
(2011) 01 AP CK 0010

In the Andhra Pradesh High Court

Case No : T.R.C. No's. 154, 155, 156, 157 160 169, 170, 181, 205 and 243 of 2010

G.S. Lamba and Sons

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 2, 20(1), 20(2), 22(1), 5E
Constitution of India, 1950 — Article 266, 269(1), 286, 286(3), 366
Evidence Act, 1872 — Section 91, 92, 93, 94, 95
Income Tax Act, 1961 — Section 263(1)

Citation : (2011) 43 VST 323

Hon'ble Judges : V.V.S. Rao, J;Ramesh Ranganathan, J

Bench : Division Bench

Advocate : Lakshmi Kumaran and Sridharan, for the Appellant; P. Balaji Varma, Special S.C. for Commercial Taxes, for the Respondent

Judgement

V.V.S. Rao, J.—These ten tax revision cases u/s 22(1) of the Andhra Pradesh General Sales Tax Act, 1956 (the Act) are filed by Assesseees against a common order dated 30.11.2009 of the Sales Tax Appellate Tribunal (the Tribunal) in Tax Appeal Nos. 467 of 2009 and batch. The details of various appeals are admitted and hence narration of minute particulars is not necessary. Suffice to mention that the assessing authority passed orders for the assessment years 2001-02 to 2004-05, in all these cases in December, 2005, August and November 2006. The Petitioners' appeals were allowed on 08.5.2007. About two years thereafter, the Additional Commissioner (Legal) passed orders on 29.11.2008 u/s 20(1) of the Act which were preceded by the show cause notices dated 02.9.2008. All the tax appeals filed by the Petitioners, being Tax Appeal No. 467 of 2009 and batch, were dismissed on 30.11.2009.

Facts

2. The undisputed factual matrix is in a narrow compass. The Petitioners - M/s.

G.S. Lamba & Company, G.S. Lamba & Sons, and G.S.L. Coal Sales Pvt. Ltd., - are dealers on the rolls of the Commercial Tax Officer (CTO), Begumpet Circle. In pursuance of the inspection and investigation by the Vigilance and Enforcement Wing, the CTO assessed tax for 2001-02 and 2002-03 u/s 5-E of the Act in respect of the taxable event, namely, the Petitioners hiring their fleet of Transit Mixers to M/s. Grasim Industries Ltd., Secunderabad, a unit of M/s. Birla Ready Mix Concrete (hereafter, Grasim). The Appellate Deputy Commissioner agreed with Assesseees and treated the hiring of Transit Mixers as contract of transport service, and not the transfer of the right to use the goods. The Additional Commissioner (Legal), in exercise of the revisional jurisdiction, levied sales tax u/s 5-E of the Act. The Petitioners then went in further appeals before the learned Tribunal, which were dismissed.

3. The case of the Petitioners is that Grasim manufactures Ready Mix Concrete (RMC), according to the specifications depending on the site requirements of a customer, at its batching plants in Miyapur and Nacharam in Hyderabad. RMC is a homogenized and a precise mixture. Its use reduces work at the site, minimises space requirements and allows smooth progress of the construction. It has a very short shelf life of 3 to 4 hours from the time of its manufacture at the batching plant, and has to be used within that period. Keeping all these in view the Petitioners entered into agreements with Grasim. These contracts are for providing transportation service for shipping RMC by hiring specially designed Transit Mixers. Under the contracts, the Transit Mixers are never transferred and the effective control over running and using of these vehicles, as well as the disciplinary control over the drivers, always remained with the Petitioners. They point out that it is their responsibility to obtain route permits, to take the risk or loss of transportation, to decide shifts for drivers and vehicles, to maintain and upkeep the vehicles in good condition. It is also their plea that damages to the goods, during the period of transportation, and the risk of loss of the vehicles have to be incurred by the Petitioners, and that registration of the vehicles is never transferred to Grasim. They further contend that, if on reading the contract, two views are possible, revision by the Additional Commissioner, u/s 20(2) of the Act, would not lie.

Submissions

4. The Petitioners' counsel contends that five eventualities to infer the transfer of the right to use goods are not completely present in the transaction between the Petitioners and Grasim. He would urge that the Tribunal was wrong in relying on Clauses (A), (B) and (D) of the contract in concluding that the Petitioners had transferred the right to use Transit Mixers to Grasim. According to him, these clauses would not lead to any such conclusion and that there was no intention to create exclusive right to use the vehicles by Grasim. The clause for providing dedicated fleet of vehicles with Grasim's logo "Birla Concrete" being painted on them is no indication that the intention was to transfer the right to use Transit Mixers. The RMC is a product with short shelf life and its marketability depends

on the quality. So as to assure the product quality to end-user, it was agreed to paint the brand name on the vehicles. The same, however, does not lead to an inference that there is consensus ad idem; and that the Petitioners should keep ready the dedicated fleet of eight vehicles to be used by Grasim. In the absence of transfer of possession and effective control, Section 5-E of the Act is inapplicable. Lastly it is urged that the Tribunal was in error in not recording findings on all the issues raised by the Petitioners. The Counsel relied on various precedents to which a reference would be made at the appropriate place.

5. The Special Counsel for Commercial Taxes points out that the agreement between the Petitioners and Grasim is a post created document and no importance can be attached to the same. Alternatively he submits that the Tribunal has correctly appreciated questions of fact in the light of the agreement between the parties which clinchingly reveals the presence of the essential requirements of Section 5-E of the Act and, therefore, no interference is called for in these revision petitions u/s 22(1) of the Act.

Points for consideration

6. The two issues that spring up from the background facts and the rival submissions are: Whether the Petitioners' contract is for transfer of the right to use Transit Mixers to M/s. Grasim Industries Limited for transporting the RMC? And whether the State Sales Tax Appellate Tribunal has committed any error warranting interference u/s 22(1) of the Andhra Pradesh General Sales Tax Act, 1957?

Revisional jurisdiction under APGST Act

7. We will first deal with second issue. The Petitioners would contend that the exercise of jurisdiction u/s 20(2) of the Act is barred when two views are equally possible and one of which is accepted by the original authority. This argument is sought to be sustained relying on MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, , Commissioner of Income Tax Vs. Arvind Jewellers, , Commissioner of Income Tax, Shimla Vs. Greenworld Corporation, Parwanoo, . and Commissioner of Income Tax Vs. Associated Food Products P. Ltd. and Popular Bread Factory, These judicial decisions were rendered in the context of Section 263(1) of the Income Tax Act, 1961, not with reference to the language of Section 20(1) of the APGST Act. The scope of revisional jurisdiction under these provisions is also different. Therefore we are afraid the decisions u/s 263(1) of the Income Tax Act would not be applicable here. For comparison, we may quote Sections 20(1) & (2) of the APGST Act and Section 263(1) of the Income Tax Act in the following table.

Section 20 of the APGST Act

Section 263 of the Income Tax Act

20. Revision by Commissioner of the Commercial Taxes and other prescribed authorities:

263. Revision of orders prejudicial to revenue

(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the Assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment.

(1) The Commissioner of Commercial Taxes may suo motu call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to it, under the provisions of this Act, including Sub-section (2) of this section and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such enquiry, or cause such enquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order in reference thereto as it thinks fit.

(2) Powers of the nature referred to in Sub-section (1) may also be exercised by the Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and the Commercial Tax Officer in the case of orders passed or proceedings recorded by authorities, officers or persons subordinate to them.

(Sub-Sections 2-A, 3, 5 and 6 are omitted.)

(Explanation and Sub-sections (2) and (3) are omitted.)

(Emphasis supplied)

8. The power u/s 263(1) of the Income Tax Act conferred on the Commissioner is exercisable only when an order passed by the assessing officer, "is erroneous insofar as it is prejudicial to the interest of the revenue". In *Malabar Industrial Co. Ltd.* the Supreme Court held that, "the Commissioner of Income Tax has to be satisfied of twin conditions, namely, (i) the order of the assessing officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue (and) if one of them is absent - if the order of the Income Tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue - recourse cannot be had to Section 263(1) of the Act". On the other hand, Section 20(1) of the Act confers suo motu power on the Commissioner of Commercial Taxes and other prescribed authorities to call for the record and modify or set aside the order of any assessing authority, "if such order or proceeding recorded is prejudicial to the interests of revenue". Thus, it would be enough to have recourse to Section 20(1) of the Act if any assessment order or proceeding is prejudicial to the revenue. This construction under the APGST Act may have certain exceptions with which we are not concerned here. We are well supported by two decisions of this Court in *Bankatlal Satyanarayana*

Parikh and Co., Nizamabad Vs. Commissioner of Commercial Taxes, A.P., Hyd. and another, and M/s. GMM Co. Ltd v. State of A.P. T. Rev. C. No. 3 of 2010, dated 11.11.2010.

9. It is axiomatic that the machinery provisions of a taxing statute have to be interpreted in such a manner that they are workable (Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders, and J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, It does not, however, mean that the interpreter can interpolate something not intended by the legislature, by supplying *causis omissus* (Illachi Devi (D) by Lrs. and Others Vs. Jain Society, Protection of Orphans India and Others, and Sankar Ram and Co. Vs. Kasi Naicker and Others, If the plea of the Petitioners is accepted, we have to read Section 20(1) of the APGST Act as empowering revision, only when an order of assessing officer/ appellate authority is erroneous in so far as it is prejudicial to the interest of revenue. This is plainly not permissible.

10. The impugned order of the Tribunal is also attacked on the ground that the Tribunal erred in not recording a finding on the issue raised. This cannot be a ground for us to exercise revisional jurisdiction u/s 22(1) of the Act. As rightly pointed out by the Special Counsel for Commercial Taxes, the submissions were noted in the order. The learned Tribunal considered the core issue and, having found that the agreement is a contract for the transfer of the right to use Transit Mixers, dismissed the appeals. We fail to understand as to how the impugned order can be put to challenge only on the ground that a finding is not recorded on one of the issues raised by the Assessee before the Tribunal.

Transportation service or Transfer of the right to use Transit Mixers?

11. The Petitioners allege that the contract with Grasim is for transportation service. They deny that it is for the transfer of the right to use the goods. Transit Mixers are indisputably goods as defined in Section 2(h) of the Act. Section 2(n) defines "sales" to mean transfer of the property in goods for cash in the course of trade or business and includes mortgage, hypothecation, pledge or charge on goods. This definition has eight Explanations. Fourth of them was inserted by Andhra Pradesh Act No. 18 of 1985 with effect from 02.02.1983. It is to the effect that "a transfer of the right to use any goods for any purpose" shall be deemed to be sale. When is the right to use goods said to have been transferred? To appreciate this, a brief journey into the past relating to tax on sale of goods under Entry 54 of List II of the Seventh Schedule to the Constitution of India may be necessary.

12. The Sale of Goods Act, 1930 defined "sale" as a contract of sale of goods whereby the seller transfers or agrees to transfer the property in goods to a buyer for price. "Goods" means "every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached or form part of the land which are agreed to be

severed before sale or under the contract of sale". In the pre-constitution era, for the purpose of sales tax law, the expression "sale of goods" was construed as having the same meaning as in the Sales of Goods Act. Firmly established in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, this view influenced the sales tax law enormously. In *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, the Supreme Court held that the transfer of controlled commodities pursuant to a Central Government Order is not a sale as defined in the Sale of Goods Act. In *K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III*, it was held that the transfer of goods on hire purchase or any system of payment by instalments does not amount to sale, and in *A.V. Meiyappan Vs. Commissioner of Commercial Taxes, Board of Revenue, Madras and Another*, the Madras High Court held that the lease of cinematograph films is not a sale. In *The Joint Commercial Tax Officer, Harbour Division, II-Madras Vs. The Young Men's Indian Association (Regd.), Madras and Others*, it was held that supply of goods by any incorporated association or a body of persons to a Member of the association is not sale and in *The State of Punjab Vs. Associated Hotels of India Ltd., and Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, it was held that service of meals in a hotel or restaurant does not constitute sale of food for the purpose of levy of sales tax and must be regarded as rendering service in the satisfaction of human need. So as to tackle these issues, which effected the State's revenue (by depriving tax on such type of sales), the matter was referred to the Law Commission of India.

13. In their Sixty First Report, the Law Commission of India dealt with specific transactions like transfer of control commodities, supply of food in hotels, transfer of goods on hire purchase and the works contracts. In Chapter 1-E the Law Commission made pertinent observations, which compel excerption.

CHAPTER 1-E

Some General Observations As To Taxation on Sale

I-E General observations as to "sale"

(1) So far, we have dealt with specific transactions. A few general observations may now be made.

A sale of goods requires an agreement to transfer title in goods for money, followed by the actual passing of such title as a result of the agreement. The broad concept, thus, requires (i) an agreement to transfer title, (ii) in goods, (iii) for money and (iv) passing of title as a result of the agreement. Most of the problems that have arisen as to the taxability of various transactions are due to the fact that one (or more) of the ingredients mentioned above are missing from the transaction. This will be clear if the ingredient and its antithesis are represented as in the following chart, which also mentions the situation where the antithesis exists.

Ingredient

Antithesis

(i) Agreement to transfer title

Title passing without agreement, or no transfer of title.

(ii) In goods

Title passing under the agreement but not for goods.

Illustrative situation -

Works contracts (No agreement to transfer the very goods which come into existence).

(iii) For money

Title passing for value other than money.

Illustrative situation -

Barter.

(iv) Passing of title as a result of the agreement

Title does not pass because there is only an agreement (or some prior step), and no complete sale.

Illustrative situations -

(a) Hire-purchase

(b) Consignment transfer.

2. The basic defect in the present scheme is that a very limited type of economic activity is taxable by the States,-- and other economic activities are not taxable, except by way of excise duties or indirectly by way of stamp duties. This leaves room for loopholes and gaps. It would appear that some day, it will be desirable to consider the possibility of devising a tax which will embrace all transactions which are regarded as adding value or which are entered into with that object.

14. The Law Commission of India submitted the report on 21.05.1974. Accepting its recommendations, the Government of India proposed to amend the Constitution to include in Article 366, a definition of "tax on the sale or purchase of goods" by inserting a new Clause 29-A and to insert a new Entry 92-A in the Union List in the Seventh Schedule and to amend Article 269(1) and 286(3) of the Constitution of India to be in consonance with the other proposed amendments. As a result, the Constitution (Forty Sixth) Amendment Act, 1982 was enacted which was published in the Gazette on 02.02.1983. Consequently this led to States amending their sales tax laws to enlarge the ambit and width of "sale of goods" for levy of tax. Due to this, a wide variety of economic activities, which were hitherto not considered as sale of goods, came within the fold of State laws. Indeed, as observed by the Law Commission of India, the underlying

theme was to devise a tax, which will embrace all transactions which are regarded as adding value or which is entered into with that object. This is reflected in the new definition in Article 366(29-A), which reads as under.

366. Definitions

(29A) "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 hirepurchase or any system of payment by instalments;
- (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 a purchase of those goods by the person to whom such transfer, delivery or supply is made.

15. The expression "tax on sale or purchase of goods" is an inclusive definition. It must receive a wide and expansive meaning. The latter part of Clause (29-A) contemplates that "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". The Sub-clauses (a) and (b) use "transfer"; Sub-clause (c) uses "delivery"; Sub-clause (d) uses "transfer of the right to use goods", and Sub-clauses (e) and (f) use "supply" of goods while defining deemed sale. Thus under the Sub-clause (d) there would be deemed sale if the right to use goods is transferred even though delivery is not an essential part of such transfer of the right to use goods. In other words, the moment the right to use goods is transferred, the taxable event happens. When would such transfer of the right to use goods de facto comes within the gravitational field of the species of deemed sale? A score of High Court decisions and half a dozen Supreme Court decisions, notwithstanding, this question remains an unavoidable vexed question. We may, therefore give a brief analysis of the judicial decisions on Article 366(29-A)(d) of the Constitution which is the basis for Section 5-E of the APGST Act as well as similar provisions in other States' laws.

16. In Builders Association of India and Others Vs. Union of India (UOI) and Others, the validity of the Constitution (Forty-sixth) Amendment Act was upheld. But the Apex Court ruled that the States' power to levy tax on the goods involved in a works contract is subject to the restrictions in Article 286. Article 366(29-A) was elucidated by the Constitution Bench as below.

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 in 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-clauses (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..... 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.

(Emphasis supplied)

17. Inspired by the Forty-sixth Amendment, like many States, Andhra Pradesh also enacted a provision on similar lines being Section 5-E of the Act. It is appropriate to read it here.

5-E. Tax on the amount realized in respect of any right to use goods. -

Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realized or realizable by him during the year:

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. 1,00,000.

18. The challenge to the above provision failed before this Court in Padmaja Commercial Corporation v. Commercial Tax Officer (1987) 66 STC 26 : (1987) 4 APSTJ 26.

19. In all probability, for the first time, the scope of above provision fell for consideration before the Division Bench in Rashtriya Ispat Nigam Ltd. Vs.

Commercial Tax Officer, Company Circle, Visakhapatnam, comprising Jeevan Reddy and Syed Shah Mohammad Quadri, JJ (as they then were). In certain civil works by contractors, RINL provided special machinery like cranes, docers, dumpers, road rollers, compressors etc., for hire charges. The plea was that there was no transfer of the right to use in favour of the contractor. Reliance was placed on the agreement between RINL and the contractor. Whether the transaction amounts to transfer of the right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of transaction. This Court noticed that the contract did not create exclusivity of use, and the contractor was entitled to use the machinery only for executing the work entrusted. Therefore, it was held that the fundamental requirements of Section 5-E are not satisfied.

20. In *I.T.C. Classic Finance & Services v. CCT* (1995) 97 STC 330 (AP) : (1995) 20 APSTJ 150 the Assessee, a finance company, was in the business of hiring out machinery, plant and equipment for rent. After purchasing the goods of required specifications, the manufacturer was advised to consign them directly to the customer on hire under an agreement of lease of the equipment for a period of sixty months or more. As these goods were moved out of the State during the course of interstate trade, in their sales tax return for the year 1988-89, the Assessee claimed exemption on the ground that the transaction was not excisable to tax u/s 5-E of the Act. The original authority rejected the contention. The Assessee was successful before the Appellate Deputy Commissioner. However, the Commissioner following the judgment of the Bombay High Court in *20th Century Finance Corporation Limited v. State of Maharashtra* (1989) 75 STC 217 in suo motu revision, set aside the appellate order restoring the original assessment order. The Assessee then filed special appeal before this Court inter alia contending that deemed sales cannot be distinguished from ordinary sales for the purpose of taxation under the Act, and that, the taxable event of delivering the goods having occurred in the State of Tamil Nadu, the same is not excisable u/s 5-E of the Act. Relying on *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, the contention was accepted observing thus.

In the determination of the inter-State character of a sale, the situs is immaterial. When goods are entrusted to a common carrier for delivery, it amounts to delivery to the consignee and when it takes place outside the State, the fact that subsequently the goods have reached the State where the tax is sought to be imposed, cannot be a ground for determining the tax liability. The decision of the Bombay High Court in *20th Century Finance Corporation Limited*, (1989) 75 STC 217, proceeds on the footing that a transfer of the right to use is different from sale without considering the fiction introduced by Clause (29-A) of Article 266 of the Constitution..... The principle that where a State law while defining the expression "sale" makes the situs a relevant consideration for the purpose of determining a deemed sale, the same cannot bring within its ambit inter-State sales or sales in the course of import and export was again emphasized by the Supreme Court in *Builders Association of India v. State of*

Karnataka (1993) 88 STC 248 : AIR 1993 SC 991

21. In order to get over the above dicta, by A.P. Act No. 22 of 1995, Section 5-E was substituted, which reads as under.

5-E. Tax on the amount realized in respect of any right to use goods: Notwithstanding anything contained in this Act;-

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licence for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licence, pay a tax at the rate of eight paise on every rupee of the aggregate of such amount realized or realizable by him during the year.

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made.

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs. two lakhs Proviso was added by A.P. Act No. 27 of 1996.

22. The decision in ITC Classic Finance went in appeal to the Supreme Court. The appeal was heard along with other similar appeals (20th Century Finance Corp'n. Ltd. and Another Vs. State of Maharashtra,) by a Constitution Bench of the Supreme Court which inter alia considered the import of Sub-clause (d) of Clause 29-A of Article 366 of Constitution, and the constitutional validity of Section 5-E of the APGST Act and similar provisions in Haryana, Maharashtra, Rajasthan, Uttar Pradesh and Tamil Nadu Acts. By majority of 3:2, Section 5-E(b) was held to be in excess of the legislative power of the State under Entry 54 of List II of the Seventh Schedule to the Constitution. But to save it from being unconstitutional, the Court read down holding that it would not be applicable to the transaction of the transfer of the right to use goods if such deemed sale is (i) an outside sale; (ii) sale in the course of import or export of the goods; and (iii) an inter-State sale. The decision of this Court in ITC Classic Finance was affirmed, and the Bombay decision in 20th Century Finance was overruled. It is apt to quote the following relevant portion from the Judgment.

The various sub-clauses of Clause (29-A) of Article 366 permit the imposition of tax thus: Sub-clause (a) on transfer of property in goods; Sub-clause (b) on transfer of property in goods; Sub-clause (c) on delivery of goods; Sub-clause (d) on transfer of the right to use goods; Sub-clause (e) on supply of goods; and Sub-clause (f) on supply of services. The words "and such transfer, delivery or supply ..." in the latter portion of Clause (29-A), therefore, refer to the words

transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of Sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of Sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of Sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of Sub-clause (d). Clause (29-A) cannot, in our view, be read as implying that the tax under Sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in Sub-clause (d) of Clause (29-A) be equated with the third sort of bailment referred to in *Bailment by Palmer*, 1979 Edn., p.88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of Sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of Sub-clause (d) of Clause (29-A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

(Emphasis supplied)

23. While holding that, in a contract for the transfer of the right to use goods, the taxable event would be the execution of the contract for delivery of the goods, it was observed.

Article 366(29-A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

(Emphasis supplied)

24. In *State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd.*, the decision of the High Court in RINL-I was affirmed by the Apex Court holding that so as to attract levy of tax u/s 5-E, the essential requirements of the transfer of the right to use must be shown to exist and collection of mere hire charges is not excisable to sales tax. The relevant observations are as under.

The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the Respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of Section 5-E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the Respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to Clause 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated, and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the Respondent company; the contractor was not free to make use of the machinery for the works other than the project work of the Respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against Respondent's possession and control of the machinery.

(Emphasis supplied)

25. In *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, the principal question was regarding the nature of transaction by which mobile phone connections are enjoyed. In an earlier decision marked as *State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another*, a two Judge Bench took the view that transferring the right to use the telephone instrument/apparatus, fell within Section 2(h) of the Uttar Pradesh Trade Tax Act, which defined "sale" to include the transfer of the right to use goods. Doubting the correctness, the matter went before a three Judge Bench. In the lead opinion, as well as in concurring opinion, it was held that though giving a telephone connection would be a transfer of the right to use the goods, there cannot be transfer of the right to use in the case of telephone service. "Providing the use of electro magnetic waves are neither abstracted nor are they consumed in the sense they are not extinguished by their user". In the lead opinion, it was held that whether there is a transfer of the right to use goods, would depend ultimately upon the intention of the parties, to be determined with reference to the contract between the parties. In the concurring opinion, following attributes to constitute the transfer of the right to use goods were pointed out; (a) there

must be goods available for delivery; (b) there must be a consensus ad idem as to the identity of the goods; and (c) the transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permission or licences required therefore should be available to the transferee; (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute viz., a "transfer of the right to use" and not merely a licence to use the goods; and (e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

26. At this stage, the following principles to the extent relevant may be summed up.

(a) The Constitution (Forty-sixth) Amendment Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" 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) of Clause (29-A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

(b) The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

(c) There are clear distinguishing features between ordinary sales and deemed sales.

(d) Article 366(29-A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use goods contemplated in Sub-clause (d) of Clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

(e) In the case of Article 366(29-A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

(f) The levy of tax under Article 366(29-A)(d) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

(g) The transfer of right is the sine qua non for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

(h) The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to identity of the good is shown the transaction is exigible to tax.

(i) The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.

27. To buttress the argument that the essential requisites of the transaction of the transfer of the right to use goods are absent, the counsel relies on *Sandeman v. Scurr* (1866) L.R.2 QB. 86, *The Omoa Coal and Iron Co. v. Huntley* (1877) 2 CPD 464, *Baumvoll v. Gilchrest* (1892) 1 QB. 253 and *Sea and Land Securities v. William Dickinson Co.* (1942) 2 KB 65 as well as passage from "Scrutton on Charterparties and Bills of Lading" (Twenty-first edn., by Stewart C. Boyd CBE Q.C.). He has also invited attention of this Court to the decisions of the Supreme Court in 20th Century, BSNL, RINL-I and RINL-II, and decisions of various High Courts in *Ahuja Goods Agency v. State of Uttar Pradesh* (1997) 106 STC 540 (All) , *Lakshmi Audio Visual Inc. and Another Vs. Assistant Commissioner of Commercial Taxes and Another*, , *Commissioner, VAT, Trade and Taxes Department v. International Travel House Limited* 2009 DST J 77 (Del), *State of Orissa v. Dredging Corporation of India Limited* 25 VST 522 (Ori) and *Indian Oil Corporation v. Commissioner of Taxes* 22 VST 70 (Gau).

28. The Special Counsel for CT relies on the contract between the Petitioners and Grasim, and the observations made by this Court in RINL-I as well as BSNL, to refute the Petitioners' case. He also brought to our notice an unreported judgment of this Division Bench in *Jasper Aqua (P) Limited v. State of Andhra Pradesh* (T.R.C. No. 270 of 2010, dated 03.11.2010). He also pointed out that the judgment of the learned single Judge in *Indian Oil Corporation* was expressly disapproved in *Deepak Nath v. ONGC* (2010) 31 VST 337.

29. We have culled out the principles to be applied to determine the nature of the transaction which, according to the revenue, falls within the ambit of Article 366(29-A)(d). These principles govern the situation here as well. Though we do not feel compelled to refer to all the cited Judgments in detail, and add to the length of this Judgment, we are inclined to summarise these cases in a tabular column below. Before that we propose to begin by making a reference to a passage from Scrutton which lucidly distinguishes the lease (involving transfer of the right to use) and licence in the context of charterparties. Referring to *Sandeman*, *Baumvoll* and *Sea and Land Securities* the learned author classifies charterparties by demise in the following manner.

CHARTERPARTIES may be categorized according to whether or not they amount to a demise or lease of the ship.

A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may nor may not be superadded. The charter becomes for

the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him. A charter by way of demise may be for time or for a particular voyage. In modern times, however, charters by way of demise are invariably expressed to be for a period of time.

Under a charter not by demise, on the other hand, the ship owner agrees with the charterer to render services by his master and crew to carry the goods which are put on board his ship by or on behalf of the charterer. In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. Although the master, by agreement between the owner and charterer, may acquire authority to sign bills of lading on behalf of, and may be obliged to accept voyage instructions from, the latter, he nevertheless remains in all other respects the servant of the owner.

Whether or not the charter amounts to a demise must turn on the particular terms of the charter. "The question depends, where other things are not in the way, upon this: whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or demise of the ship. The right expression is that it is a parting with the whole possession and control of the ship.

Time charters almost always contain expression such as "letting:", "hiring", "hire", "delivery" and "redelivery", which are really apt only in charters by demise. These expressions serve to distinguish such charters from voyage charters, but they do not in themselves characterize such charters as charters by demise. Indeed many time charters expressly provide that the charter should not be construed as a demise of the vessel.

(Emphasis supplied)

We may now tabulate various precedents in the following statement.

Statement of Judicial Decisions

Sl. No.

Citation

Goods and nature of transaction

Finding of the Court

1.

(1997)67 STC 199 (Call (Bank of India v. CTO)

Bank lockers - Hiring of bank lockers fixed and/or attached to the walls and embedded in the floors of strong room specially built for the purpose. The bank collects rent.

The transaction is not merely transfer of the right to use goods, but involved rendering various services along with a limited right to use the locker. The lease of bank lockers did not come within the meaning of "sale" by transfer of the right to use.

2.

(1988) 70 STC 215 (AP) (SBI v. So AP)

-do-

Bank lockers embedded in the floor are not "goods" for the purpose of the APGST Act. There is no transfer of right to use and it is only licence to use the goods without securing possession. The contract is one of bailment and the essential requirement of delivery in a "sale" is lacking in hiring of bank locker.

3.

Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam,

Sophisticated imported machinery like cranes, docers, dumfors and compressors in the construction of steel plant.

Providing machinery to the contractor in connection with the execution of the work does not amount to transfer of right to use the machinery. (NB: Affirmed in RINL-II)

4.

(1990) 77 STC 470 (WBTT) (Modern Decorators v. CTO)

Constructing pandals, barricades, rostrums on land, road, building roof top. Material belongs to decorators. After providing these and collecting rent, they were removed and taken away. They were not handed over to the customers.

The goods are not transferred. The customer has no right to use the materials necessary for the construction of pandals. The erection of pandals by the decorator is not "sale", but tables, chairs etc., let out to customers are "goods" within the meaning of "sale" assessable to tax.

5.

(1991) 83 STC 325(Ori) (K.C. Behera v. So Orissa)

Buses - Bus hired out to State Transport Corpn. The contract disentitled from using the vehicle covered by the agreement in any route. The bus was to be run for Corpn. as per the agreement and directions of an officer.

The transaction is a "sale" within the extended meaning of the word. Providing of the driver by the owner notwithstanding there was a transfer of the right to use bus for consideration, and effective control, general control and possession of the bus vested in the Corporation.

6.

(1993) 88 STC 357 (P&H) (Harbans Lal v. So Haryana)

Tents, kanats, crockery, utensils, furniture, shuttering material, gas cylinders and buses -These are given on hire to third parties. The authorities levied the sales tax on the hire amount under Haryana Act.

The terms of the contract determine whether or not there is transfer of right to use goods. Delivery of possession of goods is essential ingredient. If erected tents are given to customers, it will not be "goods" and any transfer of right to use shall be exercisable to sales tax. The transfer of chairs, tables, crockery would be deemed sale. Hiring of shuttering material to builders/contractors amounts to transfer of the right to use goods. The supplying of purified acetylene gas cylinders to customers is transfer of the right to use goods. The hiring of buses for transportation of personnel of the company with effective or general control with the transferee amounts to transfer of the right to use goods.

7.

Aggarwal Brothers Vs. State of Haryana and Another, (Aggarwal Bros v. S. Har)

Shuttering material Business is to hire of shuttering to builders and contractors who use in the construction of building. Rejecting the challenge to the provision to levy sales tax, High Court of Punjab and Haryana found that possession was transferred for use that customers were in effective control during the contract period and hence transactions fell within the ambit of the transfer of the right to use shuttering material.

The Supreme Court affirmed the High Court's view in Harbans Lal. It was held that the owners transferred the shuttering for consideration for use in the construction of buildings and that the requirements of a deemed sale are satisfied.

8.

20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra,

(20th Cent. Fin. v. So Mah)

Lease of machinery/ equipment under master agreement. The lease financier placed purchase orders with manufacturers and delivers them to the lessees. The value of the equipment is disbursed by the financier. On executing supplementary lease deed forming part of master lease agreement,

State cannot impose tax on inter-State trade/commerce transactions of the right

to use any goods. State is precluded from making law to impose tax on transactions that take place outside the State, in the course of import/export. The delivery of goods is not a condition precedent, but is one of the elements of the transfer of the right to use.

the machinery is allowed to be used. Sales tax was levied on the financier by the State where the equipment was located.

9.

Lakshmi Audio Visual Inc. and Another Vs. Assistant Commissioner of Commercial Taxes and Another,

Audi visual and multi media equipments - As per the requirement of customer AV services are provided by transporting equipment at the venue. The operation is supervised by the owner. After completion of the programme, AV system is dismantled and carried back to owner's stores department.

The lease of the hire or letting with possession and effective and general control is given to the customer with choice of selecting the manner, time and nature of use and enjoyment, it is transfer of the right to use goods. But if the work is entrusted to the contractor for achieving desired results and such work also involves use of the goods, it will not be deemed sale within the meaning of the transfer of the right to use goods.

10.

State of Madhya Pradesh Vs. Santosh Kumar,

(BSNL v. UoI)

Mobile telephone connections - BSNL and such other service providers - Telephone service connections. The infrastructure/ appliances exchanges through which electro magnetic/radio waves carrying signals are controlled by the service provider.

Goods do not include electro magnetic waves or radio frequencies for the purpose of Article 366 (29-A)(d). The goods in telecommunications are limited to the handsets supplied by mobile service provider. In composite contract of service and sale, the sale element is liable to the State tax. The attributes that qualify transaction for the transfer of right to use the goods are availability of goods for delivery, consensus ad idem about identity of goods. Legal right of transferee to use goods along with permissions or licences for such use, exclusive use by the transferee and owners disavowal to transfer again to others during the period of contract.

11

(2009) 22 VST 70 (Gau)

(IOC v. Commr., of Taxes)

Petroleum Trucks/Tankers - IOC hires these for delivering petroleum products to dealers paying hire charges - the insurance, fuel, maintenance and expenses for drivers and cleaners have to be borne by owner of the Tankers

The learned single Judge held that there is no transfer of the right to use goods for the reason that there was only agreement for paying hire charges that the contractor retained possession and effective control of vehicle and that even though the vehicles were identified, there is a provision for substitution of vehicles.

12

(2010)31 VST 337 (Gau)

(Deepak Nath v. ONGC)

Trucks, Trailers, Tankers and Cranes - the owner makes available these to ONGC under contracts in writing - the owner is paid operational charges as agreed to during the period of contract -ONGC also deducts tax at source under Assam Sales Tax Act.

The Division bench held that the goods are made available 24 hours a day through out the duration of the contract, and method and manner of using the goods decided by ONGC, there is transfer of the right to use the goods, even though the staff remained under his control.

(NB. The decision in IOC v. Commr., was impliedly overruled)

30. From the judicial decisions, the settled essential requirement of a transaction for transfer of the right to use goods are: (i) it is not the transfer of the property in goods, but it is the right to use property in goods; (ii) Article 366(29-A)(d) read with the latter part of the Clause (29-A) which uses the words, "and such transfer, delivery or supply ..." would show that the tax is not on the delivery of the goods used, but on the transfer of the right to use goods regardless of when or whether the goods are delivered for use subject to the condition that the goods should be in existence for use; (iii) in the transaction for the transfer of the right to use goods, delivery of goods is not a condition precedent, but the delivery of goods may be one of the elements of the transaction; (iv) the effective or general control does not mean always physical control and, even if the manner, method, modalities and the time of the use of goods is decided by the lessee or the customer, it would be under the effective or general control over the goods; and (v) the approvals, concessions, licences and permits in relation to goods would also be available to the user of goods, even if such licences or permits are in the name of owner (transferor) of the goods, and (vi) during the period of contract exclusive right to use goods along with permits, licences etc., vests in the lessee.

31. The counsel also brought to our notice the decisions in The Commissioner, Trade Tax Vs. Jamuna Prakash Jaiswal, , R.P. Kakoty v. ONGC (2009) 22 VST 136

and International Travel House Limited. We, however, do not feel it necessary to refer to these as they involve similar questions. As has been held in a number of precedents, the nature of transaction and the issue whether the contract is for the transfer of the right to use the goods or for providing service depends on the intention of the parties to be determined on a construction of the contract.

32. At this stage, we need to visit the principles of interpretation of contracts. In *Dr. K. Subbaiah v. C.N. Krishnamacharyulu* Appeal Suit No. 151 of 1991 and batch, dated 29.12.2010, one of us (WSR,J) after referring to the seven rules of interpretation of deeds from ODGERS' "Construction of Deeds and Statutes" (1967 5th edn., by Gerals Dworkin - 1st Indian Reprint 1996), and seventeen rules of interpretation treatised in Herbert Broom's *Legal Maxims*, (1939, 10th edn by R.H. Kersley), deduced four principles of interpretation of documents, which are as follows.

33. The first principle is to construe the document as a whole. It is common in Courts that the scope of rights and obligations and limitations thereto created under a document are in issue. Unless a document is thoroughly scrutinized and read as a whole, it would not be possible to know the intention of the parties with regard to all these aspects. *Quihaeret in litera haeret in cortice* He who considers merely the letter of an instrument goes but skin-deep into its meaning. The intention and parties of the document is more relevant than words used in the document. and *Contemporanea expositio est optima et fortissima in lege* The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up. very lucidly explain this principle.

34. The second principle is to understand the meaning of a document or a part of it from the document itself. The legal maxims relevant to this are *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument. and *Verba generalia restringuntur ad habilitatem rei vel personae* General words may be aptly restrained according to the matter or person to which they relate. In addition to these, the legal maxims *Ex antecedentibus et consequentibus fit optima interpretatio* A passage is best interpreted by reference to what precedes and what follows it., *Noscitur a sociis* The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it., *Certum est quod certum reddi potest* That is sufficiently certain which can be made certain., *Utile per inutile non vitiatur* Surplusage does not vitiate that which in other respects is good and valid., *Expressio unius est exclusio alterius* expressum facit cessare lacitumi The express mention of one thing implies the exclusion of another, *Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur* Words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them. and *Ad proximum antecedens fiat relatio, nisi impediatur sentential* Relative words refer to the next antecedent, unless by such construction the meaning of the sentence would be impaired.

furnish subsidiary rules while discovering the intention of the parties.

35. The third principle is to give literal meaning to the words used in a document. There are five legal maxims relatable to this principle. The legal maxim *ut res magis valeat quam pereat* A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. means that statute must be read always in such a manner that it would not lead to absurdity and make the instrument workable. Literal meaning depends on the circumstances of the parties and technical legal terms will always be given their legal meaning. When the language is very clear, the interpreter is precluded from supplying the words or reading something depending on the oral evidence. But as postulated by the maxim *Ambiguitas verborum latens verificatione suppletur nam quod ex facto oritur ambiguum verificatione facti tollitur* Latent ambiguity may be explained by evidence; for an ambiguity which arises by proof of an extrinsic fact may be removed in like manner, latent ambiguity may be explained by evidence because the ambiguity often arises by proof of an intrinsic fact, which may be removed in like manner. Sections 91 to 95 of the Indian Evidence Act, 1872 incorporate this principle.

36. The fourth principle is that in the event of the intrinsic incongruities and inconsistencies flowing from the words and language used in the document, "the intention would prevail over the words used." The intention of the parties has to be determined from the attending circumstances leading to the transaction. This principle is an exception to the first three principles. If the language used in the document is very clear, while determining the nature of the document, nature of rights and obligations flowing from the document cannot be inferred by resorting to the fourth principle.

37. In *Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, and Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others*, the Supreme Court quoted with approval the following principles of construction of contracts from "Interpretation of Contracts" by Kim Lewison, Q.C. as follows.

1.03 For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.

6.09 Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus:

It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."

In more modern times that statement was approved by the Privy Council in *Rodger v. Comptoir D' Escomple de Paris*, (1869) LR 2 PC 393 : 16 ER 618, in

which Sir Joseph Napier, delivering the advice of the Board said:

The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong."

Similarly, in *Fausset v. Carpenter* (1831) 2 Dow & Clause 232 : 6 ER 715, the House of Lords accepted the submission of counsel that the court:

"... in judging of the design and object of a deed, will not presume that a party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he had a right to do."

However, the question of construction should not be approached with a leaning in one direction or another. Thus although the law frowns upon covenants in restraint of trade, nevertheless such a covenant should not be approached on the basis that it is *prima facie* illegal. "You are to construe the contract, and then see whether it is legal."

38. On the sidelines, a "not so insignificant" issue is raised by the Special Counsel. The agreement which is part of the record does not contain the day or date and the place of execution of the contract by the parties. From this, Revenue would like the Court to draw an inference that the agreement is not genuine; it is created post transaction to avoid tax, and it is an attempt to project the case that there is no transfer of the right to use transit mixers. It is axiomatic that a document or deed of contract is an instrument written on parchment or paper, ordinarily complying with ten things viz., (i) writing; (ii) on parchment or paper; (iii) date and parties; (iv) recitals; (v) operative part; (vi) exceptions and reservations; (vii) general words; (viii) *Habendum* - (i) The clause usually following the granting part of the deed which defines the extent of the ownership in the thing granted to be held by the grantee. The purpose of the *Habendum* is to limit the estate so that the general implication of the estate which by construction of law passeth in the premises is by the *Habendum* controlled and qualified (*Advanced Law Lexicon* by P. Ramanatha Aiyar 3rd edition reprint 2007). (ii) The part of a deed or conveyance which states the estate or quantity of interest to be granted e.g., the term of a lease (*The New Oxford Dictionary of English* Fourth Impression 2002); (ix) covenants; and (x) signing and sealing.

39. There is no dispute that the agreement between the Petitioners and Grasim satisfies all conditionalities except that it does not contain the date and place of execution. Does it render it ineffective and unenforceable? We are afraid the answer cannot be in abstract or simplistic. If the agreement contains sufficient indication with regard to the grant and creation of rights and obligations with reference to such grant for the specified period therein, it would be sufficient to bind the parties to the agreement. The mere absence of date and place does not militate against the parties nor can they escape regulation by the applicable

statute. It is also a well settled rule of interpretation that even in the absence of a formal agreement, a contract can be inferred from the pre and post contract correspondence between the parties. In this case, Clause (L) gives sufficient indication when it says that, "the agreement will come into force from 01.10.2002 and remain in effect till 31.03.2006, with liberty to parties to terminate the contract by giving three months notice in writing to the other party". The reading of the agreement does not anywhere indicate that it was entered into between the parties elsewhere than at Secunderabad. The first page of the agreement in its footnote contains the address of the Marketing Department of Grasim sufficient enough to conclude that it was entered into between the parties at Secunderabad. Even otherwise it is fairly well settled that the transfer of the right to use goods can be effected even under an oral agreement. Hence, submission of the special counsel is rejected.

40. That brings us to the construction of the agreement between the parties which indisputably came into force on 01.10.2002. The intention of the parties as noticed supra has to be understood by reading the entire agreement; reading a word here or a clause there is not sufficient. Grasim was looking for a transporter to take care of the transporting need of their RMC plants in Hyderabad. The Petitioners, who are owners of Transit Mixers, were looking for advancing their business interest in Hyderabad. The latter approached the former offering their Transit Mixers to take care of all transporting solution needs. These essentially form part of the recitals. The Habendum of the agreement speaks of the Petitioners providing a dedicated fleet of five Transit Mixers painted in a particular style and colour as well as brand name of "Grasim" to transport RMC, on 24 hours basis every day of the week as instructed by the lessee, failure of which will attract penalties. The staff of the Petitioners were required to obey the instructions issued by Grasim, and they should use safety equipment like helmets. These Transit Mixers cannot move or carry RMC to the work sites as per their convenience but are to be used as per the delivery schedule given by Grasim. The counsel also does not dispute that the agreement between the parties speaks of a dedicated fleet of vehicles to be made available on 24/7 basis duly painted in a particular style and colour, and staff being under the instructions of Grasim alone. It is, however, submitted that the parties agreed for five dedicated vehicles as RMC needs to be transported immediately after it is manufactured in the batching plant, and the manufacturer cannot identify and negotiate with the transporter for carrying the products every time an order is placed. Therefore, such a clause was included in the agreement to ensure there is no delay in delivering the product to the customers. He also submits that making available the vehicles through out the day or painting them with brand name of Grasim is required keeping in view the possible hurdles in logistics, and to ensure customer satisfaction of getting the required branded RMC. According to him, these clauses by themselves do not warrant an inference of transfer of the right to use Transit Mixers.

41. As mentioned supra, whether the transaction amounts to transfer of right or

not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole to determine the nature of the transaction (RINL-I). We may, for ready reference extract important clauses from the agreement.

A. That the Second party will maintain and provide a dedicated fleet of 5 vehicles to transport the produce of the First party from their plant to the various customers in the cities of Hyderabad. The number of vehicles required to be dedicated for the use will be subject to change and the parties will mutually agree to the new fleet size. This number shall not change unless otherwise indicated by the First party and agreed to by the Second party and the remaining terms and conditions of this agreement will remain unaffected by this change.

B. That the Second party will ensure that adequate number of vehicles are made available on a 24/7 basis i.e., 24 hours and everyday of the weeks as per the instructions of the officials of the First party. If the Second party fails to provide the vehicles as desired it shall attract penalties as prescribed later in this document. The First party agrees that the Second party will require upto 2 days a month for the maintenance and upkeep of the vehicles and will, therefore, allow 2 days a month for this activity and will not demand any penalty for these days.

C. That the Second party will be solely responsible for ensuring that the produce of the First party reach the destination in time and as per the agreed schedule. No delay on any account will be acceptable and the Second party must ensure safe delivery of the produce.

D. That the produce of the First party has a strong Brand Equity in the market and they would like the vehicles to be painted in a particular style and color. The Second party has agreed to get the same done at their cost and have also assured the First party that they shall paint the vehicles every six months.

E. That the Second party has also agreed that the drivers will be suitably dressed in a uniform at all times and the uniform would be neat and clean. The drivers will be qualified and licensed and will not consume any intoxicating substance while on job-whether at the plant or at the site of the customers of the First party. The staff of the Second party engaged in providing services to the First party will also ensure that they obey all the lawful instructions of the officials of the First party and conform to the norms of decency while interacting. All the personnel of the Second party will carry identification cards with them at all times.

F. Omitted

G. Omitted

H. That the Second party will obtain proper receipts from the customers of the First party after the goods are delivered and also submit reports to the First party in the formats supplied by the First party at the required intervals.

I. Omitted

J. Omitted

K. Omitted

L. That this agreement will come into force from the 1st October 2002 and remain in effect till 31st March 2006. However, the parties will be at liberty to terminate this contract at any time by giving three months notice in writing to the other party. The First party will be at liberty to terminate this agreement at any time if the Second party violates any of the terms of the agreement or if the quality of the services provided it not to its satisfaction. The decision of the First party as to the quality will be final.

M. That the Second party will indemnify the First party against statutory claim being made by any authority on the First party for an act of omission or commission by the Second party.

(Emphasis supplied)

42. In addition to the above clauses, we have thoroughly perused and analysed the agreement between the Petitioners and Grasim. With reference to the intention, the purpose and the rights/obligations created under the said agreement, we may divide the same into three parts. The recitals form the first part, which deals with the intention. Admitting that the Petitioners are in possession of a fleet of Transit Mixers used for carrying RMC, and further admitting that Grasim was looking for a transporter of RMC, the recitals reveal that both the parties entered into an agreement for transporting RMC by using the vehicles owned by the Petitioners. Though the phrase "offer services to take care of transporting solution needs" is used the real purpose, as can be seen from the second part, is to enable Grasim to have the right to use the Transit Mixers. The agreement requires the Petitioners to provide drivers to be dressed in uniform, and all of them are to obey the lawful instructions issued by Grasim. Further RMC has to be delivered by these drivers in Transit Mixers only at the time and places as instructed by the officials of Grasim, and the Petitioners have no right to carry RMC wherever and whenever they like. Thus the full control on the method, manner and time of using the Transit Mixers, owned by the Petitioners vests absolutely in Grasim.

43. Clauses A to E and L deal with the second aspect of the agreement. Under these, the Petitioners agreed to provide five dedicated fleet of five Transit Mixers 24/7 i.e., twenty-four hours every day of the week as per the instructions of Grasim for transporting RMC during the period from 01.10.2002 to 31.03.2006 (42 months). These dedicated vehicles are to be painted in a particular style and colour which has to be re-painted once in six months. For any third party, during these 42 months, the goods as visible in use would create an immediate impression that they belong to Grasim. No reasonable man would even think that the Transit Mixers, being used for transporting RMC of Grasim, belong to the

Petitioners and they are only being used to meet the transportation needs of Grasim.

44. The third aspect deals with the Petitioners indemnifying Grasim, paying all taxes for permits, insurance etc., the rent/lease amount payable by Grasim, the dispute resolution mechanism and the mutual rights of the parties to modify the agreement. Standing alone all of them by themselves have no meaning. They are clauses intended for working out the contract which is essentially for the Petitioners placing the Transit Mixers painted with brand name at the disposal of Grasim for a period of 42 months for transporting RMC manufactured by Grasim.

45. Reading the recitals and various clauses, indeed there is a transfer of the right to use Transit Mixers. All the tests as indicated hereinabove exist in the contract between the Petitioners and Grasim. The vehicles are maintained by the Petitioners. They appoint the drivers and fix their roster. The licences, permits and insurances are taken in their names by the Petitioners, which they themselves renew. The Transit Mixers go to Grasim's batching plants in Miyapur and Nacharam, where they are loaded with RMC and then proceed to the construction sites of customers. The product carried is manufactured by Grasim, which is delivered to the customers and the customers pay the cost of the RMC to Grasim and the Petitioners nowhere figure in the process of putting the property in Transit Mixers to economic use. The entire use in the property in goods is to be exclusively utilised for a period of 42 months by Grasim. The existence of goods is identified and the Transit Mixers operate and are used for the business of Grasim. Therefore, conclusively it leads to the only conclusion that the Petitioners had transferred the right to use goods to Grasim. For these reasons, we are not able to countenance any of the submissions made by the Petitioners' counsel.

46. In the result, for the above reasons, these revision cases fail and are, accordingly, dismissed with costs.