
(1979) 04 CAL CK 0020

In the Calcutta High Court

Case No : Matters No's. 668 of 1975 and 88 to 92 of 1976

Cementation Patel

APPELLANT

Vs

Commissioner of Commercial Taxes

RESPONDENT

Date of Decision : 17-04-1979

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1979) 04 CAL CK 0020

Hon'ble Judges : Dipak Kumar Sen, J;C.K. Banerji, J

Bench : Division Bench

Advocate : R.N. Bajoria, Ajit Sengupta and Dilip Dhar, for the Appellant; Arun Prokash Chatterjee, Amal Datta, Sanjay Bhattacharyya, S.N. Saraf and A.B. Chatterjee, for the Respondent

Judgement

Dipak Kumar Sen, J.—This reference arises out of levy of sales tax on Cementation Patel (Durgapur), Burdwan, in the accounting periods being the four quarters ending respectively on 31st March, 1958, 31st March, 1959, and 31st March, 1960.

2. Cementation Patel (Durgapur), the applicant, carrying on business as a contractor was at the material time registered as a dealer under the Bengal Finance (Sales Tax) Act, 1941. It was contended by the applicant in the various assessments to sales tax before different Commercial Tax Officers, inter alia, that it was not exigible to sales tax because its transactions consisted only of transfer of materials to its member-contractors and its own sub-contractors in connection with one particular work, namely, the construction of a steel plant at Durgapur. It was contended that such transactions were not sales and, in any event, the same had not been entered into in the course of any transaction of sale. The Commercial Tax Officers noted that payments received by the applicant in the said work during the relevant period had been excluded in computing its turnover. But they held that none the less the transactions between the applicant and its member-contractors and sub-contractors amounted to taxable sales

inasmuch as the activities of the applicant therein amounted to a business of selling goods. It was noted that the goods which had been made over to member-contractors and the sub-contractors had been duly purchased by the applicant and that the transfers thereof were treated as sales and the entries in the books of the applicant in respect thereof were recorded as sales. It was noted further that such transactions which were large in number were effected systematically, fairly and regularly over a considerable period. It was also found that the applicant had disposed of its surplus, used and worked out stores, equipment and materials during the relevant period. These were also held to be taxable sales. Accordingly, the turnover of such taxable sales were computed by the Commercial Tax Officers on the basis of the applicant's books and tax was levied accordingly.

3. Being aggrieved by the aforesaid levies the applicant preferred appeals to the Assistant Commissioner of Commercial Taxes, Asansol Circle. The said appeals were consolidated and disposed of together. It was submitted in the appeals that the applicant came into existence by an agreement between Cementation Co. Ltd., a company incorporated in England, and Patel Engineering Co. Ltd., a company incorporated in India, for the sole and exclusive purpose of executing a part of the parent contract between a consortium of contractors with the Government of India for construction of a steel works at Durgapur. This joint venture was carried on under the name and style of Cementation Patel (Durgapur). The applicant did not carry on any other business. It was submitted further that in the course of execution of the said work certain materials had been made available by the applicant to its sub-contractors and other member-contractors with a view to assist them in carrying out the construction. Clause 8 of the specifications of, the parent contract provided, inter alia, as follows :

(a) All site work materials supplied pursuant to the contract would become the property of the Government on delivery to the site ;

(b) the contractors would remove from the site any site work materials when they would no longer be required for the purpose of site work without causing any damage to the site and property in such materials would revert in the contractors on such removal.

4. On the strength of this clause it was submitted that there was no transfer of property in goods when they were made over by the applicant to its sub-contractors and/or to fellow contractors at the site and, in any event, the applicant was not competent to sell any of such materials at the work site. It was further contended that the materials were procured on licence issued in favour of the Durgapur Steel Project for the exclusive purpose of being utilised at the site and could not be disposed of in any other way and that such materials were not acquired by the applicant with the object of selling them.

5. The Assistant Commissioner, however, found that though there was a general bar in the contract against sale of such materials as also against assignment and

sub-letting of the contract, the applicant had in fact assigned works and materials to others, and that such materials, if removed from the work site, could become the property of the contractor. It was noted that in respect of the goods and materials made over by the applicant to its sub-contractors and member-contractors credits had been raised under the head "sundry debtors" aggregating to a considerable sum. It was also noted that there had been actual sales of plant, machinery, motor vehicles, air-conditioners, refrigerators, office equipments, survey equipments and laboratory equipments for money by the applicant. The Assistant Commissioner accordingly held that the transactions in question had been rightly held to be sales and he rejected the appeals.

6. The applicant, being aggrieved, preferred revisions u/s 20(3) of the Bengal Finance (Sales Tax) Act, 1941, against the order of the Assistant Commissioner, Commercial Taxes. The Additional Commissioner, the revisional authority, went further into facts and found, inter alia, as follows:

(a) A contract had been entered into by and between the Government of India, Ministry of Iron & Steel, and the Indian Steel Works Construction Co. Ltd., a consortium, also known as "Iscon" for the construction of Durgapur Steel Works.

(b) The consortium in turn had distributed amongst its member-concerns stipulated portions of the work contracted for and had entered into separate agreements with its members for the purpose of execution of the respective portions of the work.

(c) Cementation Co. Ltd. was one of the members of the consortium and was accordingly under a contractual obligation to fulfil its part of the said agreement.

(d) For the purpose of carrying out the portion of the work assigned to it, Cementation Co. Ltd. entered into an agreement with another concern named Patel Engineering Co. Ltd. whereby the applicant was constituted.

(e) In order to carry out the part of the work allotted to Cementation Co. Ltd. the applicant had engaged a number of sub-contractors and had entered into separate contracts with them.

(f) In the course of implementation of the portions of the works, the subcontractors had been provided on occasions with materials as and when required for the work.

(g) For the convenience of all, materials issued to the consortium as also to its members had also been made available between them, inter se, as and when required.

7. The Additional Commissioner noted the findings of the Commercial Tax Officer that the materials obtained by the applicant had been recorded as purchases and when supplied to other members of the consortium or its subcontractors, including supplies which were not capable of being used in the construction, were shown as sales. Transactions were credited at enhanced prices in some cases and

were effected systematically, fairly and regularly for a considerable period.

8. Before the Additional Commissioner it was contended on behalf of the applicant that the items in question which had been charged to sales tax could be broadly classified under the following heads :

(a) Materials placed by the applicant at the disposal of its sub-contractors ;

(b) Materials placed by the applicant at the disposal of other members of the consortium ; and

(c) Sales of scrap and surplus materials.

9. It was contended further that the agreements between the applicant and its sub-contractors provided for rates for the respective portions of works assigned to the latter which were inclusive of the cost of materials. In respect of certain basic materials like iron, steel and cement the applicant was required to arrange for the supply of the materials to the sub-contractors and did so on the basis of requisitions or indents submitted by the sub-contractors from time to time. The accounts of the sub-contractors were debited at the basic rates of the materials where such basic rates were available or at cost price. In certain cases extra amounts were charged by way of handling charges and storage. The subcontractors in their turn charged the applicant in respect of the works done at the agreed rates including the cost of the materials and in respect of the materials consumed at the works which were placed at the disposal of the subcontractors. The bills of the sub-contractors were accordingly adjusted and only the net amount was paid. The debits which were thus raised in its books did not represent any amount payable by the applicant to its sub-contractors and the amounts of credit were similarly not price or valuable consideration for the sale of the materials to the sub-contractors. The materials were only placed at the disposal of the sub-contractors for the purpose of the work.

10. It was reiterated that under clause 8 of Part I of the contract, referred to hereinbefore, the property in the materials brought to the site vested in the Government of India on delivery to the site and till the same were removed by the contractors from the site the property therein did not revest in the contractor. Accordingly, it was contended that no materials at the site could be sold by the applicant. It was submitted further that the various basic materials like iron, steel and cement which were controlled items at the relevant time were not and could not be sold at all.

11. In respect of supply of materials by the applicant to the other members of the consortium it was contended that the position was the same as in the case of supply of materials to the sub-contractors. The property in the materials delivered at the site being vested in the Government in terms of the contract all along there could be no question of sale of such materials by the applicant to the other members. The applicant and the other members of the consortium were jointly engaged in completing the work and for convenience of all and for smooth

and expeditious execution such disposal of materials was made from one to the other as and when they became necessary and there was no question of any profit being made out of such supplies.

12. In respect of sale of scrap and surplus materials it was contended that the primary business of the applicant was to carry out the construction of Durgapur Steel Works and it was not the business of the applicant to sell scrap, surplus or other goods. It was therefore contended that the applicant could not be regarded as a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941, in respect of such sales.

13. The Additional Commissioner of Commercial Taxes held that the applicant was working in collaboration with the other members of the consortium and its sub-contractors and each of them was entitled to its dues in respect of the portions of the works entrusted to them in terms of the contract. He held further that when goods were transferred by a member of the consortium to others and debits were raised thereon the property in the goods transferred did not remain with the person supplying the same and passed to the members who received them and there was no reason why such transactions could not be held to be sales within the meaning of the Act. In the same way, when the materials were issued by a member to its sub-contractors a sale was effected. He further found that when the materials were purchased by the members of the consortium or the sub-contractors for money, the materials belonged to the actual purchasers absolutely and that the title thereto remained with the purchaser and not with the Government of India, in spite of the fact that such materials were meant for being used in the contract and not for delivery on sale. He held that the provision in the contract to the effect that all materials supplied at the site would become the property of the Government on delivery did not by itself create any proprietary right in favour of the Government of India in respect of such materials and the relevant clause simply indicated that the materials purchased should be utilised only for the project and not for any other purpose. The restriction over the disposal of the materials was meant for the smooth and uninterrupted implementation of the work.

14. The Additional Commissioner also found that the applicant as also the other members of the consortium had supplied a wide variety of materials not capable of being used in the construction systematically, fairly and regularly over a considerable period to the co-members of the consortium and also to other subcontractors. Accordingly, he held that the contention of the applicant that the primary purpose of the members of the consortium was construction of a steel plant was wholly irrelevant. He found that the applicant was undoubtedly a dealer and the necessity of disposal of its surplus materials was a part of its business and it effected sales of such materials as a dealer selling goods in the course of its business. The fact that the applicant had no profit-motive in the aforesaid transactions was not considered to be relevant as it was not necessary either to pinpoint a profit-motive in respect of each and every transaction of a

dealer or to ascertain whether a particular transaction resulted in profit or loss. It was sufficient if the main activity carried on was business with a profit-motive, The Additional Commissioner accordingly confirmed the order of the Assistant Commissioner and rejected the revision petition.

15. The applicant being aggrieved by the order of the Additional Commissioner of Commercial Taxes, West Bengal, preferred a revision petition against the same before the Board of Revenue, West Bengal. The contentions of the applicant before the Additional Commissioner were reiterated before the Additional Member, Board of Revenue. The sales tax authorities contended on the other hand that the main contracting parties, viz., the consortium and the Government of India, not being parties to the proceedings, the contract between the Government of India and the consortium could not be looked into. In the alternative, it was contended that the contract between the Government of India and the consortium, being clearly divided into parts, was, *ex facie*, a divisible contract and that as the applicant had charged the other members of the consortium and its contractors for storage and incidental charges and supplied the materials to them at enhanced rates without any fixed percentage above their cost price the applicant could not claim that such materials have been supplied in the course of its business as constructing contractors.

16. The Additional Member, Board of Revenue, held that the contract between the consortium and the Government of India was a divisible one as it was, *ex facie*, divided into several parts. He noted further that neither the Government of India nor the consortium being parties to the proceedings before him the contract between them was of little relevance and that the applicant could not take advantage of the same and that the contracts between the applicant and its sub-contractors being different from that between the consortium and the Government of India did not affect each other.

17. He next considered the meaning and construction of the expression "business" from reported decisions and the dictionary as also of the expressions "profit" and "convenience" and came to the conclusion that the petitioner carrying on its business as a contractor was definitely profit-oriented and in its dealings with its sub-contractors the concept of profit was involved. Under the relevant contracts the applicant was entitled to charge prices to such subcontractors to be fixed by the former. Such terms were variable and provided for escalation. He also noted that supply of materials by the applicant to its subcontractors and the other members of the consortium were made with the object of timely completion of the work and also to ensure the stipulated quality and quantity of work, which were valuable considerations for such supplies and the applicant must be held to be carrying on a business with the object of earning profit in the course of which the materials were transferred for smooth and expeditious completion of the work. He concluded that by such transfers and supplies the domain over the materials passed from the applicant to the other parties and the transactions amounted to sales. The Additional Member,

accordingly, held as follows :

- (a) The supplies effected by the applicant in the said transactions were systematic and regular and for valuable consideration.
- (b) That the supply of materials by the applicant to the other members of the consortium were similar as those to the sub-contractors.
- (c) That the applicant having functioned in a role other than that of a contractor could be said to have acted as a dealer within the meaning of the Act.
- (d) The applicant was a dealer also in respect of sale of surplus and scrap materials.
- (e) The applicant had effected sales within the meaning of the Act and was liable to pay sales tax on all the aforesaid transactions.

18. The revision petition of the applicant was rejected by the Additional Member, Board of Revenue.

19. On an application u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941, the West Bengal Commercial Taxes Tribunal drew up a statement of the case and sent up to this Court the following questions for the opinion of this Court as questions of law arising out of its order :

- (1) Whether or not transfers of goods by the applicant-company to other companies of the same consortium against payment of price constituted sales within the meaning of the Indian Sale of Goods Act and the Bengal Finance (Sales Tax) Act, 1941 ?
- (2) Whether or not sales of unserviceable goods, scraps, discarded and surplus materials were exigible to tax under the Bengal Finance (Sales Tax) Act, 1941, in view of the incorporation of the definition of "business" by an Ordinance promulgated in 1967 (since repealed and saved by West Bengal Act 25 of 1969) the retrospective operation of which was struck down by the Calcutta High Court in the case of Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others, ?

20. Not being satisfied with the aforesaid questions the applicant made several applications to this Court u/s 21(2) of the Bengal Finance (Sales Tax) Act, 1941, pursuant where to this Court directed the Tribunal to refer the following further questions of law for the opinion of this Court :

- (1) Whether, on the facts and in the circumstances of the case, the Board was right in holding that the applicant was a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941 ?
- (2) Whether, on the facts and in the circumstances of the case, there was any material before the Board to hold that the applicant was a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941?
- (3) Whether, on the facts and in the circumstances of the case and on the

construction of the agreement entered into between the President of India and the Indian Steel Works Construction Company Limited on 31st October, 1956, the Board was right in holding that the said contract was a divisible contract ?

(4) Whether, on the facts and in the circumstances of the case, the Board was justified in not considering the said contract dated 31st October, 1956, between the President of India and the Indian Steel Works Construction Company Limited and the submission made relating thereto while considering the question whether the applicant could be treated as a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941 ?

(5) Whether, on the facts and in the circumstances of the case, the Board was right in holding that the said contract dated 31st October, 1956, between the President of India and the Indian Steel Works Construction Company Limited was not relevant for the issues involved in the revision cases ?

(6) Whether, on the facts and in the circumstances of the case and on the construction of the agreement entered into by the applicant with its sub-contractors and on consideration of the documents filed with the letter dated 6th March, 1972, addressed to the Commercial Tax Officer, the Board was justified in holding that the applicant carried on the business of selling goods to its subcontractors ?

(7) Whether, on the facts and in the circumstances of the case and on the construction of the agreement entered into by the applicant with its sub-contractors, the Board could hold that there was any sale of materials simpliciter involved in the said transaction ?

(8) Whether, on the facts and in the circumstances of the case, there was any material before the Board to hold that the supply of the materials to the sub-contractors or to the member-contractors or the disposal of the surplus materials were made with a profit-motive ?

(9) Whether, on the facts and in the circumstances of the case, there was any material before the Board for its finding that the applicant had been functioning in a role other than that of a contractor and could have very well acted as a dealer within the meaning of the Bengal Finance (Sales Tax) Act, 1941, by supplying materials to its sub-contractors or member-contractors or by selling the scrap and surplus goods ?

(10) Whether there was any material before the Board to come to the conclusion that the supply of the materials to sub-contractors or the sale of the surplus or scrap materials was done systematically ?

(11) Whether, on the facts and in the circumstances of the case, there was any material before the Board to hold that the supply of the materials to the member-contractors amounted to carrying on the business of selling goods within the meaning of the Bengal Finance (Sales Tax) Act, 1941 ?

(12) Whether, on the facts and in the circumstances of the case, there was any material before the Board to hold that the sale of scrap or surplus materials by the applicant amounted to carrying on the business of selling goods within the meaning of the Bengal Finance (Sales Tax) Act, 1941 ?

21. At the hearing Mr. R.N. Bajoria, the learned Advocate for the applicant, submitted at the outset that he was not pressing for answers to the questions which had been sent up by the Tribunal u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941. He stated that the applicant had not asked the said questions to be referred and, in any event, the said questions were so framed that the answers thereto were self-evident.

22. Mr. Sanjay Bhattacharyya, the learned counsel for the sales tax authorities, submitted that he could not invite the court to answer the questions which were not being pressed by the applicant. In that view of the matter we decline to answer the questions sent up by the Tribunal u/s 21(1) of the Act.

23. In respect of the questions referred u/s 21(2) of the Act, Mr. Bajoria contended that so far as the transfers or supplies of materials by the applicant to the other members of the consortium and the sub-contractors were concerned by no stretch of imagination the same could be held to be sales either under the Indian Sale of Goods Act or within the meaning of the Bengal Finance (Sales Tax) Act, 1941. There could not be any sale without a transfer of property in the goods sold from the seller to the buyer. In the instant case, the property in the goods at all material times remained vested in the Government and as such the materials could not be sold by the applicant. The fact was that the materials received at the work site by the applicant, as also by the other members of the consortium, had to be accounted for in their books as having been received and similarly when such materials were made over to sub-contractors or other members of the consortium corresponding entries were made in the books to show the location of the material and their value. These had to be done for adjustment and accounting and were not meant to be nor could be sales. The object of the transfer was that the materials would be used for construction. The property in such materials remained with the Government at the time when they were made over and when the same were used up or consumed in the work the property therein still remained with the Government.

24. As regards the sale of scrap and surplus, Mr. Bajoria submitted that the question was covered by a decision of this Court in Davy and United Engineering Co. Ltd. Vs. Commissioner of Commercial Taxes, . The applicant in that case, also a member of the same consortium, had been engaged in transactions identical to those of the applicant in the instant case. On a reference it was held by this Bench that as the applicant was not carrying on business as a dealer of rejected and unserviceable goods, scrap and discarded materials, such sales were not exigible to sales tax. The wider definition of the expression "business" as introduced retrospectively in the Bengal Finance (Sales Tax) Act, 1941, was held to be not applicable inasmuch as the retrospective operation of the said definition

had been struck down by this Court in the case of *Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others*, . This decision was subsequently approved in appeal in *Bengal Paper Mill Co. Ltd. and Another Vs. Commercial Tax Officer and Others*, . Under the law, as it stood at the material time, isolated sales of scrap and other unserviceable items were held not to be a business within the meaning of the said expression in the statute.

25. Mr. Sanjay Bhattacharyya, the learned Advocate for the sales tax authorities, did not dispute that this aspect of the matter was covered by the said decision of this Court in *Davy and United Engineering Co. Ltd. Vs. Commissioner of Commercial Taxes*,

26. Mr. Bajoria contended further that even if the extended definition of the expression "business" was held to apply, in the facts and circumstances of the instant case, the applicant could still not be held to be a dealer or a person carrying on the business of selling in respect of the said transactions. He referred to Section 2 of the Bengal Finance (Sales Tax) Act, 1941, which provided as follows :

Section 2. In this Act, unless there is anything repugnant in the subject or context,-

(1a) "business" includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern ; and

(ii) any transaction in connection with, or ancillary or incidental to, such trade, commerce, manufacture, adventure or concern ;

* * * * (c) "dealer" means any person who carries on the business of selling goods in West Bengal and includes the Government;

* * * * (g) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

27. Mr. Bajoria submitted that even under the extended definition of "business" before a transaction could be made exigible to sales tax it had to be established that the said transaction took place in the course of a business of selling goods. An isolated transaction might be exigible to sales tax if it could be shown that it was in connection with or ancillary or incidental to a trade, commerce or manufacture or adventure or concern relating to the business of selling goods. He submitted that in the facts of the instant case it was established beyond doubt that the applicant was carrying on the business not of selling goods but

that of a contractor engaged in construction. This business was not the business of selling goods and the transactions of sale of scrap and other unserviceable materials could not therefore be held to be transactions in connection with or ancillary or incidental to a business of selling goods and as such were not exigible to sales tax and the person involved in such transactions could not be a dealer within the meaning of the statute. In support of his contentions Mr. Bajoria cited several decisions which are considered hereafter.

(a) Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer, .The facts in this case were that the said corporation had been constituted under the Road Transport Corporation Act, 1950, with the object of providing or securing or promoting an efficient, adequate, economical and properly co-ordinated system of road transport service in the State of Andhra Pradesh. In the course of its activities the corporation periodically disposed of by public auction or by inviting tenders scrap vehicles, old tyres, old containers and other unserviceable materials which accumulated in its hands. The State sales tax authorities sought to levy sales tax on such transactions and their decision was challenged under an application under Article 226 of the Constitution.

28. The expression "business" in the relevant Act was defined, inter alia, as follows :

Section 2. (bbb) "business" includes,-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom ; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

29. Construing the aforesaid and following the Supreme Court in the State of Gujarat Vs. Raipur Manufacturing Company Ltd., , the Andhra Pradesh High Court held that the corporation had been primarily constituted for operating an efficient road transport service and could not be held to be carrying on the business of selling discarded vehicles and scrap accumulating in the course of its activities. It was contended by the sales tax authorities that the sales of the aforesaid by the corporation were transactions in connection with or incidental or ancillary to its trade, commerce, manufacture, adventure or concern within the meaning of the statute and therefore should be included in the taxable turnover. The High Court held that the incidental or ancillary transactions referred to in the definition had to be in connection with the main trade or commerce or adventure carried on and the same should also partake of the nature of trade, commerce, manufacture, adventure or concern in order to bring the incidental or ancillary transactions within the definition. It was held accordingly that the corporation could not be held to be a "dealer" carrying on business in old or scrapped

vehicles and other scrap and was therefore not liable to be assessed to sales tax.

(b) State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, -The facts in this case were that the Burmah Shell Oil Storage and Distributing Co. of India Ltd. carried on business in storage and sale of oil, in the course of which it had to supply tea and edibles to its workmen in its canteen run under the. Factories Act. It also supplied at cost or subsidised price advertisement materials such as calendars, purses and key chains to its agents and sold as scrap unserviceable oil drums, rubber hoses, jerry cans, rims, unserviceable pipe fittings and old furniture periodically. Section 2(d) of the Madras General Sales Tax Act, 1939, as it stood in 1964, provided as follows :

Section 2. (d) "business" includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern ; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

30. The question arose whether under the said Act the assessee was liable to pay sales tax in respect of the transactions as aforesaid in advertisement materials, canteen sales and sale of scrap. The Supreme Court in its judgment considered the case of Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer, and approved of the same. The Supreme Court noted that in that case the corporation concerned was primarily constituted to provide an efficient, adequate, economical and properly co-ordinated system of road transport service and could not be held to be a "dealer" carrying on the business in old and scrapped vehicles and other scrap. In the facts before the Supreme Court it was held that the sale of spoiled drums, hose pipes, etc., were items connected with the business of the company and that the very nature of the said scrap prima facie indicated that they were the items used in the trade of the company. It was held that the sales of such goods as scrap were transactions connected with the company's trade or commerce and that the sales of advertisement materials by the assessee at cost or subsidised price were also similarly connected with such trade. The sales in the canteen at cost price of food materials to the workers of the company were also held to constitute sales as such transactions were part of the same business or trade of the company.

(c) Chief Commercial Superintendent, South Eastern Railway Vs. Member, Board of Revenue, .-The facts in this case were that the South Eastern Railway periodically disposed of unclaimed goods in its possession for money. The Commercial Tax Officer found that disposal of unclaimed goods being a regular feature of the railway the transactions therein were exigible to sales tax. On a revision the Assistant Commissioner of Commercial Taxes upheld the order of the

Commercial Tax Officer holding that the Government was included within the meaning of the expression "dealer" u/s 2(c) of the Bengal Finance (Sales Tax) Act as amended in 1950. A further revision before the Additional Commissioner was unsuccessful as also a final revision before the Board of Revenue, West Bengal. The question which was referred to this Court was ".whether the railway in effecting sales of unclaimed and uncollected goods under , -the Railways Act was a "dealer" within the meaning of the Act. Construing the relevant sections of the Act as they stood at the relevant time and taking into account the extended definition of the expression "business" in the statute a Division Bench of this Court, following the decision of the Supreme Court in the case of State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, as also the decision in Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer, , held that to be a "dealer" under the amended definition a person must be found to be carrying on a trade, commerce or manufacture or adventure or concern in the nature of trade, commerce or manufacture involving sale of goods. In the absence of such a finding an isolated or incidental transaction ancillary to any other trade, commerce or manufacture or concern carried on by an assessee would not make the person a "dealer" under the extended definition. It was held that the activities of railway carried on under the Railways Act did not amount to carrying on business of selling goods in West Bengal. Disposing of uncollected and unclaimed goods were incidents of their operation of the railway which was their main function and not of any business of selling goods. It was accordingly held that the railway was not liable to pay sales tax in respect of the said transactions and that carrying on of such transactions did not make the railway a "dealer" within the meaning of the Act.

31. Mr. Bajoria also drew our attention to a subsequent decision of the Supreme Court in The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, . In this case the Supreme Court was concerned with the Rajasthan Sales Tax Act, 1954. Section 2(f) of that Act was as follows :

"Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration and includes-

(i) the Central or a State Government or any of their departments, a local authority, a company, an undivided Hindu family....

32. Section 2 of the Act as amended in 1965 read as follows :

"Business" includes-

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade,

commerce, manufacture, adventure or concern ; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern....

33. In the facts of that case, the Northern Railways were held by the Supreme Court to be liable to pay sales tax on sales of unserviceable materials and scrap. The contention that the railway was not carrying on any business of buying and selling and therefore the sales of unserviceable materials and scrap-iron, etc., would not be a transaction in connection with or incidental or ancillary to any such trade, commerce, manufacture, adventure or concern was negated by the Supreme Court and it was held that the activity of the appellant in selling unserviceable materials and scrap-iron, etc., though not a business in the normal sense, would still be business within the meaning of the definition of the Act as extended by the amendment as such business would include any trade, commerce) or manufacture whether it resulted in any profit or not and even if it was; carried on without any profit-motive. It was held that the railway being concerned with the activity of transportation was engaged in commerce within the meaning of the definition and sales of unserviceable materials and scrap-iron were connected with such commerce and therefore were exigible to sales tax.

34. Mr. Bajoria submitted that in this case the Supreme Court had not taken into account its earlier decision in *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another*, as also the other decisions of the High Court on this point. This case was thus directly contrary to the decision in *Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer*, which had been approved by the Supreme Court earlier. He invited us to follow the earlier decision of the Supreme Court which was of a larger Bench and in this connection he cited an unreported judgment of the Supreme Court in Civil Appeal No. 212 of 1975 entitled *Union of India (UOI) and Another Vs. K.S. Subramanian*, for the following observations :

We do not think that the difficulty before the High Court could be resolved by it by following what it considered to be the view of a Division Bench of this court in two cases and by merely quoting the views expressed by larger Benches of this court and then observing that these were insufficient for deciding the point before the High Court. It is true that, in each of the cases cited before the High Court, observations of this court occur in a context different from that of the case before us. But, we do not think that the High Court acted correctly in skirting the views expressed by larger Benches of this court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger Benches of this court in preference to those expressed by smaller Benches of the court. That is the practice followed by this court itself. The practice has now crystallized into a rule of law declared by this court. If, however, the High Court was of opinion that the views expressed by larger Benches of this court were not applicable to the facts of the instant case it should have said so giving reasons supporting its points of view.

35. He also cited another decision of the Supreme Court in *Mattulal Vs. Radhe Lal*, for the following observations :

Now there can be no doubt that these observations made in *Smt. Kamla Soni's* case AIR 1969 N.S.C. 186 (Civil Appeal No. 2150 of 1966 dated 26th September, 1969) are plainly in contradiction of what was said by this court earlier in *Sarvate T. B.'s* case 1966 M.P.L.J. 26. It is obvious that the decision in *Sarvate T. B.'s* case 1966 M.P.L.J. 26 was not brought to the notice of this court while deciding *Smt. Kamla Soni's* case AIR 1969 N.S.C. 186. (Civil Appeal No. 2150 of 1966 dated 26th September, 1969) or else this court would not have landed itself in such patent contradiction. But whatever be the reason, it cannot be gainsaid that it is not possible to reconcile the observations in these two decisions. That being so, we must prefer to follow the decision in *Sarvate T. B.'s* case 1966 M.P.L.J. 26 as against the decision in *Smt. Kamla Soni's* case AIR 1969 N.S.C. 186, as the former is a decision of a larger Bench than the latter. Moreover, on principle, the view taken in *Sarvate T. B.'s* case 1966 M.P.L.J. 26 commends itself to us and we think that is the right view.

36. Mr. Bajoria lastly cited a subsequent decision of the Supreme Court in *The State of U.P. Vs. Ram Chandra Trivedi*, , where the Supreme Court quoted with approval the aforesaid observations from the unreported judgment in *Union of India (UOI) and Another Vs. K.S. Subramanian*, (Civil Appeal No. 212 of 1975).

37. Mr. Sanjay Bhattacharyya, the learned counsel for the sales tax authorities, contended in reply that the conclusions of the Additional Member, Board of Revenue, should not be disturbed in a reference. The applicant was registered as a dealer and had been held to be a dealer and, therefore, irrespective of any other consideration, any transaction in the nature of sale effected by it and entered in its books of account should be made exigible to sales tax. He submitted further that it had been found as a fact that the books of the applicant contained entries recording transactions of sale. In the proceeding the applicant also filed statements showing sales. It was also found as a fact that the applicant had received valuable consideration in respect of the aforesaid transactions. These findings of fact along with the surrounding circumstances which were duly taken note of by the authorities led to a conclusion that the applicant sold goods to the members of the consortium as also to its sub-contractors in the regular course of its business, the conclusion of the authorities that the appellant was a dealer was therefore correct.

38. Mr. Bhattacharyya further contended that the facts and circumstances also showed that the parties have acted in contravention of or contrary to the contract between the members of the consortium and the Government and such finding not having been challenged as perverse must be held to be conclusive. He finally submitted that the transfers by way of sales were made regularly and in the usual course under contracts between the applicant and its sub-contractors and without construing each and every contract by the court it would not be possible to resolve the controversy.

39. In support of his contentions Mr. Bhattacharyya cited various decisions which are discussed hereafter.

(a) C.B. Gosain Vs. State of Orissa, .-The facts in this case were that the appellant had entered into a contract with Hindustan Steel Private Ltd. for manufacture and supply of bricks at Rourkela in Orissa. The appellant objected to the levy of sales tax for supply of bricks under the contract on the ground that the earth from which the bricks were made belonged to the purchaser and therefore the bricks fashioned out of such earth all along remained the property of the consumer and, therefore, there was no transfer of property when the bricks were manufactured and supplied. It was contended further that the contract was only for labour or for work done. The Supreme Court held that under the contract the earth had been supplied by the purchaser to the assessee and there was a transfer of property in the said material from the consumer to the producer. It was held further that after the earth was fashioned into bricks and supplied by the manufacturer to the consumer there was again a transfer of property in the said material from the assessee to the purchaser and therefore the transaction was a sale exigible to sales tax. The essence of the contract was the delivery of the finished product and it was a contract for transfer of chattels.

(b) T.V. Sundram Iyengar and Sons Vs. The State of Madras, .-In this case the assessee constructed bus bodies and fitted them to the chassis provided by customers. The Supreme Court held following its earlier decision in the case of Patnaik and Company Vs. State of Orissa, , that the property in the materials used in constructing the bodies did not pass to the customers during the course of construction, but when the complete bus with the body fitted to the chassis was delivered to the customer, property in the bus bodies passed and this constituted a sale exigible to sales tax.

(c) Union of India (UOI) Vs. The Central India Machinery Manufacturing Company Ltd. and Others, - In this case the Supreme Court laid down that the question whether a contract was one for sale of goods or for executing a work or rendering a service was largely one of fact dependent upon the terms of the contract, including the nature of the obligations to be discharged thereunder and the surrounding circumstances.

(d) State of Tamil Nadu v. The Hindu [1978] 41 S.T.C. 105 (KAR).-In this case the applicant, publisher of a newspaper, had procured some newsprint for a particular publication, which was ultimately not published and the surplus newsprint was disposed of. It was also found that the applicant sold old newspapers, print waste and cut waste. It was held by the Madras High Court that all such Sales were exigible to sales tax.

40. The contention on behalf of the sales tax authorities that the applicant having been registered as a dealer it must ipso facto be held that all its transactions are exigible to sales tax, does not impress us. None of the authorities below proceeded on such basis nor was this argument advanced at

any stage. The applicant no doubt was registered as a dealer but the applicant was registered not as a seller of goods but as a contractor. This fact was specifically urged in the application before the Board of Revenue, West Bengal, while initiating this reference u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941. We hold that the fact that the applicant was registered as a dealer has no effect on the questions to be decided in the instant cases.

41. As to the transactions of the applicant with the other members of the consortium and its sub-contractors, it does not appear to us that the finding of the authorities below that the said transactions were sales concludes the question. The contention that the finding being entirely one of fact which not having been challenged stands concluded appears to us to be one oversimplifying the position. Whether a particular transaction amounts to a transaction of sale or not in our view is a mixed question of fact and law, the ultimate conclusion being always one of law.

42. It is not disputed that the applicant, as a member of the consortium, was party to a contract with the Government of India under which the applicant and the other members of the consortium were obliged to carry out the construction of the steel works at Durgapur. The transactions between the applicants on the one hand and the other members of the consortium and/or its sub-contractors on the other were pursuant to the original contract. It is clearly laid down in the contract that the materials brought at the work site would remain the property of the Government of India and would be used only for construction at the site. The property in such goods would only revert if the Government directed them to be cleared from the site.

43. It has not been found that this clause was not binding on the applicant or its sub-contractors. In any event, in law, the property in such materials all along remained with the Government of India and whatever be the nature of the transactions involved the same could not be transactions of sale between the applicant on the one hand and the other members of the consortium or the subcontractors on the other as the applicant could not transfer the property therein. The entries in the books on which much reliance was placed on behalf of the sales tax authorities in our view also cannot alter the position in law. The entries made in the books of account in respect of the materials made over by the applicant to others were either erroneous or were made for the limited purpose of final adjustment and fixing of the final rates for works done under the subcontracts. It is nobody's case that for the materials made over by the applicant to the other members of the consortium or to the sub-contractors, the applicant would be entitled to claim the price thereof as on a sale. It has been found on the other hand that the debits made in the books were confined to the basic rates and the handling and storage charges. This finding, in our opinion, supports the case of the applicant that the transactions were not sales for profit. In any event, there is no finding that there was any agreement of sale between the applicant and the other members of the consortium or the sub-contractors

prior to or in connection with such transfers.

44. Such transactions not being transactions of sale in any view of the matter the applicant could not be subjected to sales tax in respect thereof.

45. We next come to the transactions relating to the sale of scrap, unserviceable and surplus materials by the applicant. We accept the contention of the applicant that, this aspect of the controversy is covered by the earlier decision of this Court in *Davy and United Engineering Co. Ltd. Vs. Commissioner of Commercial Taxes*, and in respect of these transactions the applicant cannot be held to be carrying on a business of sale of such goods.

46. Mr. Bajoria, however, invited us to go further and decide the question whether the extended definition of the expression "business" would apply, even otherwise, in the facts and circumstances as the decision in *Davy and United Engineering Co. Ltd. Vs. Commissioner of Commercial Taxes*, was based on the decisions in *Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others*, and *Bengal Paper Mill Co. Ltd. and Another Vs. Commercial Tax Officer and Others*, from which appeals were pending before the Supreme Court.

47. We have carefully considered the High Court decisions in *Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer, , and Chief Commercial Superintendent, South Eastern Railway Vs. Member, Board of Revenue, , and the decision of the Supreme Court in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another*, The principles which have been laid down in the said cases appear to us to be as follows :

(a) Even under the extended definition of the expression "business" it is to be determined by the sales tax authorities whether in carrying on isolated transactions the person sought to be charged to sales tax is carrying on business as a dealer, i.e., the business in selling the items concerned. If this is found to be so then sales tax would be exigible in respect of the items sold or dealt with in the said transactions.

(b) If the main business of the person concerned is such that he cannot be held to be a "dealer" within the meaning of the sales tax statutes in respect of such business then the transactions connected with or ancillary to such business though in the nature of sale will not make the person concerned a "dealer".

48. The Supreme Court (sic) applied the above proposition and held in *Andhra Pradesh State Road Transport Corporation Vs. The Commercial Tax Officer, , that a corporation primarily constituted to provide an efficient, adequate and economical transport service was not a "dealer" carrying on the business of selling scrap and old vehicles. Similarly in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, , the Supreme Court held that the assessee, an oil company, primarily carrying on a trade, commerce or business of selling goods and the sales of scrap, advertisement materials and*

subsidised food were all connected with the main business or trading activity of the company. In the same judgment the Supreme Court noted that in the case of State of Gujarat Vs. Raipur Manufacturing Company Ltd., where the company was carrying on the business of selling textiles, its sale of items like caustic liquor regularly and continuously accumulating as a bye-product in the process of manufacture of cloth was incidental to the main business of the company.

49. Following the guidelines laid down by the Supreme Court, the decision in State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, being a judgment of a larger Bench has to be followed in preference to the later decision of a smaller Bench in The District Controller of Stores, Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, , where the earlier decision of the Supreme Court and none of the other decisions on the point were considered nor arguments were advanced as to the construction of the extended definition.

50. We therefore hold that, even otherwise, the transactions of the applicant in selling scrap, unserviceable and surplus materials not connected with the main business of the applicant as a contractor do not result in the assessee's carrying on the business of selling goods in West Bengal and it cannot be held to be a "dealer" within the meaning of the Bengal Finance (Sales Tax) Act, 1941.

51. For the reasons above, we answer the questions referred u/s 21(2) of the Bengal Finance (Sales Tax) Act, 1941, as follows :

Question No. (1) is answered in the negative and in favour of the applicant.

Question No. (2) is similarly answered in the negative and in favour of the applicant.

52. As to question No. (3) the Board has held the contract concerned to be divisible on the sole ground that the said contract is divided into different parts. We do not think that the conclusion of the Board in this respect is correct. In our view the contract relates solely to a particular work, namely, the construction of Durgapur Steel Works, and as such it is an indivisible contract. Question No. (3) is, therefore, answered in the negative and in favour of the applicant.

Questions Nos. (4) and (5) are answered in the negative and in favour of the applicant.

Questions Nos. (6), (7) and (8) are answered in the negative and in favour of the applicant.

53. As to question No. (9) it appears to us that the finding of the Board which is sought to be impugned is not at all clear. The impugned finding is tentative and vague and no final conclusion is reached. In that view of the matter this question does not call for any answer.

54. We answer questions Nos. (10), (11) and (12) in the negative and in favour of the applicant.

55. The reference is disposed of accordingly. There will be no order as to costs.

C.K. Banerji, J.

56. I agree.