

(1979) 04 DEL CK 0030

In the Delhi High Court

Case No : Sales Tax Reference No. 3 of 1973

Goodwill India Ltd.

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 29-04-1979

Acts Referred:

Citation : (1980) 45 STC 368

Hon'ble Judges : V.S. Deshpande, C.J.; N.N. Goswamy, J

Bench : Division Bench

Advocate : Randhir Chawla and Renu Sehgal and L.K. Pandey, for the Appellant;
R.C. Chawla, for the Respondent

Judgement

V.S. Deshpande, C.J.—The main question referred for opinion u/s 21(1) of the Bengal Finance (Sales Tax) Act, 1941 (the Act), in this and the connected cases is whether the "hire charges" received by the applicant-finance company and other such companies from others form part of the "sale price" under the said Act so as to become liable to sales tax as a part of the turnover. The constitutional background against which this question has to be considered is this: There are two different legislative powers exercised under the Constitution, namely, (1) by Parliament under Article 246(4) in respect of Union territories, and (2) by State Legislatures under Article 246(3) of the Constitution. While the power of the State Legislature in respect of taxes on sale of goods is derived from entry 54 of the State List in the Seventh Schedule of the Constitution (corresponding to entry 48 of the Provincial List in the Government of India Act, 1935), the power of Parliament in respect of Union territories to legislate as to taxes on sale of goods is derived from two sources. Under entry 92A, Parliament has power to legislate about taxes on sale of goods when such sale takes place in the course of inter-State trade or commerce. Under Article 246(4), Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. The result is that even though taxes on sale of

goods are included in entry 54 of the State List, Parliament has an independent power to legislate on the said subject under Article 246(4).

2. In *State of Madras v. Gannon Dunkerley and Co.* [1958] 9 S.T.C. 353, the Supreme Court held that the meaning of the words "sale of goods" in entry 48 of the Provincial List in the Government of India Act, 1935, corresponding to entry 54 of the State List of the Seventh Schedule of the Constitution was the same as its meaning in the Sale of Goods Act, 1930, with the result that there can be no sale until property in the goods passes. A State Legislature cannot, Therefore, treat as sale any transaction which is not a sale within that meaning. But, in *Mithan Lal v. State of Delhi* [1958] 9 S.T.C. 417, the Supreme Court pointed out the fundamental difference between the power of Parliament in respect of Part C States, which are now called the Union territories, under Article 246(4) as compared to the power of the State Legislature under entry 54 of the State List of the Seventh Schedule. Parliament was not fettered in exercising its legislative power by the meaning of "sale" in the Sale of Goods Act. It could, Therefore, treat any transaction as sale even though it would not be a sale within the meaning of the Sale of Goods Act.

3. The Bengal Finance (Sales Tax) Act, 1941, has been applied to Delhi and is and was until 1975 the law of sales tax in Delhi. The definition of "sale" given in Section 2(g) of the said Act till 1st October, 1959, was as follows:

"Sale" means any transfer of property in goods for money consideration and includes a transfer of property in goods supplied in the execution of a contract but does not include a mortgage, hypothecation, charge or pledge; and any grammatical variations of the expression "sale" shall be construed accordingly.

Explanation 1. -- A transfer of goods on hire-purchase or other Installment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Explanation 2. -- A sale shall be deemed to have taken place in the State of Delhi if the goods are actually delivered in the State of Delhi as a direct result of such sale for the purpose of consumption in the State of Delhi, notwithstanding the fact that under the general law relating to the sale of goods the property in the goods has by reason of such sale passed in another State.

5. The amended definition with effect from 1st October, 1959, is as follows:

2. (g) "Sale" with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on hire-purchase or other system of payment by Installments, but does not include a mortgage or hypothecation of or a charge or pledge on goods.

Explanation. -- A sale or purchase of goods shall be deemed to take place inside the Union Territory of Delhi if the goods are within that territory --

(i) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

6. In *Installment Supply (Private) Ltd. v. Union of India* [1961] 12 S.T.C. 489 , a Constitution Bench of the Supreme Court took note of the language of both these definitions, old and new, and arrived at the conclusion that under both of them a mere transfer of goods in a hire-purchase contract constituted sale for the purpose of sales tax in a Union territory. The material difference between the two definitions is the omission of the words "notwithstanding that the seller retains a title to any goods as security for payment of the price" contained in Explanation 1 of the old definition, while enacting the new definition with effect from 1st October, 1959. At page 499 of the Reports, the Supreme Court held that these words merely emphasised what was already conveyed by the words that a mere transfer of goods in hire-purchase contract would be included in the definition of "sale".

7. In *K.L. Johar and Co. v. Deputy Commercial Tax Officer, Coimbatore* [1965] 16 S.T.C. 213 , the Supreme Court was dealing with the Madras General Sales Tax Act enacted by the State Legislature. Consequently, it held that the State Legislature had no competence to include in the definition of "sale" a mere transfer of goods in a hire-purchase contract. For, the meaning of sale under entry 54 of the State List being transfer of property in goods there would be no sale until and unless the property in goods passes. Since the property in goods does not pass in a hire-purchase contract by the mere transfer of goods such transfer of goods would not amount to sale under a State sales tax law.

8. In *Installment Supply Ltd. v. Sales Tax Officer, Ahmedabad-I* [1974] 34 S.T.C. 65 , it was observed by the Supreme Court that after the amendment of the definition of "sale" in the Bengal Finance (Sales Tax) Act from 1st October, 1959, the type of transaction which was subject to tax in the earlier *Installment Supply* case [1961] 12 S.T.C. 489 , would not be subject to tax. What is the meaning of this observation? It seems to us that two relevant changes took place in the Act on 1st October, 1959. Firstly, the Explanation to Section 2(g) stated that a sale or purchase of goods shall be deemed to take place inside the Union Territory of Delhi if the goods were within that territory in the case of specific or ascertained goods at the time the contract of sale is made. Secondly, Section 27 of the Act stated that nothing in the Act or the Rules made there under shall be deemed to impose or authorise the imposition of a tax on any sale or purchase of goods when such sale or purchase takes place either in the course of inter-State trade or commerce or outside the Union Territory of Delhi. Explanation to Section 27 specifically stated that Sections 3, 4 and 5 of the Central Sales Tax Act, 1956, shall apply for determining whether or not a particular sale or purchase takes place in the course of inter-State trade or commerce or outside the Union

Territory of Delhi.

9. It is well-known that the Central Sales Tax Act was enacted after the amendment of Article 286 of the Constitution which declared that no law of the State shall authorise or impose a tax on the sale or purchase of goods where such sale or purchase takes place outside the State and also authorised the Parliament to formulate principles for determining when a sale takes place outside the State. To implement the provisions of the amended Article 286, Parliament enacted the Central Sales Tax Act, 1956. It is to be noted that the definition of "sale" in Section 2(g) thereof has been bodily transported into Section 2(g) of the Bengal Finance (Sales Tax) Act with effect from 1st October, 1959. The Explanation to the new definition of "sale" in the Act reproduces Section 4(2) of the Central Sales Tax Act.

10. The effect is that once the sale of goods takes place inside a State because the goods are there at the time of the contract of sale that sale would be deemed to be outside all other States. Hence it is the State in which the goods are situated at the time of the contract of sale which alone would be able to levy sales tax on the goods, while other States would not be able to do so.

11. On this view, there is no inconsistency between the decisions in *Installment Supply Ltd. v. Sales Tax Officer, Ahmedabad-I* [1974] 34 S.T.C. 65 , and *Installment Supply (Private) Ltd. v. Union of India* [1961] 12 S.T.C. 489 . This construction of these two decisions and the law stated above is confirmed by the latest decision of the Supreme Court in *Balabhagas Hulaschand v. State of Orissa* [1976] 37 S.T.C. 207 , in which it was expressly pointed out that sale under the Central Sales Tax Act includes an agreement of sale.

12. In this background, it would follow that the mere transfer of goods in a hire-purchase contract amounts to a sale for the purpose of the Act in the Union Territory of Delhi, even though the property in the goods may not pass at the time the transfer of goods is made.

13. Let us now consider the question referred to us. The hire-purchase agreement consists of two documents. At annexure C is the proposal form and at annexure D is the agreement. In the proposal form, the calculation sheet is as follows:

1. Price Rs. ... 2. Hire purchase charges Rs. ... 3. Total hire purchase value (Add 1 and 2) Rs. ... 4. Initial hire money Rs. ... 5. Unpaid balance Rs. ... 6. Payable in ... hire Installments detailed as under:

1st payable on...and next...hire Installments payable on the...day of each following month. The last payment to be made on....

14. In the agreement, paragraph 4 is as follows:

4. The owners agree that:

(a) The hirer shall be at liberty at any time during the currency of this agreement

to terminate the hiring by returning the vehicle to the owners at their head office at New Delhi in the same order and condition in which it was hired (fair wear and tear alone excepted) at his own cost and risk, but this shall be without prejudice to any claims or rights the owners may have in respect of this agreement. The hirer shall pay to the owners the stipulated hire up to the date of such determination including apportioned hire for any broken period of the month and 40 per cent of the balance of total unpaid hire (still to fall due), as mentioned in Clause 2 thereof, as compensation to the owners for extra depreciation in the value of the vehicle. The hirer shall not be entitled to any allowance, return or credit in respect of any previous payments made by him under the terms of this agreement.

(b) If the hirer shall duly perform and observe all the terms and conditions in this agreement contained on his part to be performed and observed and shall, in the manner aforesaid, pay to the owners monthly sums by way of rent amounting to the sum of Rs...in addition to the sum of Rs....so paid on the execution of this agreement as aforesaid and shall also pay to the owners all other sums of money which may become payable to them by the hirer under this agreement, the hiring shall come to an end and the vehicle shall, at the option of the hirer, become his absolute property, but until such payments as aforesaid have been made the vehicle shall remain the property of the owners. The hirer shall also have the option of purchasing the vehicle at any time during the currency of this agreement by paying in one lump sum the balance of all the hire hereinbefore mentioned and any other expenses incurred by the owners relating to the transaction.

(c) The owners shall have the right to refuse to transfer the ownership of the vehicle after they have realised their full hire amount under this agreement if the hirer has hired out another vehicle from the owners in respect of which his liability is not fully discharged or the hirer is liable to the owners for any guarantee that he may have given to the owners in respect of another vehicle hired out by the owners on the hirer's guarantee. The owners can also apply the payments against the agreement to the other agreement under which he has hired another vehicle or guaranteed the transaction of another vehicle at their sole discretion.

15. Shri Randhir Chawla, the learned counsel for the applicant, on the strength of these provisions argued that the total consideration for the hire-purchase consists of two distinct parts, namely, (a) price for the sale of goods, and (b) the hire charges. The total of the two is called the total hire-purchase value. He argued that the hirer has an option to pay the price and an Installment or two without having to pay the rest of the Installments to secure title to the vehicle if he can find the money to pay this much amount in one lump sum. He thus argued that the "sale price" would mean only the price proper but not the hire charges in this kind of hire-purchase contract.

"Sale price" in Section 2(h) of the Act means consideration for the sale of goods.

If the transfer of goods in a hire-purchase contract is the sale of goods, what is the consideration for such a transfer of goods? Shri Randhir Ghawla argued that the consideration for the transfer of goods is the price, while consideration for the hire of goods is the hire charges.

16. In our view, it depends entirely on the terms of a particular contract of hire-purchase as to what is to be regarded there under as the consideration for the transfer of goods. The point of time when the sale is concluded within the meaning of Section 2(g) in a hire-purchase contract is when the goods are transferred there under. It is the consideration for the transfer of goods which would be the consideration for the sale for the purpose of sales tax. In *Installment Supply (Private) Ltd.* [1961] 12 S.T.C. 489, the material terms of the hire-purchase agreement referred to at pages 492-493 appear to be similar to the terms of the hire-purchase agreement in the case before us. Similarly, the terms of the hire-purchase agreement considered in *K.L. Johar and Co. v. Deputy Commercial Tax Officer* [1965] 16 S.T.C. 213, are also the same. The reason why the hire-purchase contracts everywhere have these standard terms is obvious. The persons or companies carrying on the business of selling transport vehicles on hire-purchase agreements are not interested in buying the vehicle from the original dealer and selling it to other persons for the same price which the hire-purchase company has paid to the original dealer, i.e., in reselling the vehicle on the same terms as the original dealer would have sold it. The price of the vehicle being fixed, the original dealer would have sold it for that price, if the price is paid simultaneously or for an enhanced price if the payment of price would be delayed. The extra charge for the delay would be either hire charges or interest on the arrears of the price depending on whether the title to the vehicle is reserved by the original dealer or is transferred to the purchaser. Since this could be done by the original dealer itself, these would not be terms on which the hire-purchase companies would do business. What the hire-purchase company does is to take advantage of the lack of funds with the hirer-cum-purchaser. The hire-purchase contract fixes the total amount payable by the hirer-cum-purchaser which exceeds the original price of the vehicle by an amount which may be called the hire charges. If, in entering into the hire-purchase agreement, a clear distinction is made between the price for which the vehicle is sold and the hire charges which are payable only if the price for the vehicle is not paid at the time of the transfer of the goods, then it would be arguable that the hire charges should not be regarded as a part of the price of the vehicle. This argument would gather force if an option were to be given to the hirer-cum-purchaser to pay the full price of the vehicle without the hire charges at the time of the transfer of the goods or to be exempt from paying the proportionate hire charges if before the expiry of the hire-purchase period he were to pay the full price. The hire charges are for the actual period of delay in paying the full price, but they should not be payable when he exercises the option earlier than the whole stipulated period of the hire-purchase contract. On the other hand, if the whole of the amount payable by the hirer-cum-purchaser is consolidated and the Installments are

made payable without giving any right to the hirer-cum-purchaser to buy the vehicle at the original price without paying the hire charges or earlier than the expiry of the whole period of the hire-purchase after paying the proportionate hire charges for that part of the hire-purchase period which is yet to expire, then no distinction can be made between the price and the hire charges. For, the whole of the amount is the consideration for the hire-purchase and, Therefore, for the transfer of the goods in hire-purchase.

17. In *Installment Supply (Private) Ltd.* [1961] 12 S.T.C. 489, it was argued for the hire-purchase company that the hire charges were not part of the price of the goods sold. The revenue on the other hand argued that the payment of all the Installments was the total sale price. The Commissioner of Sales Tax agreed with the revenue and held that the sales tax was payable on the total amount charged by the hire-purchase company from the hirer-cum-purchaser.

18. Before the Supreme Court, the main contention of the hire-purchase company was that a hire-purchase was not a sale within the meaning of Section 2(g) of the Act. This contention was rejected by the Supreme Court because "sale" in respect of a Union territory could be made without the property in the goods having passed. The subsequent question as to what would be the sale price in case the transfer of goods in a hire-purchase was held to be a sale was neither raised nor decided.

19. In the *K.L. Johar and Co.*'s case [1965] 16 S.T.C. 213, the sale under the State legislation could be said to have occurred only when the title to the property passed. The Supreme Court had, Therefore, to consider specifically the question as to what would be the sale price for the purpose of taking the sale there under. The court expressed the view that the sale price would neither be the total amount payable under the hire-purchase contract nor the amount of Re. 1 payable by the hirer-cum-purchaser at the time of exercising the option after having paid all the Installments under the hire-purchase contract. The sale price would rather be arrived at by splitting the total amount payable under the hire-purchase contract into two parts, namely, (a) price, and (b) hire charges, and then deducting the depreciation from the price and arriving at what would be the real price of the vehicle at the time the property passes to the hirer-cum-purchaser. Under a State legislation, this solution of the problem would have also another advantage. It would allow the hirer-cum-purchaser to claim a deduction of the payment of hire charges as a deductible expenditure and treat the payment of the price as capital expenditure for the purpose of Income Tax.

20. The distinction between the concept of sale for the purpose of State legislation and that of the legislation by Parliament resulted in the further difference that while the total consideration for hire-purchase was sale price for the purpose of parliamentary legislation, the hire charges had to be separated from the price for the purpose of State legislation. The extreme difficulty of determining when exactly the property passes in a hire-purchase contract and to determine what should be deemed to be the sale price at that moment led to

great uncertainty in the sales tax laws of the States. The sales tax authorities would be required to find out the amount of depreciation of the property and to deduct that amount from the price which itself had to be distinguished from the hire charges. All these led to uncertainty and also placed the States in a less favorable position than the Union territories. To avoid this uncertainty and unintended discrimination between the States and the Union territories, the Constitution (Forty-ninth Amendment) Bill, 1979, has been introduced in Parliament to bring in line the concept of sale in a State legislation with the concept of sale in the parliamentary legislation. After the Constitution is so amended the decision in *K.L. Johar and Co.* [1965] 16 S.T.C. 213 would be abrogated and the law laid down in *Installment Supply (Private) Ltd.* [1961] 12 S.T.C. 489 would apply not only to the Union territories but also to the States.

21. But even before the coming into force of the proposed constitutional amendment, the reasoning in *K.L. Johar and Co.* [1965] 16 S.T.C. 213 cannot be applied to a sales tax law enacted by the Parliament for the purpose of a Union territory. The whole basis of the ratio as to the determination of sale price in the *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, is based on the fact that the sale takes place only when the title to property passes. It thus takes place long after the transfer of goods is made in hire-purchase contract. If in parliamentary legislation in a Union territory the sale is held to take place when the goods are transferred in a hire-purchase contract, it would be a contradiction in terms to say that the sale price nevertheless must not be determined for what is paid at the time the sale takes place by the transfer of goods, but should be determined at the time the property in the goods passes. The passage of property in goods is totally irrelevant. It cannot, Therefore, be the basis for the determination of the sale price. The sale price must be determined to be the consideration for the transfer of goods when the transfer of goods takes place. It was not disputed either in *Instalment Supply (P.) Ltd. and Another Vs. The Union of India (UOI) and Others*, or *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, , that the total consideration for the hire-purchase contract has to be paid by the hirer-cum-purchaser once he enters into that contract. It does not matter when he pays the whole amount due there under in Installments or in lump sum. The amount remains the same. These terms of the hire-purchase contract take away the very basis of the argument by Shri Randhir Chawla that the total consideration in a hire-purchase contract consists of two distinct parts, namely, the price and the hire charges. Even though these two are separately mentioned in the computation sheet in the proposal from they are merged together in the agreement and no distinction is made after the merger in payment of the whole of the amount. The consideration for the sale of goods must, Therefore, be the total amount which has to be agreed to be paid before the transfer of goods takes place in a hire-purchase contract.

22. Shri Randhir Chawla argued that this holding would lead to injustice. He said that the hirer-cum-purchaser, not being the owner of the vehicle till he pays up

all the amounts, has to bear other incidental charges such as insurance charges, etc. These charges also would be added to the total consideration and would be liable to payment of sales tax. In our view, whatever is the total under the hire-purchase contract which has to be agreed to be paid for the transfer of goods would be the consideration for the sale of goods within the meaning of Section 2(h) of the Act. We may mention that the hire-purchase company is given an option by the definition of "turnover" in Section 2(i) of the Act. It may either show the total consideration of its sale price in the period for which the goods are transferred or if it so elects it may show different parts of sale price received during the different periods in which the actual Installments are received. In case, Therefore, Installments are not fully paid the company would not be liable to pay any sales tax on those Installments which have not been realised. u/s 4 of the Act, the incidence of taxation is on the gross turnover which is the aggregate of the sale price or parts of sale price receivable. The taxable turnover is arrived at u/s 5(2) after the appropriate deductions.

23. Our answer to the question referred to us for opinion in S.T.R. No. 3 of 1973 is, Therefore, in the affirmative.

24. In S.T.R. No. 5 of 1973, the question posed for reference is the same and, Therefore, the answer to it is also the same.

25. The answer to the question referred to in S.T.R. No. 4 of 1973 is as follows: The hire-purchase company cannot claim exemption from sales tax on its receipts during 1958-59 from hire-purchase transactions entered into between 24th October, 1956, and 31st March, 1958, and 1st April, 1958, and 2nd June, 1958.

26. In S.T.R. No. 6 of 1977 also, the second and third questions referred to us for opinion are whether the total consideration of the hire-purchase transaction including what are called the finance charges go to form the sale price. The answer is in the affirmative. Question No. (1) is ground No. 4 of the revision before the Financial Commissioner. It also emanated from the record though the learned Financial Commissioner thought otherwise. Our answer to question No. (1) is that the full amount of the consideration for the hire-purchase contract which has to be agreed to be paid for the transfer of goods is the sale price even if it includes the amount recovered as interest or whatever other name given to it.

27. In S.T.R. No. 5 of 1977, the answer to question No. (1) is that the total consideration for the hire-purchase contract is the sale price. The answer to the second question is that the rate of sales tax to be charged would be the rate which would be prevalent on the date of the sale, namely, the date on which the goods are transferred in a hire-purchase contract.

28. In S.T.R. No. 16 of 1974 also, the answer is that the rate of sales tax would be the rate which was prevalent at the time the transfer of goods in the hire-purchase contract took place.

29. In S.T.R. No. 27 of 1974, the question of which reference was called for by this Court is also whether mere delivery of the vehicle under the terms of the hire-purchase agreement amounted to a sale u/s 2(g) of the Act. The answer is in the affirmative.

30. In S.T.R. No. 32 of 1973, the question relates to the period from 1st April, 1958, to 30th September, 1958. After the announcement of the decision of the Supreme Court in *Mithan Lal Vs. The State of Delhi and Another*, , the sales tax authorities started imposing sales tax on the total consideration for the transfer of goods in a hire-purchase contract with effect from 1st April, 1958. That is in the same financial year in which the hire-purchase contract took place and not retrospectively in respect of hire-purchase contracts which have taken place prior to 1st April, 1958. By the circular issued on 3rd June, 1958, they warned the hire-purchase companies that if they wanted to seek refund of the sales tax paid by them as unregistered dealers to the original dealer from whom they had bought the vehicles, they should do so immediately within the prescribed period of limitation. If the applicants do not do so, the sales tax authorities cannot be blamed for following the law as laid down by the Supreme Court in the *Mithan Lal Vs. The State of Delhi and Another*, . The answers to the questions referred to us in this case are, Therefore, as follows:

(1) Receipts of Installments in hire-purchase contract received during the year 1958-59 even though the contracts were entered into prior to 1st April, 1958, would be liable to tax in accordance with the law; and

(2) The applicant was not entitled to any adjustment of sales tax paid on the purchase of the vehicle between 1st April, 1958, and 30th September, 1958, against the sales tax liability determined for 1958-59.

31. In S.T.R. Nos. 13 of 1973, 14 of 1973 and 15 of 1973, reference to this Court is sought u/s 21(1) of the Act of the same questions which have already been decided against the applicants above. These applications are, Therefore, dismissed.

32. In Civil Writs Nos. 433, 434 and 435 of 1976, the orders of the Sales Tax Tribunal passed on revision petitions presented to it u/s 20(3) of the Act are challenged. The view expressed in these orders is that the sale in a hire-purchase contract in a Union territory is liable to tax only when the option is exercised by the hirer-cum-purchaser and not when the transfer of goods takes place there under. This view purported to follow *The Installment Supply Ltd. Vs. S.T.O., Ahmedabad-I and Others*, . We have, however, shown above that the said decision did not intend to lay down the law differently from the law laid down in *Instalment Supply (P.) Ltd. and Another Vs. The Union of India (UOI) and Others*, . We have also stated that the taxability of a hire-purchase transaction to sales tax by deeming the transfer of goods itself as a sale is legal only in a parliamentary legislation like the amended Section 2(g) of the Act, as applied to Delhi, while in a State legislation such a definition of "sale" would be

unconstitutional. Just as the imposition of sales tax on transfer of goods in a hire-purchase contract was held to be unconstitutional in a State legislation in the *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, , it must be held that the refusal to allow the imposition of sales tax on the transfer of goods in a hire-purchase contract under the amended Section 2(g) of the Act would also be contrary to the provisions of the Constitution. The decision of the Tribunal attacked in these three writ petitions, Therefore, is not an error within jurisdiction but is totally without jurisdiction.

33. The test of jurisdiction laid down in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, of the Reports (S.C.R.). Basing this on the previous decision in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, , their Lordships laid down the test in the following words, namely, "non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction". The decision in the *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, has been explained recently by the Supreme Court: per Chandra-chud, J. (as his Lordship then was), in *Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation*, .

34. Shri B.N. Lokur has argued for the writ petitioners that the decision of the Tribunal being without jurisdiction can be challenged under Article 226 of the Constitution even though its correctness could have been canvassed by way of seeking a reference to this Court. But in *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, , the Supreme Court held that a writ petition should not be entertained against an order passed in revision under a Sales Tax Act. The matter should come before the High Court by way of a reference. It is urged by the respondent Therefore, that the writ petitions should be dismissed on the ground that alternative remedy was not availed of by the writ petitioners.

35. The question whether these writ petitions could be entertained under Article 226 of the Constitution has to be decided with reference to the law as it stood at the time these writ petitions were filed in March, 1976. The Constitution (Forty-second Amendment) Act was passed late in 1976. At the time of the filing of the writ petitions, Therefore, this Court had jurisdiction to entertain these writ petitions, though the exercise of this jurisdiction was at the discretion of this Court. In *Gee Vee Enterprise Vs. Additional Commissioner of Income Tax*, , reference was made to the decisions of the Supreme Court in *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, and *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , and it was observed that this Court would not be warranted in dismissing a writ petition on the preliminary ground of the failure to avail the alternative remedy if the court once considers the merits of the case. In our view, the merits of the case are considered first when a writ petition is admitted. These writ petitions were admitted and were ordered to be heard together. At first, notice to show cause why the writ petitions be not admitted were issued. The counter-affidavits were filed showing cause why they

should not be admitted. After hearing the parties, the court admitted these writ petitions, apparently after considering the merits of each case. Once this is done it would not be fair according to the observations of the Supreme Court in the above-mentioned decisions to dismiss these cases at this late stage on the preliminary ground that the petitioners have not availed themselves of the alternative remedy. In our view, an order admitting the writ petition means that the court will decide the case on merits. If the preliminary objection of law had to be considered, it should have been considered at the time of admitting the writ petitions. In the *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , the Supreme Court also observed that if the High Court had not entertained the writ petition, the petitioner would have resorted to the statutory remedy before it was barred by time. Hence, in such circumstances, the High Court cannot dismiss the writ petition on the ground that it is not maintainable, because the petitioner has not availed himself of the alternative remedy. It may be mentioned further that at the time when the writ petitions were filed Clause (3) had not been added to Article 226 of the Constitution and now again on the date on which we are deciding the writ petitions also Clause (3) of Article 226 which had been added in the meantime by the Constitution (Forty-second Amendment) Act has been repealed by the Constitution (Forty-fifth Amendment) Act, which has been ratified by the States and has just been assented to by the President. It is not, Therefore, a bar for our entertaining and deciding the writ petitions.

36. It was also argued for the respondent that it would be a bad precedent for this Court to entertain a writ petition against the order of a Sales Tax Tribunal without the applicant having availed himself of the remedy of the reference. We do not think that this precedent can be followed. Firstly, it is only because the view taken by the Tribunal is such that it is not only contrary to a fundamental provision of the Act, namely, Section 2(g) thereof, as construed by the Supreme Court in *Instalment Supply (P.) Ltd. and Another Vs. The Union of India (UOI) and Others*, , but also to the provisions of the Constitution, namely, Article 246(4) and Clauses (1) and (2) of Article 286, that the impugned orders become entirely without jurisdiction. Secondly, the discretion of this Court to entertain an exceptional case under Article 226, even when the alternative remedy has not been availed of, is exercised when the lack of jurisdiction is apparent on the face of the record and a quick remedy can be given by this Court under Article 226 and it would be unnecessary to refer the petitioners to alternative remedy, which, in the circumstances, would be unnecessary harassment and procrastination, as observed by the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, . Thirdly, the discretion to entertain or not to entertain the writ petition in the absence of the petitioner availing himself of the alternative remedy should be exercised at the time of admitting the petition. After admission the petition should be decided on merits and not on the preliminary ground. Lastly, the period of limitation for the alternative remedy having now expired, it would be unjust for this Court to dismiss the writ petitions on the preliminary ground.

37. We, Therefore, decide these writ petitions on merits. For the reasons stated above, we hold that the orders passed by the Sales Tax Tribunal were without jurisdiction and hence they are set aside. The orders of the sales tax authorities, which had been reversed by the Tribunal and which had held that the transfer of goods in a hire-purchase contract amounted to a sale within the meaning of Section 2(g) of the Act, are restored.

38. The parties are to bear their own costs in all the cases disposed of above.