
(1956) 10 MP CK 0011

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Case No's. 45 of 1955 and 5 of 1956

F. and C. Oslar (India) Ltd. and Another

APPELLANT

Vs

State of Madhya Bharat and Others

RESPONDENT

Date of Decision : 30-10-1956

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 286, 286(2)
Contract Act, 1872 — Section 77, 79
Madhya Bharat Sales Tax (Amendment) Act, 1955 — Section 23A, 8
Madhya Bharat Sales Tax Act, 1950 — Section 14(1), 2, 23, 24, 24(1)
Madhya Bharat Sales Tax Rules, 1950 — Rule 4, 8
Sales of Goods Act, 1930 — Section 19, 4, 6(3)

Citation : AIR 1957 MP 139

Hon'ble Judges : Samvatsar, J;Nevaskar, J

Bench : Division Bench

Advocate : S.D. Sanghi, No. 5 of '56 and G.M. Chaphekar, No. 45 of '55, for the Appellant; K.A. Chitale, General, for the Respondent

Judgement

Nevaskar, J.—This is a petition under Article 226 of the Consitution of India filed by Messrs. F. & C. Oslar (India) Ltd., against the State of Madhya Bharat and the Sales Tax Officer, Indore for the issue of a writ of mandamus against the Respondents requiring them not to give effect to any of the provisions of Madhya Bharat Sales Tax Act, 1950 and Madhya Bharat Sales Tax Rules against the Petitioners and a writ of prohibition directing the Respondents not to take any steps pursuant to the notices of the second Respondent dated 24-11-1955 and 5-12-1955 so far as their works contracts are concerned on the ground that the said Act is null and void as also Rule 8 of the Madhya Bharat Sales Tax Rules. The validity of the Act and particularly of Section 3 of the Act read with the definitions of "Turnover", Taxable turn-over, "Sale" and "Contract" as given" in Section 2, is challenged on the ground that these provisions seek to bring under levy of sales tax transactions other than transactions of sale of goods and further on the ground that they seek to bring under levy of sales tax transactions involving inter-State trade or commerce.

2. The Petitioner Messrs. F. & C. Osler (India) Ltd., is a public limited company having its registered office at Calcutta and branch office at New-Delhi, Bombay, Madras, Kanpur, Gouhatt and Jullunder. This company carries on business of electrical engineers and undertaking electrical contracts and also sells and supplies of electrical goods and appliances.

3. The Petitioner has no branch office, Shop or godown nor has any manager or agent carrying on business on its behalf anywhere in the state of Madhya Bharat. It is however alleged that as part of inter-State trade or commerce it sells and supplies goods to various parties in that State. The tenders for contracts are submitted by the Petitioner from its Head Office at Calcutta (sic) their office at New Delhi and all contracts and documents are signed and sealed on behalf of the Petitioner at one or other of these places.

4. Petitioner took two contracts for making electrical installations and fittings in the Maharaja Yeswantrao Hospital and Gandhi Memorial Medical College, Indore. Both these buildings belonged to the opponent State. The contracts involved supply or requisite materials for carrying out these contracts by the Petitioner. The tenders in respect of these contracts were submitted from the Delhi office of the Petitioner. After the contracts were accepted the formal contracts were drawn up and signed and sealed in due course. The execution of these contracts was controlled from the branch office of the Petitioner at New Delhi. Materials required for execution of these works were and are being dispatched from time to time by rail from New Delhi to Indore. The Railway Receipts for these consignments are sent to one Mansasingh an employee of the Petitioner who takes delivery of the goods for the Petitioner from the Railway and carries them to the (site of work for utilising them in doing various jobs in connection with the aforesaid two contracts.

5. There is, according to the Petitioner, no provisions made for payment of sale price as such nor any such price is determined previously by or under the terms of the contract by mutual agreement and that really there was no contract relating to sale of goods in these two transactions. Under the terms of the contracts the Petitioner becomes entitled to receive full payment, on completion of the work and its approval by the State authorities Intermediate payments made towards running bills during the progress of the work are Stated to be payments on account to be covered by the final bills for the completed work.

6. The Petitioner on these facts says that he is not liable to pay sales tax in respect of the electrical goods which it dispatched from Now Delhi and utilised in exection of the contracts In question as such utilisation of electrical goods does not amount to sale of goods and further even if it did amount to sale of goods it was in the course of inter-State trade.

7. The Sales Tax Officer, Indore, however, by his order dated 30-3-1955 made assessment against the Petitioner in respect of these two contracts fixing the amount of turnover of electrical goods in question for the assessment year

1951-52 to the sum of Rs. 31,109-9-0 and determined taxable turnover at Rs. 24,888/- after making deduction of 20 per cent, in accordance with Rule 8 of Madhya Bharat Sales Tax Rules and directed the Petitioner to pay Rs. 1,660-8-0. The Petitioner lodged protest with Respondent No. 2. In reply the said Respondent asserted that the sales in respect of these goods took place at Indore as they had an agent at Indore to whom the goods were sent and further called upon the Petitioner to produce accounts for determining turnover for assessment years 1952-53, 1953-54 and 1954-55 intimating that on failure he would proceed to make best judgment assessment. By letter dated 9-7-1955 the Respondent No. 2 required the Petitioner to appear before the former on 25-12-1955 with books of account pertaining to assessment year 1952-53. The Petitioner had preferred appeal against the earlier order and a request was made to Respondent No. 2 to wait until the appeal was decided. This was disallowed and notice was issued to the Petitioner to show cause why action u/s 14(1)(a), (b) and (c) of the Madhya Bharat Sales Tax Act be not taken against him. The Petitioner made representation in writing denying its liability and asserting that Mansasingh was merely an electrician engaged in works at Indore and was not their representative to carry on business of sale of goods on its behalf. But the representation did not not favour with Respondent No. 2.

8. By notice dated 24-11-1955 the Petitioner was called upon to obtain a licence, to submit re-turns and to appear with all the account-books and further by notice dated 5-12-1955 ordered it to file return stating its total and taxable turnover.

9. On these facts it was contended by the Petitioner that:

(a) Section 3 of the Madhya Bharat. Sales Tax Act 1950 read With definitions of "Turnover", "Tax-able turnover". "Sale" and "Contract" as contained in S 2 purports to empower the levy and collection of Sales Tax in respect of materials utilised by a contractor in executing a work contract of the kind in question. This is beyond the power of State Legislature as no State Legislature by artificially enlarging the definition of sale arrogate to itself a power which is not conferred by the Constitution.

(b) Even if the said works contracts be held to involve sale of goods such a sale, having taken place in the course of inter-State trade as provided under Article 286(2) of the Constitution, would be exempt from Sales Tax.

10. The action of the Respondent No. 2 in issuing notices dated 24-11-1955 and 5-12-1955 requiring the Petitioner to obtain licence and to submit accounts, returns etc. and issuing notice u/s 14(1)(a), (b) & (c) constitutes infringement of its fundamental right under Article 19(1) of the Constitution besides working considerable hardship and harassment not warranted by law.

11. The Petitioners therefore pray firstly for a declaration that the provisions of Madhya Bharat Sales Tax Act and particularly Section 3 of the Act read with the definitions of "Turnover", "Taxable turnover", "Sale" and "Contract" given in Section 2 of the Act are null and void in so far as and to the extent to which they seek to

bring under the levy of sales tax the transactions of the nature of works contract and secondly for the declaration that Rule 8 of the Madhya Bharat Sales Tax Rules is illegal, ultra vires and inoperative, Thirdly for a declaration that the provisions of the said Act, in so far as and to the extent to which they seek, to bring under levy of sales tax transactions of, sale of goods despatched and supplied from places outside Madhya Bharat to customers in Madhya Bharat by persons belonging to other State and who do not carry on business of buying or selling goods within that State are bad in law.

12. They further pray for issue of writ of mandamus and prohibition requiring the opponent not to give effect to the provisions of the Act against them in respect of the contract in question and not to take steps coercive or otherwise pursuant to the notices dated 24-11-1955 and 5-12-1955.

13. In the return filed on behalf of the Respondent the inter-State trade character of the dealings of the Petitioners was denied. It was asserted that the Petitioner had offered tenders called for electrical installations to the buildings in question which were accepted by the Chief Engineer Madhya Bharat and Principal, Mahatma Gandhi Memorial Medical College and the contracts were made and executed at Indore and were to be executed there. It was further asserted that the contracts in question consisted of two distinct activities namely that of supply of goods and employment of labour and skill and that these two activities were capable of being split up for the purpose of taxation.

The ultra vires character of the Madhya Bharat Sales Tax Act and particularly of Section 3 read with the definitions of the four terms referred to in the petition, as well as of Rule 8 of the Madhya Bharat Sales Tax Rules were denied. It was further asserted that the said Rule 8 is not arbitrary and artificial and that ceiling is fixed with reference to empirical data available to the Government. It was, according to the Respondents, never asserted by the Petitioner that he should be permitted to deduct as allowable consideration for carrying out the contracts a sum in excess of 20 per cent. The validity of Rule 8 cannot be challenged on abstract ground according to them.

14. It was also denied that any fundamental right of the Petitioner was infringed.

15. It was also contended on behalf of the opponents that whatever might be the position prior to the passing of the Sales Tax Laws Validation Act No. 7 of 1956 with regard to the taxability of inter-state transactions, after the passing of this Act all the State Laws imposing or authorising the imposition of tax on sale or purchase of goods where such sale or purchase, took place in, the course of inter-State trade or commerce during the period from 1-4-1951 to 6-9-1955 cannot be deemed to invalid or ever to have been invalid.

16. The effect of the new Act, according to them, is that is challenge is permissible of the State law on the aforesaid ground

17. On these respective contentions raised on either side and points which

emerge for consideration are:

I. Whether words "Sale of goods" in Entry No. 54 of the List is wide enough to include works contracts such as are in question.

II. Whether the transactions, even if they are held to involve sale of goods" can be said to involve sale of goods in the course of inter-State trade or commerce.

III. Even if they are said to constitute inter-state trade or commerce is the power of the State of Madhya Bharat, Under its Sales Tax Laws, to tax them validated by Act No 7 of 1956?

IV. Is Rule No. 8 of the Madhya Bharat Sales Tax Rules invalid as it lays down artificial or arbitrary test for determining sales price of goods supplied in works contracts?

18. these questions will be considered by me serially.

19. Before considering the actual arguments advanced on either side on these questions it will be useful to refer to certain provisions of the Madhya Bharat Sales Tax Act which are material for their consideration.

20. Madhya Bharat Sales Tax Act 30 of 1956 came into force on 1-5-1950.

21. Section 3 of the Madhya Bharat Sales Tax Act is the charging section. It reads as follows:

(1) Subject to the provision of this Act, every dealer whose turnover in the previous year in respect (sic) sales or supplies of goods exceeds:

(a) in the case of a dealer who imports goods into Madhya Bharat, Rs. 5,000/- (Rupees five thousand);

(b) In the case of a manufacturer, Rs. 5,000/- (Rupees five thousand); and

(c) in the case of any other, Rs. 12,000/- (Rupees twelve thousand);

shall be liable to pay tax under this Act on his taxable turnover in respect of sales or supplies of goods effected in Madhya Bharat from the 1st day of May 1950:

Provided that a dealer who comes from outside Madhya Bharat and carries on business during a Mela shall be liable to pay tax under this Act of his average sales during the course of the Mela exceed rupees 450 per month.

(2) A dealer, who is not liable to pay tax under Sub-section (i) or "who had no business in the previous year, shall be liable to pay tax under this Act with effect from the date when his sales for the period from the 1st day of April are of such an amount as would render the proportionate sales up to 31st March liable to tax according to Sub-clauses (a), (b) or (c) of Sub-section (i):

Provided that in respect of assessment for the year 1950-51 the date of 1st of

April mentioned in this sub-section shall be deemed to be the 1st of May 1950.

22. Rate of tax is provided by Section 5 as follows:

(1) The tax payable by a dealer under this Act shall be at a single point and shall not be less than Rs. 1-9-0 per cent, or more than 61 per cent, of the taxable turnover, as notified from time to time by the Government by publication, in the Official Gazette:

provided that Government may in respect of special class of goods charge tax up to 12 1/2 cent on the taxable turnover.

(2) The Government while notifying the tax payable by a dealer may also notify the goods and the point of their sale at which the tax: is pay-able. "Dealer", means any person or association of persons carrying on the business of selling or sup-plying of goods, whether for, commission,; remuneration or otherwise, and includes any firm, a Hindu undivided family or any other association, and also includes a society, a club or any other association selling or supplying goods to the members, but does not include any department of the Indian Union.

Explanation: The Manager of Agent of a dealer residing outside Madhya Bharat who carries on the business of buying or selling or supplying goods on behalf of such dealer, shall, in respect of such business, be deemed to be a dealer for the purpose of this Act.

"Turnover" means the aggregate amount for which goods are either sold or supplied for the payment received in respect of a contract by a dealer.

"Contract" means any agreement for carrying out for cash or deferred payment or other valuable consideration:

(i) the construction, fitting out, improvement or repair of any building, road, bridge, or other immovable Property; or

(ii) the installation or repair of any machinery affixed to a building or other immovable property, or

(iii) the overhaul or repair of any motor vehicle.

"Taxable Turnover" for a specified period means that part of a dealer's turnover for such period which remains alter deducting therefrom:

(i) the sale of goods declared tax-free u/s 4 without payment of fees;

(ii) the sale of goods declared tax-free u/s 4(3) with payment of fees:

(iii) turnover of goods for which no rate of tax has been notified or which have already been sub-jected to sales tax under this Act.

(iv) all such other deductions as may be pre-scribed in the Rules made under this Act;

(v) 2 per centum of balance remaining after making all the above deductions,

"Goods" means all kinds of movable property other than actionable claims, stocks, snares and securities, and includes electrical energy and all materials, articles and commodities, whether or not to be used in construction, fitting out, improvement or repair of immovable property.

23. Section 23A which was added by Section 8 of Amendment Act No. 11 of 1955 and published in the Madhya Bharat Government Gazette on 15th of April 1955 reads as follows:

Nothing in this Act or the Rules made or deemed to have been made thereunder shall be deemed to apply to any sale or purchase of goods, or to impose or authorise the imposition of a tax on any sale or purchase of any goods, where such sale or purchase takes place:

(a)(i) outside the State of Madhya Bharat; or

(ii) in the course of import of the goods into the territory of India, or the export of the goods out of such territory; or

(b) in the course of inter-state trade or commerce, except in so far as Parliament by law otherwise provides, and the provisions of this Act and the said Rules shall be read and construed accordingly.

Explanation: For the purposes of Clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result, of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

24. Section 24(1) authorises the Government to make Rules to carry out the purposes of the Act; and Sub-section (2)(c) provides as under:

In particular and without prejudice to the generality of the forgoing power, such Rules may provide for:

The determination of turnover for the purpose of assessment of tax under this Act.

25. With these provisions of the Madhya Bharat Sales Tax Act in view I shall proceed to consider the aforesaid questions.

26. Question No. 1. The contention put forward by Mr. Sanghi on this question may be briefly put as follows:

27. Entry 54 of List II of VII Schedule authorises State Legislature to impose tax on "Sale or purchase of goods except news-papers". Thus the State Legislature can only tax what is a sale of goods. The term "Sale of goods" has to be understood and interpreted in the sense in which it was known when the

Constitution was framed and promulgated. The provision in Entry 54 is made in English and the meaning attached to the term "Sale of goods" in English law as well as the Law prevailing in India at the time of the Constitution ought to govern the meaning. This very taxing provision existed in Government of India Act, 1935 with the exception of the provision regarding newspapers. Therefore in order to find the meaning of this expression it is relevant to consider firstly whether the term was understood in English Law and Indian Law to include works contract. It is also relevant and material to take into account the exact scope of the expression as used in Indian Sale of Goods Act. Considering the matter thus it will be found that the term "Sale of goods" does not include supply of material in pursuance of works contract particularly in those cases where there is no separate provision in the contract for supply of material at a stated price.

28. It will appear from the decisions of the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, ; *Poppatlal Shah Vs. The State of Madras*, ; *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, and *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, that the terms sale of goods has the same meaning for the purpose of sales tax laws as it bears in the law relating to sale of goods. The provisions of Indian Sale of Goods Act and the legislative practice both in England and in India at the time when the Constitution was framed and promulgated are material. In English Law works contracts involving supply of materials, are not treated as sale of goods and are considered as a distinct variety of dealing particularly where the materials supplied become part and parcel of Immovable property and result in the improvement of that property. The title in the materials, according to English decisions, passes not while they are chattels but when they become affixed to the immovable property and as the material point of time to consider the nature of the transaction for the purpose of taxability is the one when the title in the material passes it follows that the transactions cannot be called sale of goods at that point of time because at that time they are not goods but have become part of Immovable property.

29. In support of this line of reasoning Mr. Sanghi mainly relied upon the decisions of Madras High Court reported in *Gunnar Dunkerly v. State of Madras* AIR 1954 Mad 1130 (E). This decision is followed in *Yarlagadda Tirupathirayadu Vs. Yarlagadda Venkateswarulu*, .

30. On the other hand and the learned Advocate General contended that the entries in the Legislative lists ought to be given a liberal construction of widest amplitude provided there is no-conflict inter se as between the two lists. Reliance was placed in this connection upon the decisions reported in *C.P. and Berar Sales of Motor Spirit and Lubricants, Taxation Act, 1938*, in the matter of AIR 1939 1 (Federal Court) , AIR 1941 16 (Federal Court) and *Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others*,

31. Therefore, according to him, while deter-mining the scope of Entry 54 in List II it is not pro-per to confine it to transactions which are unmixed and involve

sale of goods while as goods for an agreed price and delivered to the other contracting party as goods.

32. It was pointed out by him that the English cases cited in Benjamin on Sale and Halsbury's Laws of England, which make a distinction between works contract involving supply of material and the sale of goods, relate to the form of action to be chosen under technical law of procedure in England and have no material relevancy in determining the scope of entry 54.

33. According to the Advocate General the material factors to be taken into account are:

1. Whether there exist goods to which contract relates.
2. Whether there is transfer of possession and title to the other contracting party.
3. Whether this transfer is for money consideration.

34. If all these three things are satisfied then it is immaterial whether the contract is purely for goods or is a mixed one involving supply of material and application of labour and skill or whether the consideration is distinct in respect of materials or is a composite one or whether the title passes while they are in the form of chattels or have become affixed to Immovable property. Even where the transaction is a composite one involving supply of material and application of labour and skill for money consideration" it is competent for the legislature in exercise of Its plenary power to provide for a machinery by which it will be possible to determine the aloe of that part which involves essentials of sale of goods and to tax that much only. (35) The legislative practice prevailing at the time when the Constitution was framed and promulgated is not a decisive test and can be taken to be helpful within limits. (33) He mainly relied upon the decision reported in Pandit Banaras Das v. State of Madhya Pradesh 1955 6 STC 93 (Nag)(J), in support of his contention.

37. In order to appreciate these two lines of reasoning we shall first consider the implications of the decisions of their Lordships of the Supreme Court in the cases relied upon by the learned Counsel for the Petitioner.

38. The first case is one reported in The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, . It that case their Lordships had to consider the conflict of "Sale" in connection with taxing power of a State involving inter-state elements. His Lordship Patanjali Sastri C. J., while considering where the sale can be said to have taken place observed as follows:

But a localised sale is a troublesome concept; for a sale is a composite transaction involving as if does several elements such as 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 other.

39. In para 39 of the same report Bose J. observed in the same connection:

The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject matter of the sale, (2) the bargain or contract which when executed will result in the passing of the property in the goods for a price, (3) the payment or promise of payment of a price (4) the passing of the title.

40. In *Poppatlal Shah Vs. The State of Madras*, B.K. Mukherjea J. had to consider when the contract of sale becomes a sale under the Sale of Goods Act. It was observed as follows:

The expression "Sale of goods" is a composite expression consisting of various ingredients or elements. Thus there are the elements of a bargain or contract of sale. The payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property.

41. In para 9 of the same judgment the learned judge observes as follows:

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.

42. The third case of the Supreme Court is *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*. In that case the question was whether forward contracts of sale are liable to tax under U.P Sales Tax Act:

Under the statute law of India which is based on English Law on the subject, a sale of goods and an agreement for the sale of goods are treated as two distinct and separate matters.

Section 4 of the Indian Sale of Goods Act (Act 111 of 1930) runs as follows:

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one party owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell become a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

It will be noticed that though the section groups both the sales and agreements to sell under the single generic name of "Contracts, of sale" following in this respect the scheme of the English Sale of Goods Act, 1893, it treats them as separate categories, the vital point of distinction between them being that whereas in the sale there is a transfer of property in the goods from the seller to the buyer, there is none in the agreement to sell. When the contract is to sell future goods and u/s 6(3) of the Sale of Goods Act even if "the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods, "there can be no transfer of title to the goods until they actually come into existence; and even then, the conditions laid down in Section 23 of the Act should be satisfied before the property in the goods can pass. That was also the law under the repealed provisions in chapter VII of the Indian Contract Act, 1872. Section 77 of the contract Act defined "Sale" as follows:

"Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

Section 79 enacted that:

Where there is contract for the sale of a thing which has yet to be ascertained, made or finished the ownership of the thing is not transferred to the buyer until it is ascertained, made or finished.

The corresponding provision of the English Act are Sections 1, 16 and Rule 5 of Section 18. Section 1 is as follows:

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between the part-owner and another.

(2) The contract of sale may be absolute or conditional,

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Section 16 enacts that:

Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Section 18 Rule 5 provides for the passing of property in future goods after they are ascertained.

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The position therefore is that a liability to be Assessed to Sales Tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only an agree-ment to sell, which can only result in a claim for damages. It would be contrary to all principles to hold that damages for breach of contract are liable to be Assessed to sales tax on the ground that they are in the same position as the sale price.

43. In (S) The Bengal Immunity Company Limited Vs. The State of Bihar and Others, his Lordship Bhagwati J. referred to the above observations of Venkatarama Ayyar J. with approval and observed

This being the legislative practice in India as well as in England at the time when the power to tax sales or purchases of goods was conferred on the State Legislatures the scope of that power would have been ordinarily determined by the definition of the sale of goods to be found in three respective Sales of Goods Acts and the State Legislatures would have had power to tax sales or purchases of goods, in which the property in the goods passed within the respective territories of the states.

44. Thus on consideration of the dicta of their Lordships as quoted above it appears to me that they lay down the following points:

(a) The Legislative practice in India as well as in England, at the time when the power to tax sales or purchases of goods was conferred on the state legislatures, is material to determine the exact scope of the power.

(b) The definition of "Sale of Goods" in Indian Sale of Goods Act, English Sale of Goods Act and Indian Contract Act will indicate what "Sale of Goods" means for the purpose of Entry 54 of List II.

(c) Sale of goods as defined in those Acts when split into its component parts consists of the following elements:

(1) Existence of goods which form the subject matter of sale.

(2) Bargain of contract which when completed will result in passing of property in the goods for a price.

(3) The payment or promise of payment of price

(4) The passing of title.

45. It is on these considerations that it was held in the case of AIR 1954 SC 459 (C) that agreement of sale is not a sale for the purpose of Entry 48 (Corresponding to Entry 54) List II of the Government of India Act, 1935, and (sic) such not liable to tax.

46. With these points in view we shall examine the two opposing views which represent the respective stands of the parties in this case on this point which

appear in AIR 1954 Mad 1130 (E) and (1955) 6 STC 93 (J).

47. Both these cases related to the validity of taxing provisions of the Sales Tax laws of the respective States viz. Madras and Madhya Pradesh in so far as they sought to tax building materials supplied in execution of building contracts. The view taken in the former case was that the supply of material in that manner did not constitute sale of goods within the meaning of that term in Entry 48 of Provincial List (which corresponds to Entry 54 of List II of the Constitution) and as such was beyond the taxing capacity of the state while in the latter case it was held that the transaction of that sort was a composite one involving work and labour of material for money consideration and had sufficient element of sale in it and that it was competent for the State Legislature in exercise of its plenary power to segregate the "supply of material" part and to tax that much. It is considered immaterial that the material get affixed or embedded to the Immovable property when the title passes. In the Madras case the learned Judges say:

It must be remembered that the Constitution Act was enacted by the British Parliament and the draftsmen and the Parliament must have been well aware, that the expression "sale of goods" had acquired a legal import by that time, and it is legitimate therefore to presume that, the expression was used in the sense in which it was understood by the English lawyers and also in India. The draftsmen must have intended to define the power of the Legislature to tax only the transaction of sale of goods, which was understood in law as meaning and as constituting those composite series of acts beginning with the agreement of sale and ending with transfer of property for a price, which constitute sale of goods. That the expression sale of goods acquired a definite meaning in England under the Sale of Goods Act, 1893, which was modelled on the English Act, does not admit of serious doubt.

48. Further in Para 20 he says:

In order to constitute a sale as defined in the English Sale of Goods Act, which is followed in the Indian Act, two things are necessary (i) an agreement to sell, i.e., an agreement to transfer the property in goods to the buyer for a price and (ii) an actual sale by which the property in the goods passes from the seller to the buyer. Then it becomes a sale of goods. Benjamin on Sale, 8th Edn. at page 1, refers to the definition of contract of sale in Section 1, Sale of Goods Act, and according to the learned author, in order to constitute a sale, there must be (i) an agreement to sell, by which alone property does not pass and (h) an actual sale by which the property passes. The elements of the contract are, as stated at page 2, (1) parties competent to contract (2) mutual assent (3) a thing the absolute or general property in which is transferred from the seller to the buyer and (4) a price in money paid or promised. In view of these essential elements of a transaction of sale, gift and barter are excluded from the purview of the definition of sale.

Sale of goods, therefore, means a contract whereby the property in the goods is actually transferred by the seller to the buyer. It is not an executer contract but an executed contract, and the transfer of property in the goods is for a price, i.e. for money consideration. As price is an essential element of a contract of sale, barter is ruled out from a transaction of sale of goods. The subject matter of the contract of sale may be either existing goods or future goods. Goods may be ascertained goods or unascertained goods; the property is not transferred in the case of unascertained goods until the goods are ascertained and appropriated to the contract, while in the case of specific or ascertained goods, the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

49. Thus after explaining how the term sale of goods" is to be construed having regard to the English and Indian Sale of Goods Act the learned Judge concluded that the legislative power of the provincial legislature to levy a tax on sale of goods is confined and restricted only to transaction of sale as understood by the Parliament of United Kingdom in the Law relating to sale of goods.

50. He then proceeded to consider whether building contracts had in them any element of sale of goods to justify the imposition of Sales Tax upon them. It was held on consideration of some of the English decisions and concluded:

It therefore follows that the building contracts which the Assessors entered into during the assessment year, on which the turnover was calculated, do not involve any element of sale of the material and are not in any sense contracts for the sale of goods as understood in Law. Having regard to the terms of particular contracts, there may be an intention to pass the ownership in the materials for a price agreed upon between the parties, in which case such contracts might contain an element of sale of goods, but that is not the case here.

51. This decision was before the learned Judges of the Nagpur High Court when they decided 1955 6 STC 93 (J).

52. The line of reasoning adopted by Hidayatullah J. with whom Sinha C. J. concurred" was that out of the two principles upon which the reasoning in the Madras case was based, the one regarding legislative practice existing in England and in India when the Constitution Act of 1935 was passed, is helpful within limits but is not conclusive and the other with regard to the rule of construction enunciated by James L.J. in *Ex parte Campbell* (1870) 5 Ch. 703 (K) to the effect that the legislature must be presumed to have given recognition to decisions of courts, is not always accepted without qualifications nor is it conclusive unless those decisions are well-known and the legislature is legislating upon the matter for the same purpose and for the same object.

53. The learned Judge then proceeded to say: Applying these tests to the case of *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, it is clear that the Supreme Court was merely invoking legislative practice to show that there existed at the time of the enactment of the Government of India Act 1935, a well

defined and well established distinction between a "sale" and an agreement to sell" and therefore it was proper to interpret the expression "sale of goods" in Entry No. 48 in the sense in which it was used in legislation both in England and in India, and to hold that it authorized the imposition of a tax only when there was a completed sale involving transfer of title. Their Lordships further observed that the sene the thing also required that the tax should not to levied except on the price of goods and only at the stage when the seller could recover the Price under the contract. In a case of forward transactions which their Lordships were then dealing there can be no suit for recovery of the price but for damages for breach of contract and their Lordships therefore held that the entry could not contemplate a mere agreement of sale as opposed to a sale proper.

Their Lordships were not limiting the scope of the Entry for all purposes. Their Lordships only excluded from its operation matter which could not be brought within its ambit in any way. The word "sale" involves a transfer of title for a price and the entry was held not to include a power to tax a transaction in which there was at the moment of taxation no sale for a price at all. The decision of their Lordships therefore must be related to the facts then present and cannot be invoked to limit the operation of the entry in all circumstances.

While it cannot be doubted that a limited legislature which possesses a mete supremacy of enumerated entries cannot by fiction create a Power for itself which does not flow naturally from the entry. The power itself is otherwise unlimited and of the widest amplitude possible. The natural and full scope of the entry cannot be cut down by anything not found in the Constitution Act 1935. Lord Selbourn's dictum in the R. v. Burah 1878-3 AC 889 (L) has often been quoted in this connection. When Entry No. 43 was framed it conferred on the Provincial Legislature powers of the widest amplitude to tax the sale of goods in all the aspects and forms. The text being explicit, is conclusive alike in what it directs what it prohibits. The necessary conditions the impost however, were that there a sale of goods. The selection of tax-and the severance of transactions of sale from other transactions in which they might be embedded was a necessary part of the power, The Legistature could not say that a contract of service amounted to sale of service, but it could line transaction of sale of goods what sever from it took.

54. He finally concluded:

we are here concerned with a taxing measure and the power to levy the tax can only be determined by a fair consideration of the ambit of the entry by which the power is conferred. If the pith and substance of the Act come within that ambit, the power is there, otherwise not. If a building contract was not split up into its component parts, that is to say, material and labour in legislative practice relating to the ordinary regulation of sale of goods, there is no warrant for holding that it could not be so split up even-for purposes of taxation. The reasoning in the Madras case does not take into account the fundamental fact that the legislature could select out of a composite transaction the actual sale of

materials and tax such sale in the exercise of undoubted plenary powers. The word "supply" used in the definitions has not any sinister purpose and read in the context of other definitions, is apt to described that sale of building materials not directly but as part of a building contract.

55. In order to properly appreciate these two respective points of view we have to find out. how far our field of enquiry is limited by what their Lordships of the Supreme Court laid down in this respect while dealing with the question as to what constitutes sale of goods. In the United Motors Case (A) their Lordships were concerned with analysing concept of sale in order to find whether a sale can be localised at a particular place when different ingredients of sale took place at different places

Their Lordships were not concerned in that case to find whether a transaction in which, either besides transference of property for money consideration other matters such as skill or labour of the transferor are involved, or title passes at a stage when it goes affixed to Immovable property, amounts to sale partly or substantially. There the question was whether out of the essential elements involved in the concept of sale any one can be said to be more important than others. This will be clear from the observations of Patanjali Sastri C.J. in Para 12 and those of Bose J. in Para 39 quoted above.

56. The decision is helpful in so far as it indicates what are the essential ingredients of sale. On this question probably there will not be any serious difference between the Madras and Nagpur decisions.

57. In Poppatlal Shah Vs. The State of Madras, , their Lordships indicate the essential and radical difference between a contract of sale and sale and emphasises that the sale is not complete until the purchaser become the owner of the property.

58. This case also does not bring into relief any difference in the two views.

59. The difference is apparent as regards the way in which the observations of their Lordships in Budh Prakash's case (C) were sought to be interpreted.

60. That was a case in which the State of U.P. under its Sales Tax Law sought to imposed sales tax on forwarded contracts of sale. Venkatrama Ayyar J. who delivered the judgment began by observing that under the statute law of India which is based on English Law on the Subject of sale of goods, a sale of goods and an agreement for the sale of goods are treated as distinct and separate matters.

61. To bring out this fact his Lordship examined the definition of Sale of Goods in Section 4 of the Indian Sale of Goods Act, Section 77 of Indian Contract Act and Sections 1.16 and Rule 5 of Section 13 of the English Act. The learned Judge then referred to the standard works on the subject in England for the same purpose and concluded by observing that

there having existed at the time of the enactment of the Government of India Act, 1935 a well Refined and well established distinction between a sale and an agreement of sale it would be proper to interpret Entry 48 (corresponding to Entry 54) in, the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a tax only when there is a completed sale involving transfer of title

At a later stage he observed that sales tax is a levy on the price of goods, and such a levy should not be made unless a stage has been reached when the seller can recover price under the contract. The learned Judge left out of consideration a case Where price is payable under the contract on a day certain even before the delivery takes place.

62. The legislative practice obtaining at the time of the enactment of Government of India Act, 1935 was made use of to point out the radical difference between the two concepts of sale and agreement of sale and to find the stage at which the latter passes into the former. This was necessary for indication at what stage levy of sales tax would be proper.

63. The Madras Judges make use of these observations to hold that inasmuch as the transaction involving work, labour and supply of material is not regarded as one of sale or involving sale under English Law this should be held to be a limiting factor in interpreting the scope of Entry 48.

64. It is here that the difference in the two views appears. According to Hidayatullah J. their Lordships were not limiting scope of the entry for all purposes and that they only excluded from its operation matters which could not be brought within its ambit in any way because of absence of essential ingredients therein.

65. I think this view of Hidayatulla J. deserves to be accepted with respect. Their Lordships of the Supreme Court made use of the established position in English Law regarding transactions of sale in order to limit the operation of Entry 48 to those cases where there was transfer of property in the goods for money consideration and the transferee is in position to sue for the consideration. By this their Lordships cannot be taken to have meant that even in those cases where the essential ingredients of sale viz. transfer of. property in goods and money consideration are present, the English decisions, which emphasise the distinction between works contracts involving supply of material for money consideration and those of sale, should be called in aid to further limit the scope of entry 43.

At least, in my opinion, such a use is rather too Wide. I shall consider whether independently of the aid taken of the decision in Budn Prakash's case (C) it could be said whether basically on consideration of what may be said to be essential ingredients of sale is it or is it not correct to limit the scope Of entry 54 so as to exclude from Its operation works contracts involving supply of material by one who is engaged to do both.

66. The last case is (S) *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, . In that case too Bhagwati J. referred to the legislative practice in India and in England at the time the power to tax sale was conferred and observed that the scope of the power would have been ordinarily determined by the definition of rule of goods to be found in these respective Sale of Goods Acts and that the State Legislatures would have had the power to tax sales or purchases of goods in which the property in the goods passed within the respective territories of the states.

67. Thus the legislative practice was invoked to draw an inference that the ordinary power of states to impose sales tax depend upon passing of property within them. The observations of his Lordship at the most indicate that the scope of Entry 54 is limited by the definition of sale found both in the English and Indian Acts.

68. All that this decision means is that the essential ingredients of sale indicated in the definition of sale and analysed by Bose J. in *United Motors Case (A)* and by Mukherjea J. in *Popatlal Shah's case (B)* must be present viz the transfer of property in the goods in existence for price.

69. The aspect, considered by the Madras High Court on the basis of English decisions, in support of the view why the building contracts involving supply of materials for money considerations do not amount to transactions of sale, clearly, appears in Benjamin on Sale at P. 167:

Where a contract is made to furnish a machine, or a moveable thing of any kind, and before (a) the property in it passes, to fix it to land (be) to another chattel (c) it is not contract for the sale of goods. In such contracts the intention is plainly not to make a sale of moveables, as such, but to improve the land or other chattel as the case may be. The consideration to be paid to the workman is not for the transfer of chattels but for the work and labour done and materials furnished.

And farther:

A contract whereby a chattel is to be made and a mixed by the workman to land or to another chattel before the property therein is to pass, is not a contract of sale, but a contract for work, labour and materials, for the contract does not contemplate the delivery of a chattel as such.

70. On analysis these observations of Benjamin based on English decisions put forth the following as determining factors in these contracts:

- (1) There is no intention to make a sale but to make an improvement of land.
- (2) Money consideration is not for transfer of property in the chattel but for work and labour and for materials supplied.
- (3) There is no delivery of materials as such under the contract. Contract is for finding goods and affixing on land.

71. Mr. Sanghi for the Petitioner arguing in this connection emphasised these three factors According to his contention in the present case where t e Petitioner undertook to effect electric installation in the two Government buildings they did not agree to sell the materials. There was no agreement that the title in the goods should pass for a price. What the Petitioner has agreed to is to procure electrical goods and to affix the same" to an Immovable property and receive composite, payment for all that. Moreover according to him when the two essential ingredients of the transaction of sale take place viz. delivery or goods and passing of title they are no longer goods but have already become part and parcel of Immovable property and are therefore immovable.

72. Thus both on the aforesaid analyses of the reason given by Benjamin on Sale a d t e argument of the learned Counsel for the Petitioner three aspects distinguish the building contracts from those of sale.

73. In both cases viz. in building contracts involving supply of materials for money consideration and the contracts of sale there are contracts in respect of good in existence, there is money consideration there is delivery of property and lastly the property in chattels passes from the transferor to the transferee. But the factors which are said to distinguish them are firstly that whereas in the former the contract is not confined to chattels in the latter it is so, secondly whereas consideration is composite one in the former it is one and distinct for the latter and-thirdly whereas delivery and passing of title take place when the goods cease to be moveable they continue to remain so when they take place in the latter.

74. The question then for consideration is whether, these distinguished factors are such that those contracts cannot be taken to involve sale of

75. As regards composite nature of consideration it cannot be urged with any amount of cogency that merely because a person settles consideration in a composite form there cannot be sale of chattels.

76. If A transfers to B for a single consideration shop premises and articles stored therein it cannot be said that there is no sale of articles. So also if the contract relates to supply of things for value and for doing something to it, it cannot the said that there cannot be sale, leaving out of consideration a case where value of the thing supplied is negligible.

77. It A agrees to fit an electric fan in B's premises for money consideration it cannot be said that there is no sale of the fan although in fitting up the same labour and skill is to be bestowed to a certain extent.

78. Nor can we attach too much consideration to the circumstance that when the delivery takes place and Property passes the things supplied cease to be movable.

79. What is essential is that the transferor must part with the dominion over and title to the Property in favour of the transferee.

80. Section 19 of the Indian Sale of Goods Act indicates that the passing of title depends up on the intention of parties and where parties agree to bargain for a chattel there is nothing in the Act to prevent them from intending that the title to that thing should pass to the buyer when the thing ceases to be moveable.

81. Therefore existence of those distinguishing factors by themselves is insufficient to take the contracts involving work and labour out of category of a sale.

82. It is no doubt true that if the material part in Works contract is negligible the contract in substance will not be a sale. While if the works and labour part in a contract for sale of a chattel is negligible the contract in substance will not be works so contract.

83. But in those cases where the supply of materials Part for money consideration is substantial in a contract of composite nature it is difficult to say that it does not involve sale of goods.

84. In that case the four ingredients, indicated, by the Supreme Court in their decisions and as they appear in the definitions of sale of goods in English and Indian Acts, cannot be said to be absent.

85. The circumstance that the contractor is not entitled to be paid till the building contract is complete is not sufficient to lead to the conclusion that there cannot be sale of materials involved

86. As put by Hidayatullah J. "there is always a sale if goods are transferred to another and paid for by him."

87. Even assuming that in some of the contracts, where there is affixing of what at one time were chattels the element of sale of chattel may be less predominant than the element of bringing into existence an Immovable property and that for that reason they may not be said to involve sale, yet in the contracts of the nature under consideration such as electric installations or sanitary fittings the element of supply of materials for money consideration, is more predominant than the labour of affixing the same therefore in any case there is sale of goods in these cases.

88. Moreover the principle to be borne in mind in construing the scope of legislative entries is as is stated by their Lordships of the Supreme Court in *Navinchandra v. Commissioner of Income Tax Bombay City (S) Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, . In para 6 they observe:

It should be remembered that the question-before us relates to the correct interpretation of a word appearing in a Constitution Act which as has been said, must not be construed in any narrow and pendantic sense. Gwyer C.J. in AIR 1939 1 (Federal Court) observed at pp. 4, 5 that the Rules which apply to the interpretation of constitutional enactment subject to this reservation that their

application is of necessity conditioned by the subject-matter of the enactment itself. It should be remembered that the problem before us is to construe a word appearing in Entry 54 which is a head of legislative power.

As pointed by Gwyer C.J. in AIR 1941 16 (Federal Court) (II) at p. 25 none of the items in the lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is therefore, clear and it is acknowledged by Chief Justice Chagla that in construing an entry in a list conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein.

Reference to legislative practice may be admissible for cutting down the meaning of a word in order to reconcile two conflicting provisions in two legislative lists as was done in the C.P. and Berar Act case (G) (Supra) or to enlarge their ordinary meaning as in the State of Bombay v. F.N. Balsara AIR 1951 SC 318 (N). The cardinal rule of interpretation, however, is that words should be read in their ordinary natural and grammatical meaning subject to this rider that in constructing words in a constitutional enactment conferring legislative power the more liberal constructions should be put upon the words so that the same may have effect in their widest amplitude.

88a. Similarly in Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others, they say:

It is well settled that the language of these Entries must be given the widest scope of which their meaning is fairly capable because they set up a machinery of Government and are not mere Acts of a Legislature subordinate to the constitution.

89. Thus reading the Entry in its widest amplitude I have no hesitation in holding in this case that the transactions such as are in question do involve sale of goods and are to that extent liable to sales tax.

90. As I have dealt with the principal points culled from English decision in Benjamin on Sale of Goods I have not referred to the English cases in detail referred to in the Madras division.

91. Therefore the provisions in the Madhya Bharat Sales Tax Act, in so far as they seek to tax transactions of the nature in question, are not beyond the legislative competence of the state Legislature under Entry 54 of the State List.

92. This brings us to the second question.

93. The facts pertaining to this are that the Petitioner has a branch office at Delhi from where the electric goods needed for installation in the two Government buildings were sent by rail. They were taken delivery of by the workman of the Petitioner and affixed to the building.

94. The question is whether, if the transactions involve sale of the materials

needed for making electric installation, can they be said to contain inter-state trade element in them.

95. After the decision in the case of *Bengal Immunity Co. v. State of Bihar* (D) it cannot be doubted that although these goods are delivered in the State of Madhya Bharat for the purpose of consumption as a direct result of the contract of sale yet their sale ought to be held to have taken place in the course of inter-state trade or commerce.

96. They would therefore be held to be not subject to sales tax but for the effect of Sales Tax Validation Act No. 7 of 1956.

97. Section 2 of this Act lays down:

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 a 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 during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law.

98. Mr. Sanghi's contention in this connection is based on the existence of Section 23A in the Sales Tax Act of Madhya Bharat which is quoted above.

99. According to Mr. Sanghi the Validation Act cannot achieve the purpose for which it is intended because in view of the provisions of Section 23A there was nothing invalid in the Madhya Bharat Act which can be said to have been validated by the aforesaid Act No. 7.

100. Mr. Sanghi practically adopted the argument of Mr. Palakhiwala in a similar case from Bombay High Court reported in *Daldas Parmanand Kripalani v. Talwalkar* 1956 7 STC 675 (Bom)(O). This argument is set out by Chagla C.J. at pp. 685 and 686 of the report.

101. This argument was met by the learned Chief Justice. He first quoted the observation of the Supreme Court in *Bengal Immunity Co. v. State of Bihar* case (D) which are to the following effect:

In view of the interpretation we have put upon the Article 286 it must follow that the charging Section of the Act read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that the Parliament has not otherwise provided, the Act, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce is unconstitutional, illegal and void.

He then says:

Therefore what was declared to be unconstitutional, illegal and void were the charging Sections of the Act read with the relevant definitions, and as the Bihar Government purported to tax under the charging Section the Supreme Court held that the charging Section was illegal and inoperative to the extent that it was contended that by that charging Section inter-State sales could be taxed.

In other words, the view of the Supreme Court was that the charging Section of the Act could not operate to tax inter-State sales and therefore the relevant Section was invalid. And when we turn to the final order, which is at p. 849 (of SCR) at p. 75G (of AIR), the Supreme Courts makes it clear by directing that,

Until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing sales tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar.

Therefore, the flaw or the defect which the Supreme Court found in Bihar Act was the failure by Parliament providing otherwise within the meaning of Article 286(2), and the injunction was to last only so long as Parliament stepped in, provided otherwise, removed the restriction, lifted the ban, and validated the charging Section so as to make it operative upon the inter-State sales. Therefore, in our opinion, it is entirely untenable" to urge and it is not possible to contend in view of the Supreme Court decision that the law which we are considering is a valid law and it is only the executive action that was unjustified and which ought to have been validated.

102. It may be mentioned in this connection that Section 33 of Bihar Act, Section 46 of Bombay Act and Section 23A of the Madhya Bharat Act are based on Article 286 of the Constitution and are similarly worded.

103. Therefore assuming that Section 23A applies the Validating Act No. 7 is the complete answer to the Petitioner.

104. The Madias decision *Mettur Industries Ltd. v. State of Madras* reported at p. 691 of the report (1956 7 STC (P)) docs not take into sufficient account the aforesaid observations of the Supreme-Court and the operative part of their order in the case referred to above.

105. I therefore agree with respect with the view taken in the aforesaid Bombay case.

106. There is one more aspect to this question which comes in the way of the Petitioner.

107. Section 23A was inserted in the Madhya, Bharat Sales Tax Act by the Amendment Act Nos. 11 of 1955 which was published in the Gazetted dated 15-4-1955. The impugned tax relates to the period between 1-4-1951 and 31-3-1955 i.e. before the Amendment Act was passed.

108. The objection to the effectiveness of the Validating Act based on the reasoning appearing in the Bombay and Madras decisions cannot there fore prevail.

109. This disposes of the second and third question set out by me earlier.

110. The only further question which remains is whether Rule 8 of the Madhya Bharat Sales Tax Rules lays down arbitrary test for determining sales price of goods supplied in the course of execution of works contract.

111. This Rule is as follows:

In calculating the sale price for the purpose of calculating the sale price for the purpose of contracts, the dealer may be permitted to deduct from the amount payable to him as valuable consideration for carrying out a contract, a sum not exceeding such percentage as may be fixed by the Commissioner for different areas subject to the following maximum percentage, namely:

(a) In the case of an electrical contract20% (b) In the case of a structural contract30% (c) In the case of a sanitary or gas contract33 1/2% (d) In the case of an overhaul or repair of any motor vehicle60% (e) In the case of other contracts30%

112. The argument of the learned Advocate General is that the validity of this Rule cannot be challenged in the abstract. The Petitioner, according to him has not come forward with a case that in the case of contracts with which he is concerned work and labour part exceeds 20% of the total value. In the absence of such a position the Petitioner cannot obtain a declaratory opinion about the invalidity the Rule.

113. I DO not however feel that the challenge in this case is abstract in the sense that impugning the validity of the provision will confer no benefit upon him or will not affect the question of levy and collection.

114. Similar provision existed in the Madhya Pradesh Sales Tax Rules in Rule No. 4.

115. Hidayatullah J. observed in Paras 31 and 32 of Banarasidas case (J) referred to above as follows:

There being no provision for entering into agreement on the basis of "cost-plus contract" the Legislature has to hunt about for some means to determine the price of goods on which tax could be laid. It is plain that there is no ready basis in the bills themselves on which the cost of materials can be the from the contract charges.

In this state of affairs, the Legislature hit upon the expedient of allowing the State Government to fix the proportion of contract charges to the cost of goods in building contracts. The State Government fixed the ceiling proportion and within that limit left it to the Commissioner to fix proportions in different areas.

These proportions are thus pre-determined and though there may be no exception taken to the fixing of an upward limit of tax demandable in a particular case, there is much room for criticism that the proportion so fixed may have no relation to the actual price of goods supplied.

The power of the Provincial Legislature to tax sale of goods requires that there should be a sale of goods and, according to the forty eighth entry, the tax could only be demanded in relation to goods or on the basis of the price actually paid for the goods. It was not open to the Provincial Government to tax in such a way that the tax did not fall upon goods or their price. There is a vital defect in the definition of sale price taken with Rule 4 inasmuch as under them the tax is levied on a prearranged pattern applicable to all cases alike, irrespective of the kind of work which may have been executed and the nature of the materials that may have been supplied. The Rule gives the Commissioner the power to determine a proportion for himself for a particular area and the contractor is only allowed to deduct from the total consideration for the contract amount which the Commissioner's predetermination represents the valuable consideration for executing the contract. In my view, this artificial and palpably unnatural determination of the price of goods cannot be said to square with the powers given by the Constitution Act to levy a tax on the "sale of goods". The tax is not laid in the Act on different articles and commodities supplied by the contractor but on their cost, and this cost is not found out actually but is deduced by subtracting from the total consideration, the consideration for the execution of the contract as opposed to cost of materials which the Commissioner thinks suitable in any area, subject to an upward limit fixed by the Rules.

If there had been provision for agreements on the basis of "cost-plus-a-fee" the matter might have been simple but since the contract is for a finished work and payment is in a lump sum on the basis of quantity and quality, rather than the cost of labour plus the cost of the materials supplied, it is impossible on the rules as they exist to determine the correct price of the goods on which the tax can legitimately be demanded. There is a distinct probability that the tax falls on services by inclusion into the price of materials determined in the artificial manner.

116. I fully agree with the reasoning of the learned Judge and hold that the artificial test laid down in the Act to determine sale price of goods in respect of "Contracts" as defined in the Act and the Rule 8 prescribing the proportion between the value of materials and value of works and labour part are clearly not within the power granted to the Legislature of the State of Madhya Bharat and must be declared as ultra vires.

117. One more argument remains to be considered. It was contended that Rule 8 is ultra vires as the Act does not contain a scheme for segregating value of materials and value of work and labour in works contracts in the main Act and in the absence of such a scheme the defect cannot be remedied by resorting to the rule making] power and supplying the defect.

118. I do not find much force in this argument Under the Act by reason of definitions of "Goods", "Contract". "Turnover" and "Sale" the Act contains sufficient scheme to permit taxing of "supply of materials" part out of "Contracts" as defined in the Act. The Rule-making power u/s 24 is sufficiently comprehensive to make Rules to carry out the purposes of the Act Moreover apart from the general power of that character there is specific power u/s 24(c) to make Rules for determining "Turnover" for the purpose of assessment of tax under the Act.

119 In view of these provisions it is futile to say that Rule 8 of the Madhya Bharat Sales Tax Rules is made without any power for the purpose under the Scheme of the main Act.

120. However I have held above that Rule 8 of the Madhya Bharat Sales Tax Rules is ultra vires and void.

121. In other respects the petition is not en-titled to succeed. It is ordered accordingly.

122. The parties will bear their costs of the petition.

123. In the other petition in Civil Miscellaneous Case No. 45 of 1955 the same questions are involved.

124. It was a case of contract for effecting sanitary fittings as per specifications in the contract in same two buildings. The agreement was similar and involved payment of final money consideration on completion of the contract with a provision for making provisional payment in respect of running bills.

125. Validity of the same provisions in the Act and the Rules was assailed practically on same or similar grounds. Only one more question was further canvassed in that case and that was that the Petitioner's contract related to the single trans-action in Madhya Bharat and he cannot for that reason be said to be a "dealer" within the meaning of that term.

126. The word "business" is not a word of art and it cannot be said that where there is single contract which runs into thousands or more and extends over a period of several years does not involve carrying on business. Each case will depend on its own facts and in the present case we are not persuaded to hold that the Petitioner is not a dealer. No case is cited to show that in a case of this description a person is not held to carry on business.

127. In other respects the reasoning of Civil Miscellaneous case No. 5 of 1956 family applies. I would therefore hold as in that case that Rule (sic) of the Madhya Bharat Sales Tax Rules is ultra vires and void.

128. In other respects the petition is not entitled to succeed.

129. Parties to bear their costs of this petition as well.

Samvastar J.

130. I agree.