took place within the taxing State and the sale did not involve inter-State element, the State Legislature was competent to tax such a sale.

Outside sales: (i) Real: All the essential ingredients took place outside the State.
The State Legislature cannot validly tax them.

(ii) Fictional: Those sales which are not inter-State but are yet fictional inside sales for any State, shall automatically become outside sales" for all other States, and consequently untaxable by them.

Inter-State Sales:-

(a) Fictional inside sales: Certain inter-State sales in which "actual delivery" as a direct result of such sales for consumption there in takes place inside a State are deemed to be "inside sales" for the State of delivery, and consequently they become outside sales for all other States. Such sales can be taxed by the State of delivery when the bar under clause (2) of Article 286 of the Constitution is removed.

(b) Fictional outside sales: when an interstate sale becomes a fictional inside sale for the State of delivery, it, at the same time, becomes an outside sale for all other States and cannot be taxed by those States ever, because of the bar created by Article 286 (1) (a) read with the Explanation, apart from the bar under clause (2) thereof.

(c) Residuary sales:- When a sale does not satisfy all the requirements of a fictional inside sale-there comes into existence no fictional inside sale for the State of delivery with the added consequence that such a sale can also not be an outside sale for the exporting State- Such sales shall be taxable by that State which has sufficient territorial nexus with the goods to be taxed on the nexus theory, provided the bar under Article 286(2) is removed.

21. We may, at this Stage, also consider the inter-State sales with reference to the three periods in which they may conveniently be divided for the purposes of our decision:-

(1) Pre-Constitution Period:-Prior to the inauguration of the Constitution on 26-1-1950.

(2) Post Constitution period:- (1) The date of the inauguration of the Constitution, i. e, 26-1-1950

to

the date of the operation of the President's Sales Tax Continuance Order, 1950 i. e., 31-3-1951.

(ii) Period covered by section 2 of the Sales Tax Laws Validation Ordinance and Sales Tax Laws Validation Act (Act VII of 1956), i. e., 1-4-1951 to 6-9-1955.

22. Pre-Constitution Period.-For this period, the validity of a sales tax law was judged on the nexus theory, so that the State which had sufficient territorial nexus with the goods to be taxed could validly tax their sales by operating on one or more of its essential ingredients. As observed by P. Sastri C. J. in the United Motors Case:

"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." (P. 1078).

23. Post- Constitution Period (i): The President promulgated an Order called the Sales Tax Continuance Order, 1950. It provided 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 the Constitution of India shall, until the thirty-first 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 Constitution of India. The ban under Article 286 (2) was thus unconditionally lifted, provided the tax was lawfully being levied immediately before the commencement of the Constitution. The result, therefore, was that, if a transaction was fictional inside sale for the State of delivery, it could not be taxed by the exporting State at all, because it became an outside sale vis a vis that State and therefore came under the ban imposed by Article 286 (1)(a) of the Constitution. But, if it was not a fictional inside sale for any State, then the

ban created by Article 286 (1) (a) never came into operation; and as the ban under Article 286 (2) had been removed by the aforesaid Order, there was no impediment in the way of the exporting State to validly tax such sales on the principle of territorial nexus.

24. Post-Constitution Period (ii); The President promulgated an ordinance, the Sales Tax Laws Validation Ordinance (No. III of 1956) on 30 th January 1956. It was later replaced by an Act, the Sales Tax Laws Validation Act (No. VII of 1956), which came into force on 21st March 1956. Section 2 of this Act provided as follows:-

"Notwithstanding any judgment, decree or order of any Court, no law of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951, and the 6th day of September 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce; and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law."

In *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, the said Act was held to be intra vires. It was further held that it was not bad because it was retrospective in operation. The effect of this Act was to lift the ban imposed on the States against taxing inter-State sales. The result, therefore, was that legal position continued to be the same as before for the period ending on 6th September 1955.

25. We shall now consider the requirements which bring the fiction under the Explanation into operation. These conditions are:

- (1) Goods must be actually delivered within that State.
- (2) Such actual delivery must be as a direct result of a sale or purchase.
- (3) It must further be for the purpose of consumption in that State.

26. "Actual delivery" in the context in which the expression is used in the Explanation can only mean, "factual or real delivery of the physical goods in species as opposed to national or constructive delivery". Such delivery can thus take place only at the moment when the buyer or his authorised agent comes into actual physical possession of the goods: [see also *C. Govindarajulu Naidu and Co. Vs. State of Madras and Another*,]. Delivery of possession by transferring documents of title in respect of the goods sold is thus not "actual delivery" nor is delivery to a common carrier, who is presumed to be the buyer's agent for taking delivery, an "actual delivery" to the buyer, because if we peruse Section 39 of the Sale of Goods Act, it will be found that delivery to a carrier is only deemed to be a delivery to the buyer, i. e., it is not actual delivery but for certain purposes may be fictionally treated to be equivalent to an actual delivery.

But, where the Constitution requires "actual delivery", we cannot be permitted to resort to legal fictions for the purpose of including in its ambit "fictional delivery". The second condition requires the actual delivery to be in pursuance of a sale or purchase sought to be taxed. Actual delivery for any other purpose would not do. Consequently, stocking of one's goods at a place or mere transporting it there for the purpose of an eventual sale would not be covered by the Explanation. The third condition is that the actual delivery of the goods which must be in pursuance of a sale or purchase sought to be taxed, must also be for the purpose of consumption of the goods actually delivered within the State.

27. "Consumption" has not been defined in the Constitution. The dictionary meaning of the word "consumption" is:

Oxford Dictionary, Vol. IV p 888:

"1. The action or fact of consuming or destroying; destruction.

* * * *

5. The using of material, the use of anything as food, or for the support of any process.

7. Pol. Econ. The destructive employment or utilization of the products of industry."

Webster's International Dictionary p. 483:

"1. Act or process of consuming; state of being consumed; waste, decay; destruction.

* * *

3. Economics.- The use of (economic) goods resulting in the diminution or destruction of their utilities:- opposed to production. Consumption may consist in the active use of goods in such a manner as to accomplish their direct and immediate destruction, as in eating food, wearing clothes, or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery.

Generally, it may be said that consumption means using things, and production means adapting them for use."

28. According to Bose J. in the United Motors Case (Supra, p. 1107):

"In its economic sense (consumption) is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for preservation in a national museum does not destroy it nor does he use it himself except for the purposes of

presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and therefore "consumes" them even though he does not keep them himself."

In economics, it is the end of economic activity in the life cycle of goods which began with their production. Economic activity of goods is divided into three states: production, distribution and consumption. Consumption is the stage where the goods find their ultimate use as such goods. "Consumption" would thus have a varying concept according to the nature of the goods and according to different economic use to which it is capable of being put. It would be difficult to give any accurate or precise definition of the term, which may be of universal application, though possibly it would not be so difficult to arrive at the conclusion whether a particular use of the goods actually delivered was for the purpose of its consumption or not. The Supreme Court has pointed out in the *United Motors Case* that the actual delivery of the goods to the purchaser need not be for the purpose of consumption by himself. All that the Explanation required was that the actual delivery spoken of must be for the purpose of consumption in that State, i. e., it must be intended for ultimate consumption in the State of delivery. "It is to be noted that the Explanation does not say that the consumption should be by the purchaser himself. Nor do the words "as a direct result" have reference to consumption. They qualify actual "delivery". The expression "for the purpose of consumption" in that State must in our opinion be understood as having reference not merely to the individual importer or "purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transaction." (page 1084, *United Motors Case*).

29. Having given our opinion on the legal position as it obtains today, we shall now examine the various contentions of the learned counsel for the petitioners. In some of the petitions the Sales Tax Laws Validation Act (No. VII of 1956) was challenged as ultra vires on various grounds, but the point was not pressed before us, in view of the fact that that Act has been declared to be intra vires by the Supreme Court in *Sundararamior & Co. vs. State of Madras* (supra)

30. It has then contended that sub-section (6) of section 4 of the Madhya Pradesh Sales Tax Act was void as it violated Article 301 of the Constitution in so far as it attempted to impose a tax on the purchase of goods made in the State of Madhya Pradesh when the articles manufactured from these goods were sold outside the State of Madhya Pradesh. That sub-section reads as follows:-

"Where any goods are purchased by a registered dealer as being intended for resale by him by actual delivery in Madhya Pradesh for the purpose of consumption in that State, or as being goods specified in such dealer's certificate of registration as intended for use by him as raw materials in the manufacture of

any goods for sale by actual delivery in Madhya Pradesh for the purpose of consumption in that State and such goods are utilised by him for any other purpose, the price paid by him for such goods shall be included in his turnover and be liable to tax in accordance with the provisions of this Act."

31. The purpose of the sub-section is obvious. The scheme underlying the Act being one of single point taxation, it had excepted transactions between registered dealers, where the required declaration was given. The effect was that a sale was taxed at some point, so that the State did not lose its legitimate revenue from the tax on sales or purchases and the price of the goods at which it was ultimately sold to the consumers was not unnecessarily burdened with sales tax collected twice. We see nothing in this provision which could be said to offend Article 301 of the Constitution. The said Article guarantees freedom of trade, commerce and intercourse throughout the territory of India, so that no legislation can directly or indirectly obstruct, interfere with or discourage intra-State or inter-State trade or commerce as such, subject to the other provisions contained in part XIII of the Constitution, and non-discriminatory general taxation, including tax on sale and purchase of goods is not prohibited. We see nothing in the scheme of the sub-section which can be construed as curtailing the freedom of trade, commerce or intercourse guaranteed under Article 301 of the Constitution.

32. It was also faintly contended in this connection that when some goods were purchased by a registered dealer for the purpose of using them in manufacturing some other goods and then the goods so manufactured out of the goods purchased by registered dealer were sold for consumption outside the State (making them fictional inside sales for the State of delivery), the State was not competent to levy sales tax on their purchases. There appears to be some confusion in this line of reasoning. The latter transaction of sale of manufactured goods was both an outside sale as well as a sale in the course of inter-State trade or commerce, and could not consequently be taxed by the State. But, the earlier transaction of purchase was certainly liable to sale or purchase tax. The circumstance that the goods were used by the registered dealer for manufacture is immaterial. The sale in his favour was complete and had attracted the incidence of taxation, but for the declaration that he "intended to use the goods purchased for use by him as raw material in the manufacture of any goods for sale by actual delivery in Madhya Pradesh for the purpose of consumption". The "registered dealer" thus got an exemption on those sales or purchases because of the declaration which he gave and which, if carried out, would have resulted in the tax being collected on the latter sales which in term of the declaration would have been inside sales and consequently liable to tax. The scheme of the sub-section thus appears to be to prevent the evasion of the single point taxation from becoming a scheme for no point taxation for the purposes of the Sales Tax Act. We see nothing in this contention and it was correctly not pressed seriously.

33. The learned counsel for some of the petitioners Shri A. P. Sen also contended

that Explanation (II) to Section 2 (g) of the Act, which was operative for the post-Constitution period was void and inoperative as it was in conflict with Article 286 of the Constitution.

34. In order to understand the legal position, it is necessary to state a few facts. Originally, as the section stood, there was appended an explanation (II) to Section 2 (g) of the Act (hereinafter called the first Explanation (II)), which defined "sale" for the purposes of the Act. It reads as follows:-

" "sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge; and the word "purchase" shall be construed accordingly".

On 11th April 1949, the Explanation (II) was amended by the Madhya Pradesh Act No. XVI of 1949. It was challenged as ultra vires, and in AIR 1952 378 (Nagpur) , it was held to be so, as, in the first place, it offended against Section 107 of the Government of India Act because the consent of the Governor-General had not been obtained for the amendment, and, secondly, because sales tax could be collected only by the State where the goods were actually delivered for consumption and not where the goods were produced, for, in the latter case, the tax lost its character as a tax on sales but became a tax on goods, i. e., of the nature of an excise tax. In *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, , the Supreme Court upheld this decision. The result, therefore, was that the second or amended Explanation (II) to Section 2 (g) of the Act was obliterated from the statute book, bringing into operation the original or the first Explanation (II).

35. This first Explanation (II) was based on the nexus theory and its constitutional validity could not be challenged for the pre-constitution period. For the post-constitution period, however, a question arises whether and how far its validity is affected by some of the provisions in the Constitution.

36. After the coming into force of the Constitution, the "nexus theory" had to give way to the extent to which the Constitution provided otherwise. These provisions are contained in Article 286 of the Constitution, and to the extent to which they are applicable in any given case the provisions of the Act would stand modified.

37. In our opinion, two results would follow. The first is, that in so far as the absolute fetters created by the Constitution are concerned (such as non-taxability of "outside sales" and sales in the course of import into or export out of the territory of India etc.), the provisions of the Act would be construed as never having been made applicable to them and would in consequence be inoperative to that extent in their application. The second is that as regards conditional fetters, if and when such fetters are removed, the provisions of the Act, which would have remained dormant till then, would at once revive and

become applicable to the sales within their sphere of application.

38. It is, however, contended that unconstitutional legislation must be held completely void unless it was severable. In our opinion, that is not an absolute rule. It is well established that there is a presumption in favour of the constitutionality of every statute. See *Narsingdas Tanskhadas vs. Choge Mul* ILR 1939 (2) Cal. 93. It is equally well established that a legislature does not intend to exceed its jurisdiction and that general words in a statute are to be construed with reference to powers of the legislature which creates it. [Maxwell on Interpretation of Statutes, 10th Edn. p. 144, 155, *In re- AIR 1941 72 (Federal Court) Colouhoun vs. Hiddon* (1890) 25 QBD 135.

39. The Federal Court *In re Hindu Women's Rights to Property Act* (supra), p. 76) stated that this law applies to all law-making bodies with limited powers and cited with approval the following passage from *Callman vs. Mills* (1897) 1 QB 396 at p. 399:-

Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law: that if it violates these principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law."

40. *Brougham, A. C., in Langsten vs. Langsten* (1934) 2 CI. & F. at p. 243, said:

"There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense.....) that you should rather lean towards that construction which preserves, than towards that which destroys. *Uttres magis valeat quam pereat* is a rule of common law and common sense."

41. We would, therefore, be justified in confining the wide definition of "sale" in the definition of the Act to the subject-matter within the legal competence of the legislature enacting it so that its amplitude would be cut down by the provisions of the Constitution, wheresoever and whenever applicable.

42. The matter may be considered from another point of view also. The first Explanation (II) occurs in the definition section of the Act, which is headed with the expression: "In this Act unless there is anything repugnant in the subject or context, the words therein defined shall have these meanings assigned to them". The definition by itself neither creates rights nor imposes liabilities. The liability is created by the charging section and the connotation of the word "sale" occurring therein has to be understood in the sense suggested by the definition provided the circumstances warrant it.

43 In *Queen vs. Justices of Cambridge shire* (1838) 7 Ad. & E. 480 at p. 491 : 112 E. H. 551 at p. 555, Lord Benman C. J. said:

"... we apprehend that an interpretation clause is not to receive so rigid a

construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should."

The same principle is thus stated by Craies on "Statute Law".

"Another important rule with regard to the effect of interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended."

The definition section, therefore, ought not to be used in such a way as to defeat or enable the defeating of the purpose of the Act. In the instant case, the definition section attempts to fix a situs to the sale for the purpose of taxing it. So long as there was no limitation to the legislative competency on the ground of extra-territoriality or otherwise, the nexus theory could be used in the widest possible way. But, once the Constitution created fetters on the taxability of sales covered by the Constitution, the amplitude of taxable sales was at once reduced. The "sale" howsoever defined became taxable only to the extent the Constitution permitted. Howsoever comprehensive the definition of "sale" may have been, it could not be used for defining "sale" in the charging section under all the circumstances. All it meant was that where the circumstances permitted it, the word "sale" could be understood in the widest sense in which it had been so defined. In this view of the case, the definition section, being merely a key to the interpretation of the charging section, could not be declared ultra vires and wholly void, simply because there may arise cases, or circumstances when interpreting the charging section, where it would not be permissible to understand the expression "sale" in its widest connotation, as defined in the definition section.

44. It is also a sound rule of statutory construction that where a provision in an Act is ultra vires but is severable from the rest of the Act, the whole Act does not necessarily become void. The test laid down for severability by Lord Simon in *A. G. of Alberta vs. A.G. of Canada* A. I. R. 1948 P. C. 194 at P. 199 is: -

"...whether, what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair, review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all,"

45. In American decisions severability has been held to include separability in enforcement also. Adverting to the topic Cooley in his well known treatise on "Constitutional Limitations". 8th Edition, Vol. I, pp. 366-367, says: -

"A legislative act may be entirely valid as to some classes of cases, and clearly void as to others: (Tiernan vs. Rinker. 102 U. S. 123: 26 L. Ed. 103.). A State statute which interferes with interstate commerce, while invalid in so far as it does so, may be valid in its application to intrastate commerce: (Ratherman vs. Western Union Telegraph Co., 127 U. S. 411, 32 L. Ed. 229). In response to a question whether a single tax, assessed by a State upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment was wholly valid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, the Supreme Court of the United States unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid Ratherman vs. Western Union Telegraph Co (supra) and other cases the latest being Bowman vs. Continental Oil Co. 256 U. S. 642: 65 L. Ed 1139. In any such case the unconstitutional law must operate as far as it can: (State vs Philips 70 Fla. 340.) and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids: (State vs. Philips (supra) If there are any exceptions to this rule, they must be cases only where it is evident from a contemplation of the Statute and of the purpose to be accomplished by it, that it would not have been passed at all except as an entirety, and that the general purpose of the Legislature will be defeated if it shall be held valid as to some cases and void as to others (United States vs. Reese 92 U S 214, 23 L Ed 563)

46. The aforesaid principle has been accepted by the Supreme Court in the United Motors Case, where P. Sastri C J., delivering the judgment of the majority, said at P. 1097

"In the present case the tax is imposed, in ultimate analysis on receipts from individual sales or purchases of goods effected during the accounting period, and it is therefore possible to separate at the assessment the receipts derived from exempted sales or purchases and allow the State to enforce the statute with respect to the constitutionally taxable subject it being assumed that the State intends naturally to keep what it could lawfully tax, even where it purports to authorise the taxation of what is constitutionally exempt.

* * *

It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country."

47. Agreeing with the majority judgment on the point, Bhagwati J. at page 1128 said:-

"...taxation Statutes should be construed in a manner so as to allow the statute itself to stand, the taxing authority being prevented by injunction from imposing

the tax on subjects excluded by the Constitution from the purview of taxation by the State."

The aforesaid principle has been reaffirmed in the Bengal Immunity Case (See judgment of Das Ag. C. J., pp. 667-668).

48. It is not contended that the first Explanation (II) would not have been enacted except in its present form, nor that the legislative purpose would be defeated if it is held valid as to some cases and void as to others. In fact, the Explanation was later amended to exclude cases covered by Article 286 of the Constitution, though such an amendment was more a matter of form than of substance because, even without such an express exception, the provision could not have been made applicable to cases to which constitutional prohibition applied. Further, in view of the principles laid down in the Federal Court decision, we are entitled to read the general words in the Act as being limited in their application to the cases and circumstances permitted by the Constitution. In the result, we are of opinion that the first Explanation (II) even for the post-constitution period is not wholly bad, though any application of it in violation of the Constitution would be void and inoperative. We may, however, give a declaration in terms of the declaration in the United Motors Case that the respondents are hereby restrained from imposing, or authorising the imposition of, a tax on sales and purchases which are exempted from taxation by Article 286 of the Constitution.

49. The last contention of the petitioners is that the respondents. Sales Tax Authorities, should affirmatively establish the assessee's liability to the tax and not call upon the assessee to prove circumstances which could entitle them to the exemption. Reliance is placed on the decision of the Federal Court reported in In the matter of the Central Provinces and Berar Sales of AIR 1939 1 (Federal Court) but on a careful reading of the aforesaid decision, we are of opinion that no such principle emerges from that case which was principally concerned with the vires of the C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act (No. XIV of 1938). On the other hand, u/s 106 of the Indian Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The scheme of the Act is also in consonance with the aforesaid principle Sales Tax assessment is dependent on the satisfaction of the Commissioner based on the material placed before him by the dealer at his own instance or at the instance of the Commissioner; and in cases where the Commissioner is unable to make a proper assessment on the basis of such material or where the required material is not furnished as required by the Act, he is permitted to assess the dealer to the best of his judgment. Consequently, if a dealer does not want a best judgment assessment, or claims exemption under one or the other of the clauses of the Act or the Constitution, he must place all the relevant facts before the Sales Tax Authorities to enable them to determine if any exemption from liability can validly be claimed by him. It appears that, presumably acting on this principle, the Madras High Court in Indian Leaf

Tobacco Development Co. Ltd. vs. State of Madras 1955 NUC (Mad) 1562 42 held:

"Where a party pleads that a sale was covered by Explanation to cl. (1) (a) of Article 286 of the Constitution and that hence the State of which the goods were sent would not be competent to tax the sale the burden of proof is on such a party to prove the facts necessary to bring the case within the Explanation, namely that the goods were delivered in another State as a direct result of the sale and that the goods were meant for consumption in such State. In the absence of such proof the exemption under cl. (1) (a) read with the Explanation could not be claimed and the sale would be taxable by virtue of the President's Order under proviso to Cl. (2)."

Similarly, in *Tungbhadra Industries Ltd. Kurnool vs. The Commercial Tax Officer* (1955) 6 S. T. C. 259 and *Indian Steel and Wire Products Ltd. Vs. Superintendent of Commercial Taxes and Others*, the burden was rightly placed on the assessee to establish circumstances which brought his case within the exemption. See also *Batchu Subba Rao vs. Commercial Tax Officer* (1959) 10 S T. C. 394 where it was held by the Andhra High Court that onus lies on the person claiming exemption under any general or special provision of the Constitution or of the Act.

50. We shall now examine the facts of each case to ascertain if and how far interference was necessary or desirable at this stage. We have to bear in mind that these are writ petitions under Article 226 of the Constitution in cases arising out of the Sales Tax Act. The Act itself has provided elaborate machinery for correcting any error in the assessment of which the assessee may feel aggrieved. It is a settled rule of law that a petitioner, who comes to invoke the aid of the extraordinary and special remedy provided by the Constitution, should first have exhausted all his remedies under the general law. Article 226 of the Constitution is not to be resorted to as a short cut to the ordinary procedure provided by the general law, and strong and weighty reasons must be forthcoming before the petitioner could successfully invoke the aid of this Court in its extraordinary jurisdiction.

51. There is a further difficulty also. Under the Sales Tax Act, the various sales tax authorities have been designated, who have been empowered to ascertain facts for the purpose of deciding whether a particular "sale or purchase" of goods is liable to tax or not. In the scheme of the Act, the material on which such facts are to be determined has to be furnished by the assessee himself. No responsibility is cast on the Sales Tax Officers to furnish any evidence themselves. On the other hand, in the absence of any reliable material being furnished by the assessee, or in the event of the Sales Tax Officer being unable to make a proper assessment on the basis of the material furnished to him, the Sales Tax Officer is empowered to assess him to the best of his judgment. So it would be against the scheme of the Sales Tax Act to determine facts by affidavit evidence in this Court for the purpose of deciding the cases. Nor can the facts found by the first assessment orders be taken as conclusive especially as appeals

against these orders have been filed and are pending for decision

52. The Supreme Court has, however, made an exception in cases where the Act or provisions of it under which the tax was being levied are ultra vires or unconstitutional, because in these cases, unless the High Court intervened, the tax would be collected without the authority of law (by law we mean good and valid law), and in conceivable cases where the Act also prescribed penalties for the contravention of its provisions, the penalties, being under an invalid Act, would constitute an illegal restriction on the fundamental, constitutional and other rights of a citizen, which could not be permitted. In respect of such cases only, the Supreme Court repelling the contention that remedies under the impugned Act (which was challenged as ultra vires) were adequate, alternative remedies which disentitled the petitioners in these cases for invoking the aid of Article 226 of the Constitution said Das Ag. C. J in the Bengal Immunity Case: -

"The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself "ultra vires" and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is "ultra vires" the powers of the legislature which enacted it and as such void and prays for appropriate relief under Article 226."

53. The aforesaid principle is not available in these cases because no provision of the Act could be successfully challenged as ultra vires. The only challenge which in fact could now be pressed is that the assessments were not in accordance with the Act, as interpreted by the Supreme Court in its various rulings on the point. The grievance is thus not against the Act but against its incorrect interpretation or application. This, in our opinion, is certainly the function of the hierarchy of the Courts and Tribunals functioning under the Act.

54. Miscellaneous Petition No. 412 of 1956: The assessment in this case is for the period, 11th August 1951 to 31st July 1952. The Assistant Commissioner of Sales Tax has already made an assessment in this case on 15th April 1956. His order is Exh. A. Exh. B is the notice of demand, dated 18th May 1956 issued by him. The petitioner has filed an appeal against the aforesaid order of assessment to the Deputy Commissioner of Sales Tax and the same is pending for hearing and decision.

55. The petitioner is a registered company with its head-office at Bombay, which carries on the business of manufacturing and selling cement. The Cement Marketing Company of India (Private) Ltd. is their Sales Manager with a registered office at Bombay and branch offices in Madhya Pradesh. During the relevant period (11-8-1951 to 31-7-1952), amongst others, it affected the following three types of transactions:-

"(a) Supply of cement made from the petitioners" factory at Banmor situate in the State of Madhya Bharat to purchasers in the State of Madhya Pradesh.

(b) Supply of cement made from the Petitioners' factory at Kymore in the State of Madhya Pradesh to purchasers outside the State of Madhya Pradesh in response to orders received through CMI's office at Nagpur in the State of Madhya Pradesh, and

(c) supply of cement made from the petitioners' factory at Kymore in the State of Madhya Pradesh to purchasers outside the State of Madhya Pradesh in response to orders received through C.M.I.'s office situated outside the State of Madhya Pradesh i. e. through its office at Bombay, Madras, Calcutta, Delhi and Cawnpore."

56. The petitioner alleged (1) that according to the terms of the contract, delivery of cement was made to the purchaser free on rails at the works siding of the petitioner's factory, (2) that the railway receipt was made out in the name of the purchaser, and (3) that the goods were at the risk of the purchaser from the time delivery was made by the petitioner's factory to the carrier and the railway receipt obtained for the goods.

57. The petitioner claims that all the three transactions were exempted because of the limitation contained in Article 286 of the Constitution and that the assessment order (Exh. A) wrongly assessed it to tax. The grounds on which the exemption is claimed are:-

(1) That they were all inter-State sales and therefore not liable to tax;

(2) that the Sales Tax Laws Validation Act, 1956, was ultra vires, and consequently the constitutional bar-to tax inter-State sales operated; and.

(3) that none of the sales were such in which actual delivery for consumption was made in Madhya Pradesh as a direct result of the sale sought to be taxed, and consequently the sales in question could not be taxed as "functional inside-sales".

58. The Sales Tax Laws Validation Act has been held to be intra vires by the Supreme Court, and the other questions raised cannot be decided unless and until the facts are fully investigated. We have already shown that the only clear cases of exemption are: outside sales -- real and fictional- and inter-State sales in cases where the fiction operates, because the ban under Article 286 (2) was not operative during the period in question in the petition. On the material on record it cannot definitely be said that the sales in question were not taxable in any event. It has also to be remembered that the assessment order is a composite assessment and it would not be permissible for us to decide some of the questions raised therein which could be more appropriately decided in the proceedings under the Act.

59. We also consider that the circumstances of the case do not justify an interference under Article 226 of the Constitution, especially when alternative adequate remedy is available under the Act and which in fact is being pursued.

60. This petition, therefore, fails and is dismissed with costs. Counsel's fee Rs. 100/-.

61. Miscellaneous Petition No. 20 of 1957: The assessment period in this case is 1st April 1952 to 31st March 1953, and 1st April 1953 to 31st March 1954. The assessment orders were passed on 16th August 1956, and the notices of demand were dated 7th September 1956. In those cases also appeals from the assessments are pending.

62. The questions raised are similar to those raised in Miscellaneous Petition No. 412 of 1956, and for the reasons stated therein, this petition is also dismissed with costs. Counsel's fee Rs. 100/-.

63. Letters Patent Appeal No. 55 of 1958:-The period of assessment in this case is 1st April 1950 to 31st March 1951, and the order of assessment was passed on 25th July 1955, against which an appeal is pending.

64. The petitioner is a Textile Mill situated at Burhanpur. It is also a registered dealer in Madhya Pradesh under the Act. Inter alia, it entered into the following contracts for the sale of goods:-

(1) Sales, for the purpose of export out of India, to persons in Bombay, who are licensees from the Government of India for the purpose of the export. The sales to them were of two kinds:

(i) f. o. r. Bombay, and,

(ii) mill delivery.

(2) Sales to merchants in other States for the purpose of consumption in those States.

65. The petitioner contends:

(1) Its sales to Bombay merchants were covered by Article 286 (1) (b) of the Constitution.

(2) In any event, they were inter-State sales and consequently exempted under Article 286 (2) of the Constitution.

(3) The sales in question were outside sales and therefore not taxable.

66. The Supreme Court in State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, explaining the connotation of the phrase "in the course of import into or export out of" occurring in Article 286(1) (b), said:-

"What is exempted under the clause is the sale or purchase of goods in the course of the goods into or export of the goods out of the territory of India. It is obvious that the words "import into" or "export out of" in this context do not mean the article or commodity imported or exported.

* * *

The words "export out of and "import into" mean the exportation out of the country and importation into the country respectively. The word "course" etymologically denotes movement from one point to another and the expression "in the course of" not only implies a period of time during which the movement is in progress but also postulates a connected relation.

* * *

A sale in the course of export out of the country should be understood in the context of Cl. (1) (b) as meaning not only during the activities directed to the end of exportation out of the country but also as part of or connected with such activities. The time factor is not determinative.

* * *

(But) a purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot.....be regarded as an act done "in the course of export of the goods out of the territory of India", any more than the other two activities can be so regarded.

* * *

It is not correct to speak of a purchase for export as an activity so integrated with the exportation that the former could be regarded as done "in the course of" the latter."

67. It has been explained in *State of Travancore-Cochin and Others Vs. The Bombay Co. Ltd.*, at p. 1118:-

"a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land and sea."

Consequently, only the sales which themselves occasion the export, the exempt and not penultimate sales which had been effected with the ultimate purpose of exporting the goods so purchased.

68. It will thus have to be determined on the facts as finally ascertained by the sales tax authorities, whether the sales themselves occasioned the export or whether they were penultimate sales. This cannot possibly be done at this stage. Similarly, the other question raised would require an ascertainment of facts, first, before the legal position could be determined.

69. It may be that the reliance by the Assistant Commissioner of Sales Tax on the decision of this Court in *Chhotabhai Kharsondas and Co. vs. The State of M. P.* Misc. Petition No. 132 of 1954, dated 18-10-1954, was erroneous in view of the decision in *Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others*, and the *Bengal Immunity Case* (supra), when considering the sales to dealers outside that State, but this fact alone does not solve the problem. Facts

will have to be investigated finally before the application of Article 286 (1) (a) to those facts could be considered. As rightly pointed out by the learned single Judge:-

"the question still remains whether on the facts of the case, these sales fall within the express terms of the Explanation to the Article."

70. We are, therefore, of opinion that the petition is premature and it would not be permissible to interfere with the order of assessment before the facts have been finally determined by the Sales Tax Authorities.

71. This appeal, therefore, fails and is dismissed with costs. Counsel's fee Rs. 100.

72. Misc. Petition No. 268 of 1957.-The period of assessment in this petition is 22nd October 1949 to 9th November 1950, and the order of assessment is dated 30th August 1957. In this case also, an appeal had been filed to the Deputy Commissioner of Sales Tax against the order of assessment.

73. The petitioners are a firm of Bidi manufacturers at Jabalpur, who are also a "registered dealer" under the Act.

74. The assessment in question comprises two periods, pre-Constitution, i. e., 22nd October 1949 to 25th January 1950, and post-Constitution i e., 26th January 1950 to 9th November 1950. For the former, i. e. for the pre-Constitution period, the contention is that there were no "sales", but only despatches to its branches at Hardoi and other places in Utter Pradesh in order to replenish stocks in these offices in furtherance of stock reports received from there periodically and that consequently Explanation (II) to section 2 (g) of the Act had no application.

75. The assessment thus depends on questions of fact which are all disputed, and unless the facts are determined finally, we cannot say that there were no sales within the meaning of Explanation (II) to section 2(g) of the Act as contended.

76. For the post-Constitution period, the contention is twofold. The first is similar to the one advanced for the pre-Constitution period viz., that there were, under the circumstances alleged in the case, no "sales" to attract the provisions of the Act. The second is that, in any case, the transactions of sale sought to be taxed were inter-State transactions covered by the Explanation to Article 286 (1) (a) of the Constitution, so that they were all "outside" sales for Madhya Pradesh.

77. The contention is partly based on a misconception. We have explained above that for the relevant period, the fetters created by Article 286 (2) were not operative. Consequently, the petitioner could claim exemption only if it proved that the sales in question were "fictional outside sales". For the fiction to operate, all the conditions laid down in the Explanation must first be satisfied. Then only the sales would be inside sales for the State of delivery; and unless

they were "fictional inside sales" for the States of delivery, they would not be "outside" sales covered by Article 286 (1) (a) read with the Explanation for the State of Madhya Pradesh. It is not enough that the "delivery and consumption" took place outside Madhya Pradesh. It must be shown that "actual delivery for consumption as a direct result of such sale took place in the State of delivery. In the event of the sales in question not being proved to be "fictional inside sales" for the State of Uttar Pradesh, the sales would be liable to tax by the State of Madhya Pradesh on the basis of the relevant provisions of the Act based on the "nexus theory".

78. In the result this again is not a case in which we would be justified in interfering at this stage before the facts are finally determined, and before the assessee has exhausted all his remedies under the Act.

79. The petition fails and is dismissed with costs. Counsel's fee Rs. 100/-.

80. Misc. Petition No. 235 of 1957: This petition raises questions similar to those raised in Misc. Petition No. 268 of 1957 and covers the same period viz., 22nd October 1949 to 9th November 1950, partly pre-Constitution and partly post Constitution. In this case also, an appeal filed against the assessment order, dated 31st August 1957, is pending for decision.

81. For the reasons given in Miscellaneous Petition No. 268 of 1957 and in view of the law enunciated above, this petition also fails and is dismissed with costs. Counsel's fee Rs. 100/-.

82. Misc, Petition No. 102 of 1957: The petitioners are a firm carrying on the business of manufacturing and selling bidis with head-office at Jabalpur. The period of assessment is 22nd October 1949 to 9th November 1950 i. e. partly pre-Constitution and partly post-Constitution.

83. The Assistant Commissioner of Sales Tax, before whom the assessment proceedings are pending (after remand, as the earlier order of assessment, dated 31st March 1955, was set aside by the Deputy Commissioner of sales Tax with a direction that a fresh assessment be made after giving the petitioner reasonable opportunity to put up facts and adduce necessary evidence has by his order, dated 1st May 1957, (Annexure III) directed the petitioner "to furnish proof of consumption in the State of first delivery". We see nothing wrong in this direction, as the petitioner is claiming exemption under Article 286 (1) (a) read with the Explanation on the ground that the Sales in question are "fictional outside sales" for the State of Madhya Pradesh. This it cannot establish unless it proves that the sales in question were "fictional inside sales" for the State of delivery, for which proof of consumption in the State of delivery is one of the essential ingredients.

84. All other questions raised do not, at the moment, arise, nor were they seriously pressed. At any rate, there is no substance in them in view of the legal position enunciated above.

85. The petition fails and is dismissed with costs. Counsel fee Rs. 100.