
(1954) 04 MAD CK 0034

In the Madras High Court

Case No : Civil Revision Petition No. 2292 of 1952

Gannan Dunkerley and Co. (Madras) Ltd.

APPELLANT

Vs

State of Madras

RESPONDENT

Date of Decision : 05-04-1954

Acts Referred:

Government of India Act, 1935 — Section 100(3)
Madras General Sales Tax (Turnover and Assessment) Rules, 1939 — Rule 4(3)
Madras General Sales Tax Act, 1939 — Section 2
Sales of Goods Act, 1930 — Section 4

Citation : AIR 1954 Mad 130 : (1955) ILR (Mad) 832 : (1954) 67 LW 1005

Hon'ble Judges : Satyanarayana Rao, J; Rajagopalan, J

Bench : Division Bench

Advocate : K.V. Venkatasubramania Iyer and T.S. Padmanabha Iyer, for the Appellant; A.G. and Asst. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Satyanarayana Rao, J.—This revision petition u/s 12-B, Madras General Sales Tax Act, raises an important question regarding the constitutional validity of certain of the provisions of the Madras General Sales Tax Amendment Act (25 of 1947) by which "works contracts" were included within the ambit of the Madras General Sales Tax Act and they are made subject to the levy of sales-tax within the limitations provided in the said Act. The case was argued with considerable ability on both sides and all the available authorities bearing on the question which the industry of counsel could discover, were placed before us.

2. The assessees, Messrs. Gannon Dunkerley and Co. (Madras) Ltd., are a private limited company incorporated under the Indian Companies Act and they carry on business as Engineers and Contractors. The Head Office of the company is at Madras but their work-spots are spread over several places in South India. Their business consists mainly of execution of contracts for construction of buildings, bridges, dams, roads and structural contracts of all kinds. The important customers of the company are the Central and State Governments but there are

also some private parties. In addition to the said business, they also carry out sanitary engineering contracts and sell sanitary wares and other sundry goods. To facilitate the execution of their works, which are spread all over the State, and to provide amenities to the workmen, they also distribute to the workmen food grains and debit the cost thereof against the wages, which they have to pay to them. They also run canteens for the supply of foodstuffs to their employees at their work spots but they derive no profit either from the sale of the food grains or foodstuffs. In the case of most of the contracts, the controlled commodities such as steel and cement are supplied by their employers, while the non-controlled materials and work and labour and technical skill for the construction work are provided by the company. In the case of contracts with the State and Central Governments, they sometimes act as their procuring agents, purchasing materials on their behalf according to their specifications and instructions. In the case of such contracts, the Governments concerned retain and exercise absolute control and dominion over such materials till the construction is completed and taken over. It is only after the construction is completed that final settlements are made under the contracts.

3. In the accounting year 1949-50, the Deputy Commercial Tax Officer by his order dated 30-3-1951 assessed them on a turnover of Rs. 35,08,153-5-0 made up of the following items:

1. Turnover of works contracts. .. Rs. 29,51,528-7-4

2. Works-spots sales. ..

2,21,181-7-6

3. Sales of Sanitary wares. ..

42,434-0-0

4. Turnover of canteens (estimated). ..

81,000-0-0

5. Foodgrains. ..

1,98,929-0-3

6. Sales-tax ..

13,080-6-9

Rs. 35,08,153-5-0

4. The company admitted their liability to items 2 and 3 but disputed the rest. Of these disputed items, items 1 and 5 alone now survive and are the subject-matter of challenge in this revision petition. There was an appeal to the Commercial Tax Officer as provided under the Act, who modified the amount determined by the Deputy Commercial Tax Officer and, on further appeal to the

Tribunal, there was further modification. But, as regards items 1 and 5, they were unsuccessful before the department and the Tribunal and, therefore, they have filed this revision petition.

5. The contention as regards item 1, turnover of works contracts, was that the amending Act of 1947 was beyond the legislative competency of the Provincial Legislature as the works contracts executed by the assesseees were not contracts of sale of goods and, therefore, the Provincial Legislature had no jurisdiction or power to enact the impugned provisions with a view to bring works contracts of such a nature into the net of taxation. As regards the 5th Item food grains, the contention urged was that they were not "dealers" within the meaning of the definition contained in the Madras General Sales Tax Act, as they did not carry on any "business" within the meaning of its provisions, and, therefore, they could not be assessed to tax, it was also urged that the supply of food grains to the workmen was only for their convenience and was an ameliorative activity of the company for the welfare of the workmen and that they did not make any profit by supplying food grains to the workmen. These contentions were negated by the Tribunal.

6. The legislative power of the Province to enact the General Sales Tax Act to provide for the levy of a general tax on the sale of goods in the State of Madras was derived under the Government of India Act, 1935, the Constitution Act then in force. u/s 100, Sub-section (3), the Provincial Legislature is empowered to legislate for the Province with respect to any of the matters enumerated in List II in the 7th Schedule to the Act, and item 48 in that list is "taxes on the sale of goods and on advertisements." The corresponding item in List II (State List) of the Constitution of India is item 54, the language, of which is somewhat different. Item 54 is "taxes on the sale or purchase of goods other than newspapers."

7. Before the Madras General Sales Tax Amendment Act 25 of 1947 works contract were not made subject to the levy of sales-tax in any form. The amending Act of 1947 added an inclusive definition of sale in Section 2(h) of the Act by the words "Includes also a transfer of property in goods involved in the execution of a work contract." A new clause, Clause (ii) was introduced in the definition and Section 2 defined "works contracts" as meaning

"any agreement for carrying out for cash or for deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road bridge or other Immovable property or the fitting out, improvement or repair of any moveable property."

In the definition of "turnover" in Clause (i) an explanation was also added relating to works contracts.

"EXPLANATION 1: Subject to such conditions and restrictions, If any, as may be prescribed in this behalf, (1) the amount for which goods are sold shall, in relation to works contract, be deemed to be the amount payable to the dealer for

carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract."

8. Under Rule 4, a new Sub-clause (3) was added:

"For the purposes of Sub-rule (1), the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract subject to the following minimum percentages."

9. During the assessment year the return made by the assessee showed as many as 47 contracts, most of which were building contracts, which were executed by the assessee. From the total of the amount, which the assessee received in respect of the sanitary contracts and other contracts, 20 per cent and 30 per cent respectively were deducted for labour and the balance was taken as the turnover of the assessee for the assessment year in question. A sample of the agreement, which the assessee entered into with the State Government and which is stated to be typical of other contracts, was filed before the Tribunal and marked as Ex. A. The contract no doubt does not relate to the assessment year but the printed conditions in that form are taken as typical of the other cases. The important provisions of this agreement are:

(1) in consideration of the payment of the said sum of Rs. or such other sum as may be arrived at under the clause of the Standard Preliminary Specification relating to

"payment on lump sum basis or by final measurement at unit prices, the contractor will, upon and subject to the said conditions, execute and complete the works shown upon the said drawings and described in the said specifications and to the extent of the probable quantities shown in schedule A with such variations by way of alterations of, additions to, or deductions from, the said works and method of payment therefore as are provided for in the said conditions."

10. The agreement related to special repairs to the Grand Anicut Canal and was within the State Government. Schedule A attached to the agreement gives the schedule of rates and approximate quantities. There are two provisions in this schedule:

"(a) The quantities here given are those upon which the lump sum tender cost of the work is based, but they are subject to alterations, omissions, deductions or additions as provided for in the conditions of this contract and do not necessarily show the actual quantities of work to be done. The unit rates quoted below are those governing payment for extras or deductions for omissions according to the

conditions of the contract, as set forth in the preliminary specification of the Madras Detailed Standard Specifications and other conditions or specifications of this contract.

(b) It is to be expressly understood that the measured work is to be taken nett (notwithstanding any custom or practice to the contrary) according to the actual quantities when in place and finished according to the drawings or as may be ordered from time to time by the Executive Engineer and the cost calculated by measurement or weight at the respective prices without any additional charge for any necessary or contingent works connected therewith. The rates quoted are for works "in situ" and complete in every respect."

11. Then follows a tabular form showing the probable quantity of the work, the description of the work, the rate, the total number of units of work and the total amount for the work. The remark at the end of the schedule shows that cement for all the items should be supplied by the department at a rate specified in the schedule. Schedule B to this agreement gives particulars of the list of drawings relating to the work to be executed by the contractor. Schedule C contains certain special specifications describing the manner and the conditions to be observed in carrying out the work. It also says that the department should supply cement and provides for the disposal of empty cement gunny bags.

12. From the summary of the provisions of the contract, It will be seen that the contract entered into by the assesseees with the State Government was to execute the works specified in the plans and of the quantity, particulars of which were given in the schedule, for which they should get a lump sum payment as per their tender, which was accepted by the Government. Provision is also made for any alteration, omission, deduction or addition to the actual quantity of work to be done, in which event the tender amount is to be revised after measurement at the respective prices specified in the schedule. In other words, it is a lump sum contract for the quantity of work specified but the cost of work may be revised if there were any alterations, omissions, deductions or additions.

13. The main argument on behalf of the assesseees by their learned advocate was that works contracts of this nature are not contracts of sale of goods and that the Legislature of the province had no power to levy sales tax treating them as involving sale of goods and bringing them within the ambit of the General Sales Tax Act. The Legislative power under item 48, it was contended, extended only to enact a law for levying a tax on a transaction known to law as "sale of goods." and on no others. The Legislature had no power to include within the definition of "sale" a transaction, which is not a sale and thereby extend its power to tax to transactions, which are wholly outside the legislative field. This argument necessitates an examination of the import and the fundamental essentials of a transaction, which may legitimately be described as a sale of goods in order to determine the extent and the limit of the legislative power of the province and also makes it obligatory to analyse and see whether building contracts or contracts of the nature, which were carried out by the assesseees during the

assessment year, were in any sense transactions of sale of goods and do involve any element of sale of the non-controlled materials utilised by the assesseees in carrying into execution contracts entered into by the assesseees.

14. In interpreting item 48, and in order to define the legislative power, no help is derived from the decisions of the Courts in Australia, Canada and the United States as the basis of taxation in those countries is different from ours. These decisions are helpful only in a general way in so far as they lay down the principle on which a constitutional provision conferring legislative power is to be interpreted and the way in which it should be approached. It must be mentioned at the outset that the allocation of subjects in Sch. VII of the Government of India Act was not made on any scientific basis. As observed by Sir Maurice Gwyer C. J. in -- In the matter of AIR 1939 1 (Federal Court) , in construing the provisions, the court should, seek to ascertain the meaning and intention of the Parliament from the language of the Statute Itself, but with the motives of the Parliament it has no concern (vide page 4). Adverting to Lord Wright's observations in -- "James v. Commonwealth of Australia (No. 2)", 1936 AC 578 (B), the learned Chief Justice points out that

"a Constitution is not to be construed in any narrow and pedantic sense. The rules, which apply to the interpretation of other statutes apply, it is true, equally to the Interpretation of a constitutional enactment, but their application is of necessity conditioned by the subject matter of the enactment itself."

At pp. 4-5, it is observed,

"I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory or even for the "purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen but only derogate from its position if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed "ut res magis valeat quam pereat."

In the same case, It was stated, that the language of this item is very plain in its import.

15. Laws, which impose a tax on sales being tax laws, are subject to strict construction. Vide Crawford on the Construction of Statutes, page 738. The same author, while dealing with the source from which the legislative intent should be gathered, points out that

"the intention should be ascertained primarily from the language employed In the statute itself and not from conjectures "allunde". In other words, before a Court can resort to any other source for assistance, it must first seek to find the legislative intention from the words, phrases and sentences, which make up the statute subject to construction. If the meaning of the language of the statute is

plain, then according to the rule announced in innumerable cases, there is really no need for construction as the legislative intention is revealed by the apparent meaning, i.e., the meaning clearly expressed by the language of the statute, In this case, the statute is given a literal interpretation. It is Interpreted to mean exactly what it says."

At page 758 he adds,

"In this connection, it should also be noted that the statute should be construed according to the legislative intent "existing therein at the time of its enactment." The words, which make up the statute, should be given the meaning that they had at the time of its passage, even though the language used may be broad enough to include subjects unknown at the time of the law's enactment. Or stated in a different manner, the language as it was understood when used by the law makers constitutes the source from which the legislative intention must be ascertained". (Italics (Here in " ") are mine)

At page 420, the same author observes:

"Every statute should be regarded as a part of the whole body or system of law. Consequently in construing a statute, the constitution, the common law and other statutes, particularly those "pari materia" and those expressly referred to should be examined, in the effort to ascertain the intention of the legislature. Then too the Legislature is presumed to have known the condition of the law in existence whenever a given statute was enacted. As a result, even judicial decisions must be taken into consideration. Moreover, there is also a presumption that the Legislature did not intend to overthrow legal principles, which have been in existence for a long period of time, in the absence of a contrary intent clearly expressed in the statute. In other words, any statute which requires a construction should be construed to be in harmony with existing law. This is a basic principle of construction."

16. Weaver on Constitutional Law also lays down a similar rule page 77. While referring to the Constitution of the United States, he lays down the following rule of interpretation:

"In Interpreting the Constitution, recourse may be had to the common law of England in force In the United States at the time of the Revolution. Many principles of Government were adopted directly from this source and it has been presumed that the statesmen who wrote the Constitution adopted these principles with the fixed technical meaning they had acquired in legal and constitutional history. The interpretation of the Constitution said Justice Brewar "is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." To which statement Chief Justice Taft has added, "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to

ratification of the conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary".

17. Bearing these principles in mind, we have to construe the relevant entry item 48 of List II of Sch. VII and give effect to the plain words employed in the expression "taxes on the sale of goods." 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 pre-sume that the expression was used in the sense in which it was understood by 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 an 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, 1883, and, in India under the Sale of Goods Act, 1930, which was modelled on the English Act, does not admit of serious doubt.

18. Even before the English Act the English law followed mostly the Roman law. In the Institutes of Justinian under Title XXIII, a contract of purchase and sale was considered. The contract of purchase and sale, It is stated, is complete immediately the price is agreed upon and even before the price or as much as any earnest is paid, for earnest is merely evidence of the completion of the contract. It is necessary that the price should be settled for, without price, there can be no purchase and sale, and it ought to be a fixed and certain price. The price, too, should be in money. As soon as the contract of sale is concluded, i.e., as soon as the price is agreed upon, if the contract is not in writing, the thing sold is immediately at the risk of the purchaser, even though it has not yet been delivered to him. In this description of purchase and sale under Roman Law, stress is not laid on the delivery of the goods.

League on Roman Private Law, under the caption "Emptio Venditio", which is a contract of sale, discusses the elements that go to constitute a contract of sale under Roman law. It is a consensual agreement between a seller and a purchaser with reference to property for a definite and ascertainable price. With the fixation of the price, the contract is treated as complete. There was a difference of opinion between, the Sabinians and the Proculians on the question, whether the price should be in money or whether it could be anything valuable, which is given as consideration, such as a piece of land or a "toga". According to the Proculians, if the price was anything but money, the contract was really one of exchange and was not "emptio venditio", i.e., a contract of sale. The opinion of Proculians finally prevailed. Some changes were introduced by Justinian, but those are not very relevant for the present discussion.

19. Benjamin on Sale, 8th Edn. at page 8 adverts to the difference of opinion as regards sale and barter between the Sabinians and the Proculians. The question

however was finally disposed of, as pointed out by the learned author, by a rescript of the Emperor Diocletian and Maximian in A. D. 294, which was adopted by Justinian. By Justinian's time, therefore, it was decided finally that price was an essence of a contract of sale, and barter was relegated to the class of real contracts.

20. 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 (1) an agreement to sell, by which alone property does not pass and (ii) 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) 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.

21. 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 executory contract but an executed contract, and the transfer of the 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.

22. That this is the meaning to be given to this expression may also be gathered from a decision of the Supreme Court, -- Poppatlal Shah Vs. The State of Madras, .

At p. 276 Mukherjea J. laid down,

"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 riot completed or concluded unless the purchaser becomes the owner of the property."

The transaction denoted by the expression "sale of goods" had a well-defined meaning under law as it existed before the Parliament enacted the Government

of India Act, 1935, and even thereafter. There is a definition of "goods" both in the English Sale of Goods Act and also in the Indian Act. The definition in both the Acts is substantially the same. Under the Indian Act, "goods" means every kind of moveable property other than actionable claims and money; and Includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. According to the definition in the English Act "goods" include all chattels personal, other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements (industrial growing crops) and things attached to or forming part of the land, which are agreed to be severed before sale or under contract of sale.

The Government of India Act, Section 311, gives an inclusive definition of goods, as including all materials, commodities and articles. The transaction denoted by the sale of goods, therefore, as commonly understood under law, is that Which is defined in Section 1 of the English Sale of Goods Act and Section 4 of the Indian Sale of Goods Act. The essential element of a sale of goods is the transfer of the property in the goods to the buyer for a price. It is a consensual act, as it requires an agreement to transfer property in goods for a price. The goods may be existing goods or future goods. They may be ascertained goods or unascertained goods, but in any case, the transfer of the property contemplated is in the goods, which are the subject matter of the contract.

23. The power, therefore, of the Legislature and the field, which is open to the Legislature could not extend to anything other than a transaction of sale, which is well known to lawyers. It does not thereby mean that the Legislature had no power to enact provisions which are intended and which are necessary for the enjoyment and exercise of the power, which is conferred upon it by an Act of Parliament; for example, in imposing a tax on sale of goods, it is necessary that the machinery to levy the tax and enforce it and the powers and jurisdiction that are needed to adjudicate upon the validity or otherwise of the imposition of the tax should be provided. It is also open in the exercise of the incidental power to determine the taxable event or events, which attract the tax. It is open to the Legislature to impose a tax at any point and on any of the elements, which constitute the composite idea of sale of goods. It may choose the point at which the property in the goods passes or the point at which the delivery of the goods is effected or even the point at which the goods are situate.

But these are all incidents or necessary concomitants of the power to impose a tax on the transaction known as sale of goods. Under the guise of enacting a law in respect of a field open to the Legislature, it is not entitled to transgress the limits and widen the field by enacting an inclusive definition of sale of goods, to include what in law is not a transaction of sale. Such transgression may not strictly fall within colourable legislation, which has been declared invalid by the Judicial Committee in more than one case. In the instant case, the question of trenching into the legislative field of the Federal Legislature is not in question. If

really the Legislature has no power to levy a tax upon transactions, which do not constitute in law sales of goods, it purports to do something, which is forbidden; and as observed by Lord Atkin in -- *Xadore v. Bennett*", 1939 AC 468 (D),

"It is unnecessary to repeat what has been said many times by courts in Canada and by the Board that the courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail."

Again in -- "*Attorney-General of Alberta v. Attorney-General of Canada*", AIR 1939 PC 53 "(E), the Judicial Committee observed that under the guise or pretence in the form of an exercise of its own power, the Legislature cannot carry out an object, which is beyond its power and trespass on the exclusive power of the other.

24. The Allahabad and Calcutta High Courts had to construe the expression "sale of goods" and define the limits of the legislative power conferred thereby. As the power to tax is conferred upon an executed contract of sale and not on a mere agreement to sell, i.e., an executory contract, both the High Courts held that a provision imposing a tax on mere agreements to sell was invalid and ultra vires the Legislature. Vide -- *Budh Prakash Jai Prakash and Another Vs. The Sales Tax Officer and Others*, and - *Bharat Sabaigrass Ltd. Vs. The Collector of Commercial Taxes*, , In the latter case, at p. 25, the learned

Judges observed;

"There seems to be enough force in the contention that a mere contract for sale cannot constitute a sale. It being executory in character, pure and simple, no property of ownership passes under it. The sale, on the other hand, is an executed contract where complete ownership passes. The second proviso in Section 2 (g), Orissa Sales Tax Act, seems to be ultra vires. Entry No. 48 in List II of the 7th Schedule of the Government of India Act, 1935, running as "taxes on the sale of goods and on advertisements" is a provincial subject. The provincial Legislature is competent to legislate on the subject. But the term sale under the Orissa Sales Tax Act cannot be made wider than what it means under the Government of India Act, We are to take it that the British Parliament used the term "sale" in the sense in which it was used in India, i.e., a completed transaction involving a transference of interest. A mere contract for sale is not a completed transaction. If it meant anything other than or wider than the meaning of the word "sale" appearing in the Government of India Act, to that extent, it must be said to be ultra vires. Mere contract for sale, therefore, within the State of Orissa cannot be taxable under the Orissa Sales Tax Act."

To the same effect are the observations of Saprú, J. in the first of the cases referred to above, which is a decision of a Bench of the Allahabad High Court, where the learned Judge refers to the elements, which constitute a sale as stated in *Benjamin on Sale*, and to the observations in -- "*Dixon v. Yates*", (1833) 5 B & Ad 313 (H).

25. It, therefore, follows that the legislative power of the Provincial Legislature to levy a tax on sale of goods is confined and restricted only to the transaction of sale as understood by the Parliament of the United Kingdom in the law relating to the sale of goods and any attempt of the Legislature to tax under the guise of or under the pretence of such a power transactions, which are wholly outside it, will be ultra vires and must be declared invalid.

26. This leads us to the consideration of the question whether the contracts of the assessee, which are mostly building contracts, constitute contracts of sale of goods and contain any element of the nature of the sale of goods to justify the imposition of the tax upon them. Contracts, which involve labour and work, may relate to a chattel, such as building a ship or an engine or painting a picture or may relate to immovable property, such as building contracts, contracts for the construction of bridges, dams, laying roads and so on. A contract purely for the supply of labour and work is not a contract of sale of goods, as labour and work cannot be deemed to be goods in any sense of the term. In the case of a chattel, it has to be produced by the labour and work of the contractor and also by the supply of materials necessary for producing the thing.

This was the subject matter of consideration in a number of cases in England, and the question arose whether such contracts are contracts for the sale of goods or contracts for work and labour and materials furnished. The question became important as in the case of a contract of sale of goods a writing is required by Section 4 of the English Sale of Goods Act, if the contracts are for the sale of any goods of value above a certain amount. There was also a similar requirement under the Statute of Frauds, which deals with contracts not to be performed within a year. Benjamin on Sales discusses elaborately the cases on the subject at pages 156 to 161 and again at pages 352 to 355. He formulates the question at page 352 thus:

"It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the 'materials provided' and the parts 'prepared' for executing them but not yet affixed to the ship or vessel or other corpus."

The discussion begins with -- "Tripp v. Armitage", (1839) 4 M & W 687 (I) and -- "Wood v. Bell", (1856) 5 El & Bl 772 (J); -- "Seath v. Moore", (1886) AC 350 (K) and -- "Reid v. Macbeth & Gray", 1904 AC 223 (L) and the discussion is concluded at page 355 thus:

"It follows from this decision 1904 AC 223 (L) that the various rules in the Act as to the passing of the property in goods do not apply in the absence of a contrary intention, unless the materials are contracted for 'separatim', and not merely as part of the larger corpus, which is the subject matter of the contract. The property in them will prima facie pass when the property passes in the larger corpus itself."

It will be sufficient for this discussion to refer to two cases, viz., (1886) 11 AC

350 (K) and 1904 AC 223 (L). In all these cases, the crucial question was whether the contract to construct a building or a ship with materials supplied by the builder could be deemed to be a contract for the sale of the materials apart from the corpus. In (1886) 11 AC 350 (K) which was of course a Scotch case, Lord Watson at p. 381 stated the principle thus:

"There is another principle which appears to me to be deducible from these authorities and to be in itself sound and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished although Intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as sold, unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in (1856) 5 El & Bl 172 (J). In -- "Woods v. Russell", (1822) 5 B & Aid 942 (M), the property of a rudder and some cordage which the builder Had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord Chief Justice Jervls, delivering the judgment of the Court in (1856) 5 El & Bl 772 (J), who stated the real question to be what Is the ship, not what is meant for the ship, and that only the things can pass with the ship "which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience"."

I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in (1839) 4 M & W 687 (I).

In other words, when the material is fixed to the corpus by the builder, the property passes when the property in the larger corpus itself passes to the other party. This rule, of course, is subject to any special stipulations in the contract to build. If the parties intended that property in materials should pass at an earlier stage that of course governs the rights between the parties. If the material is supplied by the other party to the contract, or if on his account the builder purchases the materials, the contract in either event will be a mere contract for labour and work and not for sale of the material. The difficulty arises only in cases in which the material also is supplied by the contractor along with labour and work. In such a case, the general rule is as stated by Benjamin based upon the authorities -- "(1886) 11 AC 350 (K)" and -- 1904 AC 223 (L)". "1904 AC 223 (L)" related to a contract to build a ship. The contract contained this stipulation:

"4. The vessel as she is constructed and all her engines, boilers and machinery, and all materials, from time to time intended for her or them, whether in the building yard, workshop, river or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money."

Before the ship was completed, the ship builders became bankrupt. At the date

of the bankruptcy, there were lying at the railway stations a quantity of iron and steel plates at the orders of the ship-builders. These plates were claimed by the trustee in bankruptcy and also by the shipowners. The plates had been passed by Lloyd's surveyor at the makers' works, and they were each numbered by the makers with the number of the vessel and with marks showing the position which each plate was to occupy in the vessel. Notwithstanding the existence of the clause aforesaid, it was held by the House of Lords that the contract was for the purpose of building a ship and the materials in question should not be regarded as appropriated to the contract or sold under the Sale of Goods Act. Earl of Halsbury L. C. at p. 229 clearly expressed the view that :

"there was no sale at all of the materials as distinguished from a contract of sale of the ship and that there was no acceptance of these materials in any sense, which can be relied upon except in a sense, which, as I have said, is inapplicable for the purpose, viz., the certificate of Lloyd's as to the goodness of the materials. It seems to me, with all respect to the learned Judges who have decided the case in the court below, that their decision was wrong and ought to be reversed."

Lord Davey at p. 232 of the same report expressed his view of the contract in these terms:

"The learned counsel and also the learned Judges in the court below seem to me to have proceeded on the supposition or hypothesis that this contract contained, not only a contract for the purchase of the ship, but a separate contract for the purchase of the materials also; and that seems to me to be a complete fallacy. There is only one contract--a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials "separatim" and unless you can find a contract for the sale of these chattel within the meaning of the Sale of Goods Act, it appears to be that the sections of that Act have no application, whatever to the case."

The special class of contracts with which we are now concerned is building contracts, which, term in this judgment includes contracts for the construction of dams, road work, construction of bridges etc., which were the contracts which the assessee entered into with the State and Union Governments as well as private parties. These contracts are always considered in law as entire and indivisible contracts in the sense, that the complete fulfillment of the promise by one party is a condition precedent to the right of the other to call for the fulfillment of any part of the promise by the other. They have been classified by Hudson on "Building Contracts" into four categories having regard to the mode by which the consideration payable was to be ascertained under the contracts. The first and the most simple form is a contract to do the whole work, the consideration for which is the payment of a lump sum, the second is a contract to do the whole work in consideration of the payment of different sums for different parts of the work, the third is a contract to do the whole work, no mention of the price being made; and the fourth a contract to do the whole work for a price to

be ascertained for example by a schedule of price. The most common form of these are the first and the last.

27. In -- "*Appleby v. Myers*", (1867) 2 CP 651 (N), the Exchequer Chamber considered the nature of a contract to do work and supply materials. The plaintiffs in that case contracted to erect certain machinery on the defendant's premises at specific prices for particular portions and to keep it in repair for two years--the price to be paid upon the completion of the whole. After some portions of the work had been finished and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire. It was held that both parties were excused from further performance of the contract by reason of the accident, and that the plaintiffs were not entitled to sue in respect of those portions, of the work which had been completed, whether the materials used had become the property of the defendants or not. The learned Judges had to consider the question, whether the property in the materials passed to the owner of the premises. The contract was for work, labour and materials and not one of bargain and sale. The labour and the materials became the property of the defendants soon after they were worked into the premises and became part of them. As the plaintiffs stipulated to keep the machinery in repair for two years, they were not entitled to recover anything under the contract unless the whole work was completed, even if the materials had become unalterably fixed to the premises of the defendants. Blackburn J. at p. 659 observes:

"It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or moveable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair or planks and nails and pitch worked into a ship under repair become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as was the case in -- "*Roberts v. Havelock*", (1832) 3 B & Ad 404 (O), or because in consequence of a fire he could not go on with it as in -- "*Menetone v. Athawes*", (1764) 3 Burr 1692 (P). But though this is the prima facie contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be "paid when the whole is complete, and not till then; and we think that the plaintiff in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched and only injured a part of the work, which the plaintiffs had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again in order to fulfill their contract to complete the whole and put it to work for the sums above named respectively."

In conclusion his Lordship observed:

"The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to Justify the conclusion that the parties have entered into a fresh contract."

28. In -- "Reeves v. Barlow", (1884) 12 QBD 438 (Q), the contract was a building contract and it provided that all building and other materials brought by the builder upon the land shall become the property of the land-owner. It was held that the contract was not a bill of sale within the Bills of Sale Act, 1878. Bowen L. J. observed at pp. 441 and 442:

"Down to the time when the building materials were brought upon the landlord's premises, there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises and until this happened, there was no right or interest in equity to any goods at all."

29. The question, when in such a contract the property in the materials passes and on what principle, was discussed by Hudson on Building Contracts at page 386, Chapter XIII, According to the learned author, the property in the materials, bricks, stone, iron, etc., used in a building, as soon as they are affixed passes to the free holder by the well-known rule "*quicquid plantatur solo, solo cedit*". Once the materials therefore are fixed to the soil, they cease to be the materials of the builder and become property of the owner of the land.

In -- (1839) 4 M & W 687 (I)", the rule is definitely stated that until building materials are actually affixed to the building, in the absence of an agreement to pass the property in the materials on delivery, the property therein remains in law in the builder, notwithstanding that they may have been approved by the employer or his agent or brought on the site. It, therefore, follows that unless there is a contract intending specifically to pass the property In the materials as and when they are brought to the site, the property in the materials passes only when they are fixed to the building, whether it is bricks, doors, or door-frames or other material and the contract is treated as an entire contract to build, and the price is to be paid either on lump sum basis or the amount ascertained according to the schedule of rates, after measuring the quantities. There is, therefore, no element of sale of the materials in such a contract, as the contract is not in substance and in effect a contract to sell the materials as goods for a price stipulated between the parties, the ownership in which is to pass in accordance with the principles applicable to them and laid down in the Sale of Goods Act. The ultimate result of executing a contract is to bring into existence Immovable property and not moveable property and the contract therefore does not become a contract relating to sale of goods but is only a contract to build.

30. Our attention has also been drawn to the decision In -- "Clark v. Bulmer", (1843) 12 LJ Ex 463 (R), which related to a contract to build a steam engine,

which was also a contract for work, labour and supply of materials. Baron Parke considers the question at pp. 466 and 467 and observes:

"Whenever a simple contract is executed and terminates in a debt, which it is the duty of the defendant to pay "instanter", it is no doubt, the subject of an indebitatus count; but the executed contract must be described properly and the question here is, whether it is proper to describe this as a debt for a main engine or goods sold and delivered. We think not. The engine was not contracted for to be delivered, or delivered as an engine in its complete state, and afterwards affixed to the free hold; there was no sale of it, as an entire chattel and delivery in that character; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it, which were used in the construction and from time to time fixed to the free hold and therefore became part of it be deemed goods sold and delivered for there was no contract for the sale of them as moveable goods; the contract was in effect, that the plaintiffs were to select materials, make them into parts of an engine, carry them to a particular place and put them together and fix part to the soil and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine. The cases of -- *Cotterell v. Apsey*", (1815) 6 Taunt 322 (S) and (1839) 4 M & W 687 (I) are authorities that materials used or intended to be used, in the construction of a fixed building; cannot be deemed goods sold and delivered; and "there is no difference between the erection of this sort of fixture and any other building; the proper form of count is in "indebitatus assumpsit" for work, labour and materials or for erecting and constructing an engine."

31. The learned counsel for the petitioners referred us to Roman Private Law, where the principle of "accessio" was discussed. "Inaedificatio" is one branch of the principle of "accessio". It is stated therein that where A with B's materials builds a house upon his own ground, A becomes owner of the building and so long as the building stands, B cannot claim his materials because the XII Tables provide that no one is to be compelled to take out of his building "tingnum" or material, even though it belongs to another. But B is not without remedy, for by means of the action "de tigno juncto", perhaps a special form of "actio furti", he can recover double damages from A, if he acted in bad faith, and when the building is pulled down, can bring an "actio ad exhibendum" and claim the materials if he has not already obtained damages. But if A acted in good faith B's only remedy is to claim the materials, in case the building is dismantled, but he may perhaps have had an "actio in factum" for their value. See Leage on Roman Private Law, page 153, and also the institutes of Justinian Book II, Title I, pages 40 and 41.

32. Substantially the same principle is embodied in Section 3, Transfer of Property Act, where the things attached to the earth are defined. Mulla, in his Transfer of Property Act, commenting on this, points out that though the maxim of English law "quicquid plantatur solo solo cedit" does not apply to India, nevertheless the question, whether a chattel is imbedded in the earth so as to

become Immovable property, is decided by the same principles as those which determine what constitutes an annexation to the land in English law (See also Classical Roman Law by Frintz Schulz at pages 364 and 365 where he discusses "inaedificatio") The decision in -- "Vallabhdas Naranji v. Development Officer, Bandra," AIR 1929 PC 163 (T), cited by the learned Advocate General does not conflict with any of these principles. In that case, the Government officials, it was found, were not mere trespassers, but, under a colour of title, they erected a building bona fide believing in their right to do so. It was, therefore, held that title to the superstructure did not pass to the owner of the land, and that the superstructure continued to belong to the Government. The Judicial Committee referred to the principle well-established In England, that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on It, unless there are special circumstances. It was agreed by counsel that the maxim "quicquid plantatur solo, solo cedit" had no application to India. The Judicial Committee referred to a statement of the law by Barnes Peacock C. J. In -- "Gobind Puramanick V. Gooroo Churn Dutt", 3 Suth WP 71 (U), where it was pointed out that there is no absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and it is subjected to the same rights of property as the soil itself. By the mere accident of attachment to the soil, the building does not become the property of the owner of the soil. But this applies only to a case where the person making the improvement does It under a bona fide title or claim of title, and if it turned out that his plea was unfounded, he is entitled to remove the materials restoring the land to the owner; but if he is a trespasser no such right is recognised. But all this does not apply to a case where, under a contract to build, a person erects a building with labour, work and materials supplied by him upon the land of another. In such a case the principles above discussed will apply.

33. It is clear from the foregoing discussion that there is no element of sale of the materials in a building contract and that the contract is one and entire and is indivisible. Unless the work is completed, the builder is not entitled to the price fixed under the contract or ascertainable under the terms of the contract. It does not imply or involve a contract of the sale of the materials for a price stipulated. The property in the materials passes to the owner of the land not by virtue of the delivery of the materials as goods under and in pursuance of an agreement of sale which stipulates a price for the material. The property in the materials passes to the owner of the land because they are fixed in pursuance of the contract to build, and along with the corpus, which ultimately results by the erection of the superstructure, the materials also pass to the owner of the land.

34. Bearing these principles, in mind, we may now consider the nature of the contracts entered Into by the assessee, of which Ex. A is taken as typical to find out whether a contract to sell materials as such, which answers the description of a contract of sale of goods, could be spelt out of such a contract. The relevant terms of the contract have already been set out. It is a lump sum contract and it is on that basis that the lump sum tender for the entire coat of the work was

accepted by the Government. The expression used is "The quantities here given are those upon which the lump sum tender cost of the work is based." But the parties contemplated that it may be possible that certain alterations or omissions or additions may be required during the progress of the work, and for that eventuality they provided that as per the schedule of rates the necessary adjustments in price fixed should be made either by addition or subtraction, calculating the amount on the basis of the schedule of rates. Cement and other materials were supplied by the Government. It is only the non-controlled materials that the contractor had to find himself for the purpose of the work. He does not purport to sell the materials under the contract, and it is not a contract for the sale of the materials. The ownership in the materials does not pass by reason of any agreement of sale by which the materials were agreed to be sold. On the face of the contract, therefore, it is difficult to come to the conclusion, that the contract involves any element of sale of goods to justify the imposition of a tax upon the assesses.

35. Though before the Tribunal and the Department no attempt was made to justify the levy of the tax on the ground, that apart from the amendment introduced in 1947, the contracts on the face of them involve an element of sale of goods, such an argument was, however, attempted before us. Even if it is permissible for the Government to take up that stand, we think that there is no substance in that argument.

36. The learned Advocate General, when he was asked to define the meaning of the expression "sale of goods" as contained in item 48 of List II, attempted a very wide definition of sale of goods, which does not fit in with the accepted notion of the transaction known to law as sale of goods. According to him, a sale occurs wherever one person having dominion or disposing power over moveable property including materials, articles and commodities by a consensual arrangement transfers the property to another for consideration, and in support of this definition he was not able to cite any authority. It is unnecessary for us to consider the question debated before us, whether the price should be in money and whether it can be any other valuable consideration, for that question does not arise for consideration here. The learned Advocate" General, however, attempted to argue that, exchange transactions under Sections 118 and 121, Transfer of Property Act, are also transactions of sale, and that hire purchase agreements are also treated as sale transactions under certain contingencies as laid down in the -- *The Auto Supply Co. Ltd. Vs. V. Raghunatha Chetty*, . But it is unnecessary for us to deal with this.

37. Of the decisions cited by the learned Advocate General reference may be made to the -- "*Deputy Federal Commr. of Taxation (Queens-land) v. Stronach*", .55 CUB 305 (W) and -- "*Hornbook (Pty.) Ltd. v. Federal Commr. of Taxation*", 62 CLR 272 (X). In the 55 CLR 305, (W) the question was whether granite and freedstone, which, in Australia, are cut out of quarries and moved in large blocks and then sawn into sizes and suitable for use in the construction of

buildings, are goods manufactured in Australia within the meaning of the Sales Tax Assessment Act and not exempted by Section 20(1), (g) of the Act. Under that section primary products, which are derived directly from operations carried on in Australia in mining and which have not been subject to any process of treatment resulting in an alteration of the form, nature or condition of the goods, were exempt from taxation. It was held that as the granite, etc., were subjected to manufacturing process were not primary products, which could be exempted from the tax u/s 20(1) (g) of the Assessment Act. This decision does not throw any light on the question now in issue before us, as legislative power in Australia was not founded on transactions of sales of goods as under item 48 of List II.

In 62 CLR 272 (X), a specific section in the Sales Tax Assessment Act provided that sales tax shall be levied and paid upon the sale value of goods manufactured in Australia by a tax payer and sold by him or applied to his own use. In that case, the contractor constructed a bridge under contract with a highway company, which held a franchise for the erection of the bridge under the Tolls on Privately Constructed Road Traffic Facilities Act of 1931. The bridge was constructed on reinforced concrete piles driven into the bed of the sea. The piles were constructed by the contractor on the shores of the bay adjacent to the site of the bridge. Concrete piles were not bought and sold in Australia but were specially constructed by contractors for a particular Job on which they were engaged. It was held that the piles were goods within the meaning of the Sales Tax Assessment Act and by virtue of Section 3(1) of the Act, the contractor must be deemed to have sold the piles and was liable to tax.

At p. 278 Latham C. J. definitely finds that there was no sale of the piles to any person whereby that person became owner of the piles before they lost their character as chattels and became part of the bridge. By virtue of the language of Section 3(4) a person shall be deemed to have sold goods, if, in the performance of any contract under which he has received or is entitled to receive valuable consideration he supplies goods, the property in which, whether as goods or in some other form, passes under the terms of the contract to some other person. As the requirements of that section were satisfied, it was held that the tax was justified. But for Section 3(4) of the Act the levy would not have been justified. But the question of the competency of the Australian Parliament to enact the provision was not in issue as the power to levy sales tax was not restricted as under our Constitution Act of 1935 to a sale transaction.

The only question considered in -- "Love v. Norman Wright (Builders) Ltd.", 1944 1 KB 484 (Y) was whether under a contract entered into after the Finance (No. 2) Act, 1940, the buyer was under liability to pay the registered seller the purchase tax in addition to the agreed purchase price unless the contract so provides. As u/s 22 of the Act, the registered seller is accountable for the tax, there is no obligation imposed and u/s 27 of the Act, no liability was imposed on the buyer and the seller had no right to recoup it from the buyer. The British Parliament Is omnipotent and its power of legislation is not restricted in any manner. This case

does not help us.

38. It therefore, follows that the building contracts, which the assessee entered into during the assessment year, on which the turnover was calculated, do not involve any element of sale of the materials 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. If the amendments introduced in 1947 by the Provincial Legislature are intended to catch in the net of tax contracts of the nature with which we are concerned, we should hold that to that extent the amendments introduced are ultra vires of the Provincial Legislature as they had no power to tax transactions which are not sales of goods. We, therefore, think that the levy of tax on the assessee on the sum of Rs. 29,31,528-7-4 was not justified in law.

39. It only remains to consider the second question, viz., whether the assessee is liable to pay tax on the value of the food grains which they have supplied to the workmen. The question really turns upon the meaning to be given to, the definition of "dealer" in the Act. "Dealer" means any person, who carries on the business of buying or selling goods. As observed already the assessee supplied food grains for the benefit of the workmen and recovered the cost of them by debiting the value against their wages. There is no element of profit. It was intended merely as a scheme for the amelioration of the workmen and it was in no sense a business of selling goods within the meaning of the definition. "Business" in the definition does not include every activity which in popular sense is called business. The word "business" must be understood in a commercial sense as involving an activity designed to earn profit.

40. The taxing statutes, which attempt to levy a tax on business turnover are generally intended to impose a tax on commercial transactions. The Madras General Sales Tax Act is not a statute, which attempts to impose a tax on the mere sale or purchase of goods. Besides the definition of dealer in which reference is made to the person, who carries on the business of buying or selling goods, the definition of sale also implies that the transfer of property in the goods by one person to another should be in the course of trade or business. The words "business" and "trade" are sometimes used as interchangeable, though very often it is stated that the word "business" is of wider import than trade. In the Concise Oxford Dictionary, various meanings of business are given, viz., being busy, task, duty, province, cause of coming, habitual occupation, profession, trade, serious work. A man may be employed in his domestic business, that is, the affairs concerning his home. He may be engaged in political business or social activity and so on. From the intention of the Legislature gatherable from the provisions of the Act, it is obvious that the word is not used in a general sense. Under the Income Tax Act and the Excess Profits Tax Act, it cannot be disputed that the word "business" is used in the sense of carrying on

continuous trading operations with a view to earn profit. He may not actually obtain profit and the business may end in loss. The test is not whether he actually gets profits or loss but the object with which the trading activity is carried on, If we omit the expression "who carries on the business of" in the definition of dealer, it would only mean that a dealer is a person who merely buys or sells goods. The object of the Act is not to impose tax upon such a person. The words "buying and selling" are qualified by the expression "carries on the business of." The context, therefore, requires that the word "must be understood in a restricted and commercial sense that the activity was with a view to earn profit.

41. In *Graham v. Lewis*, (1888) 22 Q. B. D. 1(Z), the Court of Appeal in England had to construe the expression "carry on business" occurring in the Mayor's Court (Extension) Act 1857 (20 and 21 Vict. Ch. CL VII Section 12). In construing the meaning of the expression "carry on business" Fry L. J. stated at p. 5 of 22 Q.B.D.) :

"Now I think that the expression "carry on business is not ordinarily used in the sense of a person being busy or doing business merely. A butler employed to look after his master's plate and perform the other duties of his occupation may be a very busy man, but he could not be said to be carrying on business. A man who busies himself about science, the volunteer movement, or politics, though he may have a great deal of business to transact in respect of those matters, does not carry on business. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion, it imports that the person has control and direction with respect to a business and also that it is a business carried on for some pecuniary gain."

"*Inland Revenue Commrs. v. Korean Syndicate Ltd.*", 1921 3 KB 258 (ZI) is a case in which a company was incorporated as a limited company for the object of acquisition and working of concessions and turning the same to account. The company entered into an agreement to lease a concession in Korea, which it had acquired in consideration of the lessees paying what was therein described as a royalty but which was in fact a percentage based on the profits made by the lessees. The company also received the Interest on a certain sum of money on deposit at a bank. The operations of the company were restricted to the collection and distribution of these two sources of Income and to the payment of the premiums on a sinking fund policy. The question that arose for decision was whether the company was carrying on "trade" or "business" within the meaning of the Finance Act of 1915, Section 39. The Court of Appeal held that the company did carry on trade or business and was, therefore, liable to be assessed to excess profits duty under the Finance Act.

Lord Sterndale M. R. at p. 272 considered the meaning of the word "business" used in the Finance Act, Section 39 and according to the learned Master of Rolls, the word denotes trade or business of any description carried on by a company and if a company did, as in that case, acquire concessions and turn them to

account, it is impossible to maintain that it was not carrying on any business. The profit element, therefore, was present. In the same case, Atkin L. J. points out that the definition given by Rowlatt J. in -- "*Inland Revenue Commrs. v. Marine Steam Turbine Co.*", 1920 1 KB 193 (Z2), that it must be an active occupation or profession as opposed to passive, was too narrow and that even holding-company, which does not do any active business but only indulges in passively carrying on business, may yet be doing "business" within the meaning of the Finance Act.

42. *A. Lewis and Co. (Westminster), Ltd. v. Bell Property Trust Ltd.*", 1940 1 Ch 345 (Z3), is an interesting case. The question dealt with was concerned with the interpretation of a restrictive covenant by the lessors as to the use of certain premises. The stipulation was that the premises should not be used for the business of sale of tobacco, cigars and cigarette. The premises however was subsequently let by the lessors to a tea shop, and, in the course of the business of the tea shop, cigarettes were sold to customers at the cashier's desk. It was complained that this was a breach of the restrictive covenant but the contention was negatived as the sale of the cigarettes was only an incidental part of the business of the tea shop and was not in any sense a breach of the lessors' covenant. This decision is only helpful in determining the main business of a person whether an individual or a corporation as distinguished from incidental business of such a person. That it is possible to have sales and purchases as incidental to non-commercial objects was recognised in -- "*Inland Revenue Commrs. v. Eccentric Club Ltd.*", 1924 1 KB 390 (Z4). The -- "*Religious Tract and Book Society of Scotland v. Forbes*", (1896) 3 Tax Cas 415 (Z5) is a peculiar Instance of a case in which one particular transaction was held to be a business and the other was not. The Religious Tract and Book Society of Scotland, which was founded for the diffusion of religious literature, sold Bibles, etc., at a shop in Edinburgh and also sent out colporteurs, whose duty was to sell Bibles and to act as cottage missionaries. The sales at the Edinburgh shop earned profit but the colportage ended in loss. The combined effect of the two operations was an annual loss, which was made good by subscriptions. It was held that colportage, though it involved an element of sale, as not a trade and that the loss on it could not be set off for purposes of Income Tax against the profits from the book-seller's business carried on at the shop in Edinburg.

In -- *Sri Gajalakshmi Ginning Factory Ltd., Palladam Vs. The Commissioner of Income Tax, Madras*, , this Court had occasion to consider the meaning of the word "business" under the Income Tax law, where it is defined as including any trade, commerce or manufacture or any adventure or concern not exactly amounting to trade, commerce or manufacture.

"Trade has been explained" to quote the passage where it was considered, "in the Concise Oxford Dictionary" "as business, especially mechanical or mercantile employment opposed to profession carried on as means of livelihood or profit". The meaning of "commerce" as given by the same Dictionary is "exchange of

merchandise, especially on large scale". In ordinary parlance, trade and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell them for profit, it is an ordinary case of trade. If the transactions are on a large scale it is called commerce. Nobody can define the volume of business, which would convert a trade into commerce. But everybody understands the distinction between the two with sufficient vagueness."

43. From a review of these authorities, it seems to us clear that the word "business" employed in the definition of "dealer" in the Madras General Sales Tax Act is used in the sense of buying or selling goods with a view to earn profit.

44. As observed already, in the present case, the supply of food-grains to the workmen by the assesseees is not carried out with a view to earn profit and in fact no profit accrued. We think, therefore, that the objection of the assesseees that they are not liable to pay sales tax must be upheld.

45. The result is that the Revision Petition is allowed in respect of the two Items (Items 1 and 5) which were included in the turnover of the assesseees during the assessment year, which we direct must be deleted from the turnover. The assesseees who have succeeded will be entitled to their costs, which we fix at Rs. 250.