

**(1994) 02 RAJ CK 0016**

**In the Rajasthan High Court**

**Case No :** Civil Writ Petition No's. 2206, 2207, 2208, 2209, 2350, 2351, 2352, 2353, 2354, 2393, 2492, 2602, 2702, 2704, 2708, 2709, 2710, 2711, 2712, 2825, 2842, 2843, 2844, 2845, 2846, 2852, 2923, 2924, 2925, 2927, 2935, 3088, 3099, 3320, 3321, 3323, 3372, 3447,

Gannon Dunkerley and Co.

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

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**Date of Decision :** 28-02-1994

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5  
Constitution of India, 1950 — Article 141, 265, 268, 269, 286

**Citation :** (1994) 1 WLC 554 : (1994) 1 WLN 652

**Hon'ble Judges :** N.L. Tibrewal, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

N.L. Tibrewal, J.—The above mentioned writ petitions and other similar petitions mentioned in Schedule "A" annexed herewith are disposed of by a common order, as they are identical and common questions have been raised, which relate to imposition of tax on the transfer of property in goods involved in execution of a works contract. More precisely, the grievance of the petitioners is that in view of the decision of the apex Court of the country in M/s Gannon Dunkerley & Co. and Ors. v. State of Rajasthan and Ors. (1983) 1 SCC 364 : (1993) 88 STC 204, whereby Section 5(3) of the Rajasthan Sales Tax Act, 1954 (hereinafter referred to as "the RST Act" or "the Act") and Rule 29(2)(i) of the Rajasthan Sales Tax Rules, 1955 (hereinafter referred to as "the Rules") were declared unconstitutional and void, no tax is leviable in the State of Rajasthan on the goods and materials used in a works-contract, but still the same is being charged by the Commercial Taxes Department and the awarders of the contract are making deductions of the amount of tax as provided in Rule 46(2) of the Rules, as the matter goes to the root of the imposition of tax and is of general importance, notices were given to the respondents Mr. G.S. Bapna, Advocate

accepted notices on behalf of the Commercial Taxes Department. He argued the matter without filing any return as pure questions of law are involved for decision.

2. The petitioners are contractors engaged in the work of on struction. It was urged on behalf of the petitioners that Section 5(3) of the RST Act was the only charging provision for levy of tax on works contracts and once the said provision is declared unconstitutional and void, the basis of levy/charge of tax on works contracts in respect of goods and materials used in their execution, no more exists and, as such, no tax can be imposed. Learned Counsel contended that no tax can be lived and charged from a dealer or a contractor unless the charging provision clearly imposes an obligation. It other words, the arguments is that if the case does not fall within four corners of the provision of a taxing statute, no tax can be imposed by inference and the operation of the existing provisions cannot be enlarged so as to embrace matters not specifically mentioned therein.

3. On behalf of the revenue, Mr. Bapna, on other hand, vehemently conceded that even after Section 5(3) of the RST Act and Rule 29(2)(i) of the Rules were declared unconstitutional and Void by the Supreme Court, tax is leviable on the goods or materials used in the execution of a works-contract in view of other provisions of the Act and the Rules which clearly provide charging provisions. According to Mr. Bapna, as a result of Forty-sixth Amendment, the Contract which was single and indivisible, has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and services, and such contract has been brought at par with a contract containing two separate agreements and imposition of tax is permissible on sale or purchase of goods. Mr. Bapna, therefore, contended that sales-tax is leviable on the value of the goods involved in the works-contract as per the existing provisions of the RST Act and the Rules.

4. In over to appreciate the contentions urged by the learned Counsel for the parties, it is necessary to refer the relevant provisions of the Constitution, RST Act and the Rules. In Builders Association of India and Others Vs. Union of India (UOI) and Others, , the Hon"ble Supreme Court has traced the historical background of the relevant constitutional and statutory provisions and the circumstances leading to the Constitution (Forty sixth Amendment) Act, 1982. I shall therefore, make a brief reference to the relevant provisions.

5. There was a conflict of judicial opinion amongst the various High Courts of the country on the question as to whether the cost of goods and materials used in a works-contract could be subjected to payment of sales tax or not. In Madras general Sales Tax Act, 1939, an amendment was introduced, in the year, 1947 and the definition of "Sale" was enlarged to include a transfer of the property in goods and materials used in construction so as to impose a tax on the supply of such goods and materials. The validity of the said provision was challenged by the Contractor in a writ petition before the Madras High Court. The Madras High Court, in its decision reported in AIR 1954 Masd. 1130, held that the impugned provisions introduced by the Amendment Act of 1947 were ultra vires the power

of the Provincial Legislature. The same view was taken by the Hyderabad High Court in *Jubilee Engineering Co. Ltd. v. S.T.O.* AIR 1956 Hyd. 79 : (1956) 7 STC 423. The Kerala High Court in *Gannon Dunkerley & Co. (Madras) (P) Ltd. v. STO* AIR 1957 Ker : (1957) 8 STC 347 and the Mysore High Court in *Mohammed Khasim v. State of Mysore* (1955) 6 STC 211 took a contrary view and held that the provisions of the Act imposing a tax on construction of work are valid, and further upheld the determination of the value of the materials on a percentage basis under the Rules. In *Banarsi Das v. State of Madhy Pradesh* (1956) 6 STC 93 MP, a Bench of the Nagpur High Court held, differing from the view taken by the Madras High Court, that the provisions of the Act imposing a tax on the value of the materials used in a construction on the footing of a sale thereof were valid, but that they were bad insofar as they enacted an artificial rule for determination of that value by deducting out of the total receipts of fixed percentage on account of labour charges, inasmuch as the tax might, according to that computation, fall on a portion of the labour charges and that would be ultra vires. The Rajasthan High Court in *Bhuramal and Others Vs. State of Rajasthan*, took a similar decision.

6. The controversy was ultimately resolved by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, The Supreme Court affirmed the view taken by the Madras High Court and held that the expression "Sale of Goods" in Entry 48, List II of Schedule Seventh to the Government of India Act, 1935 had the same meaning as the said expression had in the Sale of Goods Act, 1930, its essential ingredients being an agreement to sell movable for a price and property passing therein pursuant to that agreement. It was also held that in a building contract, which is entire and indivisible there is no sale of goods and it was not within the competence of the Provincial Legislature to impose a tax on the supply of materials used in such a contract treating it as a sale. Para 46 of the judgment leading to the conclusion may be reproduced for the sake of convenience:

To sum up, the expression "sale of goods" in Entry 48 is a nomen jurist, its essential ingredients being an agreement to sell movable for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible and that is its norm, there is no sale of goods, and it is not within the competence of the Provisional legislature under Entry 48 to impose a tax on the supply of the materials used in such contract treating it as a sale.

7. However, it was made clear that the above mentioned conclusions had reference to works which were entire and indivisible land it was observed:

It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements though there is a single instrument emoting them, and the power of the State to separate the agreement to sell, from the agreement to

do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.

8. By virtue of the above decision, no sale-tax could be believed on the amount received under a works-contracts, even though, the contractor had supplied goods for construction of the buildings. This decision was equally applicable to the provisions found in Entry 54, List-II of the Seventh Schedule of the Constitution.

9. After the decision in Gannon Dunkerley's case (supra), the Law Commission examined the matter with regard to taxability of goods involved in the execution of works-contracts. In its Sixty-first Report, the Commission considered the legal position and expressed the desirability of inserting in Article 366 of the Constitution, a wide definition of "sale" so as to include works contracts, consequently, the Constitution was amended by Forty-sixth Amendment and Clause (29-A) was inserted in Article 366 and Clause (3) of Article 286 was substituted. There were other amendments also, but they are not relevant for the present petitions. Clause (29-A) of Article 356 is in the following terms:

(29-A) "tax on the sale or purchase of goods" includes-

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration.
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of these goods by the person to whom such transfer, delivery or supply is made.

Clause (3) of Article 286 was submitted as under:

(3) Any law of a State shall, insofar as it imposes, or authorizes the imposition

of,-

(a) a tax on the sale or purchase of goods declared by the parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause (29-A) of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

10. After Forty-sixth Amendment, a works-contract, which was single and indivisible, has been altered by a legal fiction into a contract, which is divisible into one for sale of goods and the other-for supply of labour and services and such contract has been brought at par with a contract containing two separate agreements. After this amendment, it has become possible for the State to levy sales tax on the value of goods involved in a works-contract in the same way in which the sales tax was leviable on the price of the good and materials supplied in a building contract, which was entered into two distinct and separate parts, as stated earlier.

11. However, the power of the States to levy sales tax on the materials used in the works contact is subject to other provisions of the Constitution and the Parliamentary Legislation made in pursuance of Articles 269(3) and 268(2), i.e., the Central Sales-Tax Act. In view of these provisions, the State Legislature is not competent to levy the tax on the following sales or purchases:

(i) Where sales or purchase takes place in the course of Inter- State Trade or Commerce, such a sale is beyond the legislative competence of the State Legislature for purposes of levy of sales-tax (see Article 269(3). Entry 54 of List-II is subject to Entry-92-A of List-I. Entry-92-A of the List-I gives exclusive powers to the Parliament to levy tax on the sales taking place in the course of Inter-State Trade or Commerce.

(ii) Where the scales takes place outside the State vide Article 286(1)(a) of the Constitution.

(iii) Where sales takes place in the course of import into an export from the country (vide Article 286(1)(b)).

(iv) Such other limits, if any, as the Parliament may impose in respect of:

(a) Sale of goods declared by Parliament by law to be of special importance in Inter-State Trade or Commerce;

(b) Sale or purchase of goods being a tax in the nature referred to in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause 29-A of Article 286 of the Constitution.

12. Following the Forty-sixth Amendment, various States amended their sales tax legislation to make provision for imposition of sales-tax on the goods and

materials used in construction of a works-contract. The RST Act was amended by the Rajasthan Finance Act, 1987 (Act No. 7 of 1987) and by the Rajasthan Sales Tax (Amendment) Act, 1988 (Act No. 9 of 1988). The definition of "sale" contained in Clause (o) of Section 2 was substituted, certain amendments were made in definition of "sale price" contained in Clause (p), the definition of "turnover" in Clause (t) was also amended. Clause (u) was introduced to define works contract. Sub-section (3) was added in Section 5 and Sub-section (2-C) was inserted in Section 7. Then again, by Rajasthan Sales Tax (Second Amendment) Act, 1988 (Act No. 13 of 1988) definition of "works contract" contained in Clause (u). Was substituted. After the decision of the Supreme Court in Builders Association of India's case (supra) Rajasthan Sales Tax (Amendment) Act, 1990 was enacted whereby some minor changes were made in the definition of "sale" contained in Clause (o) and the proviso, which was inserted in the definition of "sale price" in Clause (p) by Rajasthan Act No. 7 of 1987 was deleted.

13. In Rajasthan Sales Tax Rules, 1955 by notification dated May 28, 1987, Sub-rule (2) was inserted in Rule 29 to provide deductions in turnover relating to works-on tracts. This was subsequently substituted by notification, dated June 28, 1989, after the decision in Builders Association of India's case (supra).

14. The expression "sale", "sale-price, "taxable turnover" and "turn-over" are defined in Clause (o), (p), (s), (t) of Section 2. Their amended definitions are as under:

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

(i)....

(ii) a transfer of property in goods(whether as goods or in some other form) involved in the execution of works contract;

(iii)....

(iv)...

(v)...

(vi)....

EXPLANATION I--The transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to take place within the State of Rajasthan if the goods are within the State at the time of their appropriation or application or use for the execution of the works contract irrespective of the place where the agreement for such works is made or from where the goods are transferred or delivered for use in the works contract.

EXPLANATION-II--Where the work under a works contract is spread over many State including the State of Rajasthan, the proportionate work done within the State of Rajasthan shall be deemed to be the sale under this clause irrespective of the place of agreement for works or the point of movement of goods involved in the execution of that works contract."

"1(p)--"sale-price" means the amount payable to a dealer as consideration for the sale less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged and the expression "purchase price shall be construed accordingly:

Provided that in the case of a hire-purchase agreement, the market-price of the goods on the date on which such goods were transferred under such agreement shall be deemed to be the sale price of the goods."

"2((s)--"taxable turnover" means that part of turnover which remains after deducting therefrom the aggregate amount of the proceeds of sale of goods--"

(i) on which no tax is leviable under this Act,

(ii) which have already been subjected to tax under this Act.

(iii) which have been sold to persons outside the State for consumption outside the State; and

(iv) which are taxable at a point of sale within the State subsequent to the sale by the dealer and such sale is covered by a declaration in as may be required under any provision of this Act or the rules made thereunder.

"2(t)--"turnover" means the aggregate amount of sales received or receivable for a sale, transfer, delivery or supply by a dealer in any of the ways referred to in Clause (o); (Provisos omitted)

Explanation--Subject to such conditions and restrictions, if any, as may be prescribed in this behalf -

(i) The amount for which goods are sold or supplied shall in relation to a works contract be deemed to be the amount payable to the dealer for carrying out such contract less the cost of labour up to such extent as may be prescribed.

15. The expression "works contract" was defined in Section 2(u), which was inserted by Amending Act No. 9 of 1988:

2(u)--"Works contract" includes any agreement for the buildings, construction, manufacture, processing, fabrication, erection, installation, fitting out, overhauling, repair, improvement, modification, white-washing, painting, varnishing and other similar activities or commissioning of any movable or immovable property for cash, deferred payment or other valuable consideration

but excludes a work contract purely of labour or service.

16. The newly inserted Sub-section (3) of Section 5 provided as under:

(3)--Notwithstanding anything contained in this Act, in the case of a works contract, the turnover of such contract shall be subjected to tax:

Provided that such deductions as may be prescribed, may be allowed to a contractor while determining his tax liability."

Sub-section (2-C) of Section 7 provides as under:

(2-C) Notwithstanding anything contained in this Act, in the case of a works contract, the tax may be deducted in such manner and under such circumstances as may be prescribed from every bill of payment to a contractor.

17. Sub-rule (2) of Rule 29 of the Rules, as substituted by Notification dated June 24, 1989, reads as under:

(2)--In case of a works contract, tax shall be computed on the turnover of the contractor after deducting:

(i) The value of the goods transferred in execution of works contract, whether as goods or in some other form which have already suffered tax at the rate, prescribed u/s 5 or which are exempted from tax u/s 4 of the Act.

(ii) All sums towards labour charges, which are directly co-related with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form: Provided that where the labour charges are not determinate from the accounts of the contractors, or are considered unreasonably high considering the nature of the contract, the deductions towards labour charges shall be allowed by the assessing authority according to the limit prescribed in column 3 of the type of contract specified in column 2 of the table given below.

"Table omitted."

18. Sub-rule (2) of Rule 46 of the Rules as substituted by Notification dated June 28, 1989, is as under-

2(a)--In a works contract, the awarders, in case of its being a department of any Govt., a Corporation, a Govt. undertaking, a Cooperative Society, a local body, a trust, or a private or public limited company, (responsible for paying any sum to a contractor for carrying out any works, shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, deduct an amount equal to three per cent of such sum towards the tax) (and shall issue a certificate of deduction of tax to the contractor in form ST45).

(Provided that such deduction of tax shall be subject to adjustment at the time of assessment of the contractor.)

19. A close scrutiny of the relevant portions of the RST Act and the rules, some of which have been referred to above, makes it abundantly clear that Sub-section (3) in Section 5 was inserted to levy tax on works-contract and as per this provision, tax was leviable on the turn-over of such contract and not on the "taxable turn-over" as provided under Sub-section (1) of Section 5. This provision, therefore, makes a departure in relation to imposition of tax in case of works contract from levying of tax in respect of sale of other goods. With regard to works contract, Explanation I to Clause (t) of Section 2 lays down that amount for which goods are sold or supplied, shall in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less the cost of labour up to that extent as may be prescribed.

20. Section 5(3) read with Clause (t) of Section 2 of the RST Act, thus, provides in relating to works contract that tax would be leviable on the value of the works-contract after deducting (i) the cost of labour upto that extent as may be prescribed in the Rules framed under the Act, in view of Explanation I to Section 2(t); and (ii) such deduction as may be prescribed in the Rules in view of the proviso to Section 5(3)--On the other hand, Sub-section (1) of Section 5) of the Act, which applied in respect of other sales, imposes tax on the taxable turnover which has been defined under Clause (s) of Section 2 of the Act.

21. The constitutional validity of Forty-sixth Amendment as well as the amendments made in the State Legislatures were considered by the Supreme Court in Builders Association of India case (supra). The second question, which also came for consideration in the above case was whether the power of State Legislature to levy tax on the transfer of property in the case of goods in the execution of a works contract referred to in Sub-clause (b) of Clause (29-A) of Article 326 of the Constitution was subject to the restrictions and conditions contained in Article 286 of the Constitution.

22. The Supreme Court upheld the validity of the Forty- sixth Amendment. On the second question, it was held that Sales Tax laws passed by the Legislature of State to levy taxes on the transfer of property in goods (whether as goods of some other form involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. It was laid down as under:

Sub-clause (b) of Clause (29-A) states that "tax on the sale or purchase of goods" includes among to there things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract, it does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract it refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property n goods (whether as goods or in some other form). The latter part of Clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that

takes place as per Sub-clause (a) to (f) of Clause (29-A), the latter part of Clause (29-A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under Sub-clause (b) of Clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in Clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of Sub-clause (b) of Clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution.

23. Explaining the effect of the Forty-sixth Amendment on the powers of the State to levy sales tax, it was observed:

Even after the decision of this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the State to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above.

(Emphasis supplied)

24. While deciding the case in Builders Association of India (supra), the Supreme Court had interpreted the relevant provisions, but did not consider the validity of the provisions of the Act & Rules of the States and the petitioners were left to approach the authorities under the Sales Tax Act of the High Court concerned for necessary relief. Consequently, fresh writ petitions were filed in Rajasthan High

Court challenging the validity of the provisions of the R.S.T. Act and the rules relating to imposition of tax on transfer of tax on transfer of property in goods involved in the execution of a works contract. The writ petitions were dismissed by the Division Bench of this Court vide judgment dated September 3, 1991. Thereafter, appeals were filed before the Supreme Court after seeking Special leave to Appeal. Thus appeals, arising from the judgment of the Court and the connected writ petitions filed under Article 32 of the Constitution were decided by the Supreme Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*,

25. In the above case, their Lordships defined the ambit of the field available to the State Legislature for enacting law imposing a tax on transfer of property in goods involved in the execution of a works-contract after taking into consideration all statutory provisos in this regard. Thereafter, their Lordships considered the various arguments in relation to the definition of "sale", "situs of sale", "measure of tax" and the method for determination of the goods involved in the execution of a works contract and the various deductions to be made and then, summarised the following conclusions in para 51 of the judgment in Supreme Court cases:

51. (1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366(29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale, in the course of inter- State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Sections 3, 4 and 5 and Section 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract converted by Article 366(29-A)(b).

(3) While defining the expression "sale" in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29-A)(b) but it is not permissible for the State Legislature to define the expression "sale" in way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29-A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute them eligible for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29-A)(b), it is permissible to take the value of the works contract as

the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other service from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on otherwise machinery and tools use for execution of the works contract; (iv) charges for planning, designing and architect's fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and service; (vii) other similar expenses relatable to supply of labour and service; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and service.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis, of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract.

It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed respect of sales or purchases of those goods as a separate article.

26. In the back-ground of the discussion made here in above and the principles of law laid down by their Lordships of the Supreme Court, the submission made by the learned Counsel for the parties may now be considered.

27. The principal contention of the learned Counsel for the contractors is that no sales tax is leviable in Rajasthan on a works contract after the decision of the Supreme Court in M/s. Gannon Dunkerley & Co.'s case (supra) whereby Sub-section (3) of Section 5 of the R.S.T. Act and Rule 29(2)(i) of the Rules were declared unconstitutional and void. Learned Counsel contended that Sub-section (3) of Section 5 of the R.S.T. Act was the charging provision and the said provisions having been struck down, tax cannot be imposed by inference or enlarging the existing provisions of the Act so as to cover the matters which are not specifically mentioned therein. It was also contended that their Lordships of the Supreme Court were aware of other provisions of the R.S.T. Act and the Rules but still assessment orders were set aside. The decision of the Supreme

Court, according to the learned Counsel, is clear and admits no other argument except that sales tax is not leviable on the goods and materials used in a works contract under the existing provisions of the R.S.T. Act, till amendments are incorporated in it in the light of the judgment.

28. Mr. G.S. Bapna, learned Counsel appearing for the Revenue, on the other hand, seriously contended that after Forty- sixth Amendment, the State Legislature is competent to impose tax on the goods and materials used in execution of a works contract and a single and indivisible contract is, by legal fiction, divisible into one-for sale of goods and materials and the other for supply of labour and services. According to Mr. Bapna, this preposition of law is no more in dispute, Mr. Bapna, therefore contended that if in the existing provisions of the R.S.T. Act and the Rules a single and indivisible works contract is made divisible tax can be imposed on the goods and materials used in the construction after deducting labour and service charges. Mr. Bapna submitted that in a works contract there is deemed sale of goods and materials which are involved in its execution and such a deemed sale has all the incidents of a sale of goods.

29. Mr. Bapna, then, referred the definition of "sale" and submitted that the definition of "sale" now embraces a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. He also pointed out the definition of "turnover" which, in relation to a works contract, is deemed to be the amount payable to the dealer for carrying out such contract less the cost of labour upto such extent as may be prescribed. Mr. Bapna submitted that the amount of "turnover" in case of a works contract can be converted in taxable turnover after deducting therefrom the aggregate amount of the proceeds of sale of goods mentioned in Clause (i) to (iv) of Section 2(s) which defines "taxable turnover". He also pointed out Clause (ii) of Sub-rule (2) Rule 29 which provides that in case of works contract tax shall be computed on the turnover of the contractor after deducting all sums towards the labour charges which are directly co-related with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form.

30. I have given my careful consideration to the above submissions. The decision of the Supreme Court in *M/s. Gannon Dunkerley & Co.*'s case (supra) was also minutely considered in the light of the above submissions. The arguments made by Mr. Bapna may appear attractive at the first instance, but on probing no substance is found in them. After Forty-sixth Amendment the State legislatures have got power to impose tax on the goods and materials used in the execution of a works contract, and in pursuance to that, amendments were made in the Rajasthan Sales Tax Act and Rajasthan Sales Tax Rules to make provision of tax on a works contract. The various provisions of the R.S.T. Act and the Rules so amended, as extracted earlier, to provide for imposition of sales tax on the goods and materials involved in a works contract make it clear that the tax on a works contract was leviable on the turnover of such contract and not on the taxable

turnover; as provided in Sub-section (1) of Section 5, which applied to other transaction of sale. In other works, in case of a works contract tax was leviable on the turnover, while for other transaction of sale, tax was leviable on the "taxable turnover". Sub-section (3) of Section 5 read with Clause (t) of Section 2 of R.S.T. Act, therefore, provided that in relation to a works contract tax would be leviable on the alue of works contract, i.e., turnover, after deducting (i) The cost of labour upto such extent as may be prescribed in the Rules farmed under the Act in view of Explanation I to Section 2(t); and (ii) such deductions as may be prescribed under the Rules in view of the proviso to Section 5(3). Thus, there were two distinct measures for levying sales tax, one for the value of the goods involved in a works contract and the other for other transactions of sale. Section 5 (3), which was inserted to ley at on a works contract made a departure rom other provisions for imposition of tax and was made leviable on the turnover and not n the taxable turnover. Their Lordships of the Supreme Court have stated this distinction in M/s. Gannon Dunkerley & co."s case (supra)-when they observed as under:

We will first examine the validity of Sub-section (3) of Section 5 read with Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules. In this regard it is necessary to mention that while making provision in relation to works contract, Section 5(3) makes a departure from the other provisions inasmuch as in the case of a works contract the tax is to be levied on the turnover of such contract and not on the taxable turnover a provided in Sub-section (1) of Section 5 in respect of other sales. The proviso to Sub-section (3) of Section 5 prescribes that the deductions, as may be prescribed, may be allowed to the contractor while determining his tax liability.

31. Their Lordship also made clear that the provisions contained in Sub-section (1) of Section 5 were not applicable to the works contracts and Sub-section (3) of Section 5 alone was applicable. Their Lordships then laid down as under:

A comparison of the provision contained in Sub-section (3) of Section 5 read with Section 2(t) and Sub-section (1) of Section 5 read with Section 2(s) would indicate that in relation to works contract the legislature has made a departure in the matters chargeability of the tax and by using the expression "turnover" instead of "taxable turnover" in Section 5(3) it has charged the field of taxability to permit tax being levied on sales in the course of inter-State trade or commerce, sales outside the State and sales in the course of import and export and to ignore the conditions and restrictions placed by Section 15 of the Central Sales Tax Act in relation to imposition of tax on goods which are declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act. The proviso to Section 5(3) does not oblige the rule-making authority to frame a rule allowing deductions for the turnover of the amount of proceeds of sale of goods in which no tax is leviable under the Act so as to exclude the above mentioned sales from levy of tax. The rule-making authority would not be contravening the making authority would not be contravening the mandate of the

statue if it does not allow deduction of the amount of proceeds for sale of goods on which no tax is leviable under the Act from the turnover.

32. Their Lordship further rejected the argument that Clause (i) of Sub-rule (2) of Rule 29 should be construed to mean that sales on which no tax is leviable under Sub-section (1) of Section 5 are to be excluded from the turnover for the purposes of computing tax on such turnover in relation to a works contract. It was observed as under:

The goods on which no tax is leviable under Sub-section (1) of Section 5 are not subject to any tax under the Act and there is no question of such goods having suffered tax at the rates prescribed u/s 5. In this context we may again refer to the definition of taxable turnover contained in Section 2(s) of the Rajasthan Sales Tax Act wherein provision is made under Clause (i) to (iv) for deduction from the turnover for arriving at the taxable turnover. Clause (i) refers to sale of goods, "on which no tax is leviable under this Act" and Clause (ii) refers to sale of goods "which have already been subjected to tax under this Act." These clauses show that the legislature has made a distinction between a sale of goods on which no tax is leviable and a sale of goods which has already been subjected to tax under the Act. Clause (i) of Sub-rule (2) of Rule 29 is a provision similar to that contained in Clause (ii) of Section 2(s). It is, therefore, not possible to construe Clause (i) of Sub-rule (2) of Rule 29 to mean that sales on which no tax is leviable under Sub-section (1) of Section 5 are to be excluded from the turnover for the purpose of computing tax on such turnover in relation to a works contract.

33. While holding Section 5(3) of the R.S.T. Act and Clause (i) to Sub-rule (2) of Rule 29 of the Rules as unconstitutional and void, their Lordships observed as under:

Since the invalidity of Section 5(3) goes to the root of the imposition of tax and in the absence of the said provision the tax cannot be levied the appellants in the appeals are entitled to succeed. In the circumstances, it is not necessary to examine the other question relating to the validity of Explanation I to Clause (o) of Section 2 of the Rajasthan Sales Tax Act, Explanation (i) to Clause (i) of Section 2, Sub-section (2-C) of Section 7, Clause (ii) of Sub-rule (2) of Rule 29 and Sub-rule (2) of Rule 46 of the Rajasthan Sales Tax Rules.

(Emphasis supplied).

34. The above decision, therefore, leaves no doubt that the Apex Court has categorically held that Sub-section (3) of Section 5 of the R.S.T. Act alone was applicable to levy tax on the goods involved in a works contract and the provisions contained in Sub-section (1) of Section 5 were not applicable to this. Thus, the charging provision to levy sales tax on a works contract was Sub-section (3) of Section 5 of the R.S.T. Act and their Lordship made it clear that in validity of Sub-section (3) goes to the root of the imposition of tax and in the absence of the said provisions the tax could not be levied. Therefore, I have no hesitation in holding

that after the judgment in M/s. Gannon. Dunkerley's case sales tax is not leviable on the goods involved in a works contract unless a charging provision is incorporated under the Act in the light of the said decision. The argument of Mr. Bapna also falls to the ground that tax can be levied on the goods involved in a works contract u/s 5(1) of the R.S.T. Act.

35. Apprehending the above situation, Mr. Bapna, learned Counsel for the Revenue, had also contended that the Apex Court in M/s. Gannon Dunkerley's case did not consider the remaining provisions of the R.S.T. Act and the rules on the basis of which sales tax was leviable on the goods used in the execution of a works contract. In other words, the argument of Mr. Bapna was that this aspect of the matter was not argued and adequately considered by the Supreme Court in the said judgment, as such, this Court can hold that tax is leviable on the goods used in the execution of a works contract on the basis of taxable turnover as provided u/s 5(1) of the R.S.T. Act. This argument of Mr. Bapna can be rejected conveniently on two counts; firstly, it is not correct that their Lordships of the Supreme Court, while deciding M/s. Gannon Dunkerley's case, were not aware of other provisions of the R.S.T., Act and the Rules when the assessment order passed by the Commercial Taxes Officer was set aside after holding Section 5(3) of the R.S.T. Act to be unconstitutional and void. Their Lordships have categorically held "In view of the non-obstinate clause in Sub-section (3) of Section 5, the said provisions contained in Sub-section (1) are not applicable to works contract and Sub-section (3) Section 5 alone is applicable." Their Lordships also observed in para No. 71, as extracted earlier, that the invalidity of Section 5(3) of the R.S.T. Act goes to the root of the imposition of tax and in the absence of the said provisions the tax cannot be levied. Thus, their Lordships were quite conscious of" all the provisions of the R.S.T. Act and the Rule while deciding the cases and according to them Sub-section (3) of Section 5 of the R.S.T. Act was the charging provision to levy tax on at works contract and in the absence of that provision tax could not be levied. Secondly, the decision of the Supreme Court in M/s. Gannon Dunkerley's case has a binding effect under Article 141 of the Constitution of India. Every new discovery and argumentative novelty cannot undo to compel re-consideration of a binding precedent, as held by the Constitutional Bench of the Supreme Court in *Ambika Prasad Mishra v. State of U.P. and Ors.* : [1980]3SCR1159 ; it was also observed by their Lordships:

It is wise to remember that fatal flaws silenced by earlier ruling cannot survive after death because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned" (Salmond "Jurisprudence" p. 215 (11th Edition)).

36. Lastly, it was contended by Mr. Bapna, that the Commissioner, Commercial Taxes Department, Rajasthan, Udaipur, vide his circular No. F. 16(59) Tax/CCT/89-8891 dated March 17, 1983, has directed all the Assessing Authorities to levy tax on "taxable turnover" and not on "turnover" in cases of works contracts.

In para No. 3 of the said Circular he has made clarification of the procedure to be followed by them and has clearly pointed out that the charges for the labour and service were to be deducted from the value of the works contract as observed by the Supreme Court in M/s. Gannon Dunkerley's case. According to Mr. Bapna, tax can be calculated as per the guidelines, issued by the Commissioner and the same is permissible under the existing provisions of the R.S.T. Act and the Rules.

37. In my view, the above argument is the same, though in a different form, as argued by Mr. Bapna as principal contention. The circular of the Commissioner has no statutory force and it cannot create a charging provision to levy tax. Once the Supreme Court had held that in the absence of Section 5(3) of the R.S.T. Act tax cannot be levied u/s 5(1) of the R.S.T. Act, a charging provisions cannot be incorporated in the R.S.T. Act or the Rules by mere issuing an administrative circular by the Commissioner, Commercial Taxes Department, Rajasthan. The said circular cannot, therefore, over-ride the decision of the Supreme Court and tax cannot be levied on a works contract in the absence of a charging provision under the R.S.T. Act. Law is now well settled that in the absence of a charging provision tax cannot be levied and a charging provisions requires strict interpretation to impose an obligation to pay tax. Article 265 of the Constitution of India clearly lays down that no tax shall be levied or collected on a works contract on the basis of the circular of the Commissioner unless there is statutory provision to levy tax.

38. The case may be judged from another angle also. In M/s. Gannon Dunkerley's case their Lordships of the Supreme Court has laid down that the value of the goods involved in the execution of a works contract, will have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards the labour and services which would cover (a) labour charges for execution of the works; (b) amount paid to a sub-contractor for labour and services; (c) charges for planning designing and architect's fees; (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; (e) cost of consumable such as water, electricity, fuel. etc. used in the execution of the works contract the properly in which is not transferred in the course of execution of a works contract; and (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (g) other similar expenses relatable to supply of labour and service (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

39. In the existing provisions of the R.S.T. Act and the Rules no mechanism has been provided for ascertaining (i) - cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract, the property in which is not transferred in the course of execution of a works contract; and (ii) cost o establishment of the contractor to the extent it is relatable to supply of labour and service and (iii) - profit earned by the contractor to the extent it is relatable to supply of labour and services.

40. In *M/s. Gannon Dunkerley's* case, their Lordships were also aware of this situation that there may be cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence. Hence, it was held that it would be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract it was also held that the expenses on labour and service would depend on the nature of the works contract and would not be the same for all types of works contract and it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts.

41. In the existing provisions of the R.S.T. Act and the Rules the expression "turnover" in the case of the works contract is the amount payable to the dealer for carrying out such contract less the cost of labour upto such extent as may be prescribed. Rule 29(2) (ii) of the Rules provides that in case of a works contract, tax shall be computed on the turnover of the contractor after deducting all sums towards labour charges which are directly correlated with the goods, property in which has passed in the execution of the works contract whether as goods or in some other form. The proviso to this rule then provides that where labour charges are not determinable from the accounts of the contractor or are considered unreasonably high considering the nature of the contract, the deduction towards labour charges shall be allowed by the assessing authority to the limits prescribed in column 3 for all types of contracts specified in column 2 of the table. Thus, it would be seen that there is no provision for deduction of other expenses for arriving at the amount of turnover on which tax is required to be computed in the case of a work contract. The expression "labour charges" does not include other charges to cover items No. (b) to (h) referred to above for determination of the value of the goods involved in the execution of a works contract as laid down in *M/s. Gannon Dunkerley's* case, it is true that fixation of percentage on account of labour charges and other charges is permissible and it is also permissible for the rule making authority to categorise works contract into different categories and prescribe different percentage for them as laid down by their Lordships of the Supreme Court in *Gannon Dunkerley's* case and in *Builders Association of India v. State of Karnataka and Ors.* (1993) 1 SCC 409. But there should be some provision in the R.S.T. Act or the Rules to provide deduction of charges for labour and other services to cover all deductions which are required to be deducted from the value of the works contract for determining the value of the goods involved in the works contract on which tax is leviable.

42. The net result of the above discussions is that in view of the decision of the Supreme Court in *M/s. Gannon Dunkerley's* case, whereby Section 5(3) of the R.S.T. and Rule 29(2)(ii) of the Rules have been declared unconstitutional and void, sales tax cannot be charged on a works contract, unless the Act and the

Rules are suitably amended in the light of the said decision.

43. Consequently, all the petitioners are allowed, as indicated above. Parties are left to bear their own costs in the facts and circumstances of the case.