
(1993) 04 MAD CK 0026

In the Madras High Court

Case No : Writ Petitions No"s. 11589 and 15639 of 1989, 9601, 13390, 13863, 14434, 15531, 15532, 15533, 15534, 15535, 15725, 15751, 16294, 18164, and 19831 of 1990, 2614, 3035, 3142, 4864, 4865, 4866 and 15018 of 1991 and 2981 and 10007 of 1992

Hotel Parisutham (P) Ltd. and others

APPELLANT

Vs

State of Tamil Nadu and others

RESPONDENT

Date of Decision : 12-04-1993

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3, 3A, 3B, 4

Citation : (1993) 04 MAD CK 0026

Hon'ble Judges : Raju, J;Abdul Hadi, J

Bench : Division Bench

Advocate : T.R. Raghavan, B. Bharathabooshan and V. Ramachandran, s for M/s. K.M. Mani, M. Krishnakumar, Mallika Srinivasan and N. Ramakrishnan, V. Ramesh, T.P. Sankaran, M. Liagat Ali, M. Subramaniya Rao, K. Govindarajan, P. Seshadri, P. Radhakrishnan and S.N. Kirubanandam, for the Appellant; K. Subramaniam, Advocate-General and Mrs. Chitra Venkataraman, Additional Government Pleader, for the Respondent

Judgement

Abdul Hadi, J.—Though the reliefs in terms of the prayers differ in this batch of writ petitions, in essence and in spirit, taking all of them

together, they relate to the question whether food and drinks supplied in the hotel/restaurant/eating house of the petitioners are exigible to sales tax

during the assessment years 1980-81 to 1989-90. The main submissions were made by Mr. V. Ramachandran, learned Senior Counsel arguing on

behalf of many of the writ petitioners in this batch and Mr. Venkataraman, who appears in W.P. No. 4332 of 1991 and certain other writ

petitions. The learned Advocate-General argued for the respondents.

2. We may straightway point out that one of the two main submissions made by

the petitioner's counsel is only similar to the submissions made earlier before another Division Bench of this Court in the batch case K. Damodarasamy Naidu & Bros. v. State of Tamil Nadu whose decision dated February 8, 1990, had been reported in [1990] 76 STC 427. Likewise, the other main submission made by these counsel is similar to the submission made before the learned Judge S. Ramalingam, J., of this Court in Writ Petition Nos. 9281 and 9282 of 1991, whose unreported decision is dated July 18, 1991 [Since reported in [1994] 94 STC 568 and relied on by the learned Advocate-General appearing for the Revenue.

After going through the above referred to two judgments, one, of the Division Bench and another of the above referred to learned single Judge, we do not think that there is any reason for taking a different view from the respective views taken in the above referred to two judgments on the above referred to two main submissions made before us.

3. It is well-known that after The State of Punjab Vs. Associated Hotels of India Ltd., (judgment dated January 4, 1972), Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, (judgment dated September 7, 1978), and Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, (judgment dated December 21, 1979), the Constitution (Forty-sixth Amendment) Act, 1982, which came into force on February 2, 1983, introduced the definition of the term "tax on the sale or purchase of goods" in the Constitution of India, by bringing a new clause (29A) to article 366. As per sub-clause (f) therein, the said term includes "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". The said definition, inter alia, states that such supply shall be deemed to be a sale of the abovesaid goods by the person making the supply. Earlier, in the abovesaid [1972] 29 STC 474 (State of Himachal Pradesh v. Associated Hotels of India Ltd.), the Supreme Court has held that the transaction between hotelier and the visitor to the hotel is one essentially of service in the performance of which and as part of the amenities incidental to the service, the hotelier serves meals and that such supply of meals by the hotel to the residents is not sale of food. This position was only pursuant to

the earlier decision of the Supreme Court in *State of Madras v.*

Gannon Dunkerley & Co. (Madras) Ltd. [1958] 9 STC 353 that the term "sale" in the expression "tax on sale or purchase of goods" in entry 54 of

List II of the Seventh Schedule to the Constitution of India should mean only "sale" as understood in the Sale of Goods Act, 1930 (vide section 4

thereof), since the Constitution of India as it existed then and even earlier the Government of India Act, 1935, did not contain a definition of the

term "sale" and, taking into account the legislative practice of the Central Legislature, which passed the Constitution of India, the meaning of the

term "sale" as found in the Sale of Goods Act, 1930, passed by the same Legislature, alone should be adopted to arrive at the meaning of the term

sale" as it is used in the said constitutional entry. As understood in the said Sale of Goods Act, the three essential ingredients of "sale" are, (1) first,

there must be an agreement to transfer property in goods, as goods, (2) the said agreement to transfer must be for a price and (3) pursuant to such

an agreement, there must be an actual transfer of property from one to another. The Supreme Court, in [1972] 29 STC 474 (*State of Himachal*

Pradesh v. Associated Hotels of India Ltd.) held that there was no such agreement or transfer of property, in the abovesaid hotel transaction since

the dominant idea therein was one of service only.

4. After [1972] 29 STC 474 (*State of Himachal Pradesh v. Associated Hotels of India Ltd.*) in [1978] 42 STC 386 [*Northern India Caterers*

(*India*) *Ltd. v. Lt. Governor of Delhi*], the Supreme Court held that there was no distinction between a case of meals supplied to resident in hotel

and those served to customers in restaurants and that service of meals in a hotel or restaurant did not constitute sale of food for the purpose of levy

of sales tax, but the said transaction must be regarded as rendering of a service in the satisfaction of human being or ministering to a bodily want.

Then in [1980] 45 STC 212 [*Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*] (which is the judgment in the review petition), the

Supreme Court also pointed out that apart from the fact that the supply of meals must be regarded as ministering to the bodily want of human

beings, there was no right to the customers to take away any eatable served and that also was relevant in determining that it was not a sale, since

that shows that no title of property was transferred.

5. However, it must also be pointed out that in [1980] 45 STC 212 [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi] it was also

reiterated that if the rendering of the above service was only incidental and the dominant object was sale of food or drinks, it was exigible to sales

tax. In this connection, the following observation of the Supreme Court is significant :

If you go to a coffee-house, order two dosas, eat one and carry the other home, you buy the dosas. You may keep the cake and eat it too, like a

child which bites a part and tells daddy that he would eat the rest at home. Myriad situations, where the transaction is a sale of a meal, or item to

eat or part of a package of service plus must not be governed by standard rule. In mere restaurants and non-residential hotels, many of these

transactions are sales and taxable. Nor are additional services invariably components of what you pay for. You may go to an air-conditioned cloth

shop or sweetmeat store or handicrafts emporium where cups of tea may be given, dainty damsels may serve or sensuous magazines kept for

reading. They are devices to attract customers who buy the commodity and the price paid is taxable as sale. The substance of the transaction, the

dominant object, the life-style and other telling factors must determine whether the apparent vendor did sell the goods or only supply a package of

services. Was there a right to take away any eatable served, whether it be bad manners to do so or not ? In the case we have, the decision went

on the ground that such right was absent. In cases where such a negative is not made out by the dealer - and in India, by and large, the practice

does not prohibit carrying home - exigibility is not repelled.

6. While so, subsequent to the abovesaid Forty-sixth constitutional amendment, inter alia, the definition of the term ""sale"" in section 2(n) of the

Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as ""the Act") was also amended by the Amendment Act, Tamil Nadu Act 28 of

1984. After the said amendment, section 2(n)(vi) of the Act says that that ""sale"" includes ""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"". The said sub-clause (vi) came into force from the said date February 2,

1983.

7. Now, the first main submission of the abovesaid counsel appearing in the abovesaid writ petitions, which consists of different parts, is as follows

:

Despite the abovesaid constitutional amendment and the abovesaid subsequent statutory amendment to the Act, there cannot be a levy of sales tax

on the abovesaid supply of food and drinks by the petitioners' hotels/restaurants/eating houses, since there is no charging section in the Act,

authorising such levy on the abovesaid supply of food and drinks. Further according to the said counsel, the abovesaid constitutional amendment

extended the meaning of the term "sale" so as to include, among other transactions, "transfer of property in goods involved in the execution of

a works contract" and even "transfer of the right to use any goods" with reference to the abovesaid two transactions when the abovesaid Tamil

Nadu Act 28 of 1984 was passed, apart from including these two transactions in the term "sale" under the abovesaid section 2(n), the Legislature

also introduced one additional charging section, viz., section 3-A in the Act, levying tax on the abovesaid right to use any goods. Subsequently by

Tamil Nadu Act 42 of 1986, the Legislature also introduced another charging section, viz., section 3-B levying tax on the transfer of property in

goods involved in the execution of works contract. According to the said counsel, similar to the said sections 3-A and 3-B, there is no separate

charging section for the abovesaid supply of food and drinks in hotels, etc., pursuant to the said Forty-sixth Amendment and there is only an

amendment of the term "sale" under the abovesaid section 2(n)(vi) as stated above. According to the said counsel, unless there is a separate

charging section regarding the abovesaid supply of food and drinks, the State cannot tax such supply of food and drinks by the petitioners. Further,

even assuming that no such separate charging section is necessary after the said constitutional amendment, the learned counsel say that the said

supply of food and drinks consists of two elements, viz., (1) supply of goods and (2) rendering of service and that without a guideline to separate

the service portion thereof the attempt to tax the entire turnover is illegal.

8. The abovesaid argument was also made in the above referred to batch case K. Damodarasamy Naidu & Bros. v. State of Tamil Nadu whose

decision has been reported in [1990] 76 STC 427 as stated above. The Division Bench therein has already held thus :

The first contention advanced by Mr. V. Ramachandran is that there is no charging section authorising the levy of the sales tax on the supply of

food and drinks in eating houses/restaurants/hotels in the TNGST Act, 1959. This contention is to be stated just to be rejected as without

substance. After the amendment of the definition, bodily incorporating the definition in clause (29A)(f) of article 366 of the Constitution in the

definition of "dealer" in the TNGST Act and also in the definition of "sale", it is futile to argue that section 3 which is the charging section does not

cover the supply of food and drinks in hotels/restaurants The next contention is that notwithstanding the enlarged definition of "sale" as

amended by the Amendment Act, still it is circumscribed by entry 54 and also by the definition of "sale" under the Sale of Goods Act. This

contention again, in our view, is without substance. Except stating the argument, it has not been elaborated how it is circumscribed when the State

Legislature has defined "sale" in consonance with the clear and unambiguous definition given in sub-clause (f) of clause (29A) of article 366 of the

Constitution. The Constitution which is supreme, gives an inclusive definition to "sale" enabling the States to levy tax on the "sale or purchase of

goods" in clause (29A) of article 366. Sub-clause (f) of clause (29A) specifically enables the State Legislature to levy a tax on the supply, by way

of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink

(whether or not intoxicating) where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer,

delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of

those goods by the person to whom such transfer, delivery or supply is made. In view of this, we are unable to agree with the learned counsel for

the petitioner that entry 54 in List II of the Seventh Schedule to the Constitution and the definition of "sale" in the Sale of Goods Act, still stand in

the way of the States from levying sales tax on supply of food and drinks by the hoteliers..... The third contention is that the supply of food and

drinks in hotel/restaurant consists of two elements, namely, supply of material and service as held by the Supreme Court in several cases and

without a guideline to separate the service portion, the attempt to tax the entire turnover is illegal There will be no scope for this type of

argument advanced by Mr. V. Ramachandran, the learned counsel for the petitioners, if due regard is given to the deeming clause found in sub-

clause (f) of clause (29A) of article 366 of the Constitution which is to the effect that "such transfer, delivery or supply of any goods shall be

deemed to be a sale of goods". No distinction is made between the supply part and the service part in the supply of food and drinks in a hotel

..... The last contention of Mr. V. Ramachandran is that a section similar to section 3-A or 3-B should have been introduced in the Tamil Nadu

General Sales Tax expressly enabling the levy of sales tax on the supply of food and drinks in the hotel/restaurants. This argument proceeds on the

basis that the charging section, namely, section 3 by itself is not sufficient to levy sales tax on the supply of food and drinks in hotels/restaurants.

We have earlier rejected the contention of learned counsel Mr. V. Ramachandran that section 3 does not authorise the levy of sales tax on the

supply of food and drinks in the hotels/restaurants. The same reasonings will apply to this contention as well. Therefore, we reject this contention.

8A. Despite the abovesaid decision, the same counsel Mr. v. Ramachandran would contend before us that before the other Division Bench which

decided the said [1990] 76 STC 427. (Damodarasamy Naidu & Bros. v. State of Tamil Nadu), the abovesaid contentions were not substantiated

by referring to certain decisions of the Supreme Court on the applicability of the doctrine of eclipse and that hence the said decision requires

reconsideration. He also relied on certain observations in Sree Annapoorna v. State of Tamil Nadu [1986] 63 STC 18 for his contention that

without a new charging provision dealing with such a supply of food and drinks, there can be no tax on the petitioners such supplies. He also

submitted that with reference to the above referred to ""third contention"", dealt with in [1990] 76 STC 427 (Damodarasamy Naidu & Bros. v.

State of Tamil Nadu) the recent decision (dated December 23, 1992) of another Division Bench of this Court [to which one of us (Raju J.) was a

party] reported in [1993] 88 STC 289 (Larsen and Toubro Limited v. State of Tamil Nadu) has thrown new light in the matter while dealing with

the abovesaid article 366(29-A)(b) of the Constitution of India and section 2(n) (ii) of the Act in regard to works contract, after taking into account

the Supreme Court decisions Builders Association of India v. Union of India [1989] 73 STC 370, Gannon Dunkerly & Co. v. State of Rajasthan

[1993] 88 STC 204 and Builders' Association of India v. State of Karnataka [1993] 88 STC 248 and that the same reasoning could be applied

to the present cases of the abovesaid supply of food and drinks in hotels, etc., also and that, therefore, there being two elements viz., (1) supply of

food and drinks, and (2) service, in the present cases also, the attempt to tax the entire turnover without a guideline to separate the service portion

is illegal. (He also points out that earlier in [1972] 29 STC 474 (State of Himachal Pradesh v. Associated Hotels of India Ltd.) and [1978] 42

STC 386 [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi] the Supreme Court held that the Revenue was not entitled to split the

transaction into two parts, one of service and the other, of sale of food-stuffs.) For these reasons also, according to the said counsel, the decision

in [1990] 76 STC 427 (Damodarasamy Naidu & Bros. v. State of Tamil Nadu) is not correct and requires reconsideration.

9. Dealing with the abovesaid doctrine of eclipse, the said learned counsel relies on the decisions in Deep Chand Vs. The State of Uttar Pradesh

and Others, , Saghir Ahmad Vs. The State of U.P. and Others, , Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, and A.V.

Fernandez Vs. The State of Kerala, . Relying on these decisions, the learned counsel submits that the doctrine of eclipse would not apply to the

present case since the present case is one of post-Constitution legislation and such a legislation does not revive on mere amendment of

Constitution. But, the learned Advocate-General submits that there is no scope for the application of these decisions in the present cases at all.

10. We have considered the rival submissions in this regard. No doubt, the majority view in Deep Chand Vs. The State of Uttar Pradesh and

Others, that in respect of post-Constitutions law, the doctrine of eclipse is not applicable, was approved in Mahendra Lal Jaini Vs. The State of

Uttar Pradesh and Others, by all the five learned Judges, who constituted the Bench. But certain subsequent decisions like The State of Gujarat

and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, and Dularey Lodh Vs. Third Additional District Judge, Kanpur and Others,

seem to favour the minority view in Deep Chand Vs. The State of Uttar Pradesh and Others, However, we think that there is no necessity in the

present case to go into the question of applicability of the abovesaid doctrine of eclipse in view of section 6(1) of the abovesaid Constitution

(Forty-sixth Amendment) Act, 1982 itself, whose relevant portions are as follows :

6. Validation and exemption. - For the purposes of every provision of the Constitution in which the expression "tax on the sale or purchase of

goods" occurs, and for the purposes of any law passed or made, or purporting to have been passed or made, before the commencement of this

Act, in pursuance of any such provision, -

(a) the said expression shall be deemed to include, and shall be deemed always to have included, a tax (hereafter in this section referred to as "the

aforesaid 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) for cash, deferred payment or other valuable consideration; and

(b) every transaction by way of supply of the nature referred to in clause (a) made before such commencement shall be deemed to be, and shall be

deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to

whom such supply is made, is the purchaser,

and notwithstanding any judgment, decree or order of any court, Tribunal or authority, no law which was passed or made before such

commencement and which imposed or authorised the imposition of, or purported to impose or authorise the imposition of, the aforesaid tax shall

be deemed to be invalid or ever to have been invalid on the ground merely that the legislature or other authority passing or making such law did not

have competence to pass or to make such law,

In [1986] 63 STC 18 (Sree Annapoorna v. State of Tamil Nadu) (judgment dated January 21, 1986) also, the abovesaid section 6(1) was noted

and it was held as follows :

As may be seen from the latter part of clause (1) that section 6 only validated the law which was passed or made before the commencement of

the Constitution (Forty-sixth Amendment) Act which imposed or authorised the imposition or purported to impose or authorise the imposition of a

tax on food and drinks supplied in a hotel or restaurant and that if the law thus made, though would have been ultra vires on the ground of

legislative competence, the defect or want of competence was removed by the validation provision.

The said decision [1986] 63 STC 18 (Sree Annapoorna v. State of Tamil Nadu) also dealt with supply of food and drinks in hotels or restaurants.

The assessment years in question, there was 1973-74 to 1975-76 only and the said decision found that in those years, there was no "express law

in Tamil Nadu imposing a tax on such supply of food and drinks. So, it held on the facts of that case thus :

In the instant cases during the relevant assessment years 1973-74, 1974-75 and 1975-76 the definition of "sale" did not specifically include food

and drinks supplied to customers in hotels and restaurants. The State wanted these transactions to be taxed only relying on the word "sale as

including normally those transactions as well, but in view of the decision of the Supreme Court, supply of food and drinks in a hotel or restaurant is

not a sale. The main part of the definition of "sale" could not be said to have included those transactions and therefore the turnover relating to the

same was not liable to sales tax.

11. But, in the present cases, as already indicated we are concerned with the assessment years 1980-81 to 1989-90. Dealing with such a situation,

we find that it cannot be said that there was no "express law" in Tamil Nadu during this period imposing tax on such supplies of food and drinks.

This is because of the following entry, as entry 150 found in the First Schedule to the Act, it having been introduced by the Tamil Nadu Act 7 of

1981 with effect from October 6, 1980 :

Articles of food and drink, sold to customers in three star, four star and five star hotels as recognised by Tourism Department, Government of

India, whether such articles are meant to be consumed in the premises or outside.

No doubt, the said entry was substituted by the following entry, by Tamil Nadu Act 4 of 1982 with effect from June 15, 1981 :

Articles of food and drink other than those specified elsewhere in this Schedule, sold to customers in hotels, classified or approved by the

Department of Tourism, Government of India.

No doubt this substituted entry was struck down as unconstitutional by this Court in Sangu Chakra Hotels Private Limited v. State of Tamil Nadu

[1985] 60 STC 125 [judgment dated January 21, 1985, that is, before the above referred to [1986] 63 STC 18 (Sree Annapoorna v. State of

Tamil Nadu) was decided]. But [1985] 60 STC 125 (Sangu Chakra Hotels Private Limited v. State of Tamil Nadu) has been subsequently

reversed by the Supreme Court in Kerala Hotel & Restaurant Association v. State of Kerala [1990] 77 STC 253 (judgment dated February 21,

1990) holding that the said substituted entry 150 was intra vires the Constitution. The said entry 150 was no doubt subsequently omitted pursuant

to a notification with effect from March 23, 1987. However, the said entry 150 got restored from July 23, 1987, in view of the Tamil Nadu Act 31

of 1987, though subsequently the said entry was omitted again with effect from March 25, 1989 by virtue of Tamil Nadu Act 17 of 1989.

Anyway, the said entry was in force when the abovesaid Forty-sixth Amendment came into force on February 2, 1983. So, in view of the said

entry read with section 3, the charging section, and the relevant definitions of the terms "sale" and "turnover", etc., under u/s 2 of the Act, it cannot

be said that there was no "express law" imposing tax on the abovesaid supply of food and drinks. So, in view of the abovesaid section 6(1) of the

Constitution (Forty-sixth Amendment) Act, 1982 itself, there is validation of the law then existing in Tamil Nadu with reference to the abovesaid

supply of food and drinks. That is why, in [1990] 76 STC 427 (Damodarasamy Naidu & Bros. v. State of Tamil Nadu) also, the following

passage in [1986] 63 STC 18 (Sree Annapoorna v. State of Tamil Nadu) was relied on :

It may be seen from the definition newly inserted in clause (29A) of article 366 and the objects as set out in the Statement of Objects and

Reasons appended to the Bill, the Act intended to validate only the laws levying tax on supply of food and drinks and it does not have the effect of

altering a definition of "sale" in the various State legislations. The Supreme Court decisions are that "sale" will not comprehend within it supply of

food and drinks in a hotel or restaurant and that if any definition of "sale" in a State law included those transactions it would be ultra vires on the

ground of want of legislative competence. Therefore, if any State sales tax law had included any transaction of works contract, hire-purchase,

supply of food and drinks in a hotel or transfer for consideration of controlled commodities in the definition of "sale", then such a provision, though

lacked legislative competence at the time when it was enacted, shall stand validated by the Constitution (Forty-sixth Amendment) Act so that the

levy and collection of tax under those provisions would become legally valid.

12. Therefore, there is no necessity for any separate charging section as contended by the learned counsel for the petitioners. There may be

different reasons for the special introduction of the above referred to two other charging sections, viz., sections 3-A and 3-B. But, the present case

does not require a separate charging section.

12A. Then, coming to the other submission of the learned counsel that even assuming that no such separate charging section is necessary after the

said constitutional amendment, without a guideline to separate the service portion from the supply of food and drinks, the attempt to tax the entire

turnover is illegal, the learned counsel, as already indicated, very much relies on the above referred to [1993] 88 STC 289 (Larsen and Toubro

Limited v. State of Tamil Nadu). We have already pointed out how actually this point also was met in [1990] 76 STC 427 (Damodarasamy Naidu

& Bros. v. State of Tamil Nadu) itself. But, according to Mr. V. Ramachandran, [1990] 76 STC 427 (Damodarasamy Naidu & Bros. v. State of

Tamil Nadu) requires reconsideration in view of the abovesaid decision in [1993] 88 STC 289 (Larsen & Toubro Limited v. State of Tamil Nadu)

which took into account three earlier Supreme Court decisions reported in [1989] 73 STC 370 (Builders Association of India v. Union of India),

[1993] 88 STC 204 (Gannon Dunkerley & Co. v. State of Rajasthan) and [1993] 88 STC 248 (Builders Association of India v. State of

Karnataka). But in our view, this submission also has no merit. The abovesaid decisions, Gannon Dunkerley and Co. and Others Vs. State of

Rajasthan and Others, [1993] 88 STC 248 (Builders Association of India v. State of Karnataka) and [1993] 88 STC 289 (Larsen & Toubro

Limited v. State of Tamil Nadu) all deal with works contract cases, which came under article 366(29-A)(b) of the Constitution of India v. Union of

India) only dealt with the validity of the abovesaid Forty-sixth Amendment itself. It upheld the said amendment. No doubt, that validity question

also arose in a works contract case. While upholding the Forty-sixth amendment, the Supreme Court, no doubt has said that the said amendment

is subject to article 286 of the Constitution of India. It also held in relation to the

above referred to sub-clause (b) of article 366(29-A) that the said amendment did no more than make it possible for the State to levy tax on the price of goods used in the works contract as if there was a sale of those goods. Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, dealt with the relevant provision in the Rajasthan Sales Tax Act introduced after the Forty-sixth Amendment. [1993] 88 STC 248 (Builders Association of India v. State of Karnataka) dealt with the relevant provision in the Karnataka Sales Tax Act after the Forty-sixth Amendment. [1993] 88 STC 289 (Larsen & Toubro Limited v. State of Tamil Nadu) no doubt, inter alia, dealt with the validity of the abovesaid section 3-B of the Tamil Nadu General Sales Tax Act, 1959, dealing with the works contract. But, these decisions, or any of the observations therein, in the context of the abovesaid sub-clause (b) of article 366(29-A) or the corresponding statutory amendments made in the respective State enactments, will have no bearing while considering the sub-clause (f) of the abovesaid article 366(29-A) and section 2(n)(vi) of the Act in regard to the above referred to supplies of food and drinks, since the terminology used in the abovesaid sub-clause (b) and sub-clause (f) are different. Pursuant to the said sub-clause (b) and section 2(n)(ii) of the Act in relation to the works contract, the tax could only be on the transfer of property in goods involved in the execution of the works contract and it is such transfer, that is deemed to be a sale of those goods. But, in so far as the abovesaid sub-clause (f) and the corresponding section 2(n)(vi) of the Act, the tax could be on the "supply" of those food or drinks, whether the said supply is by way of or as part of any service or in any other manner whatsoever, and the said "supply" itself is deemed to be "sale" of those goods. In the former case since the terminology used is "transfer of property in goods" necessarily the value of the labour involved in the execution of the works contract therein has to be excluded and the tax could be only on the value of the goods whose property or title has been transferred, but, in the latter case, the tax is on the "supply" of food or drink. In this latter case, even though the said supply may be by way of or as part of any service, the total consideration for the said "supply" itself could be taxed and there is no necessity to exclude anything from the said total consideration on the ground that service part of it has also got some value. In

this connection, we may point out once again the above extracted observation of the Supreme Court in Northern India Caterers (India) Ltd. Vs.

Lt. Governor of Delhi, , particularly the following :

Nor are additional services invariably components of what you pay for. You may go to an air-conditioned cloth-shop or sweetmeat store or

handicrafts emporium where cups of tea may be given, dainty damsels may serve or sensuous magazines kept for reading. They are devices to

attract customers who buy the commodity and the price paid is taxable as sale.

So, even in the case of sales of cloth and other goods, the value of such additional services are not to be excluded in arriving at the taxable

turnover of such cloth or other goods and the total consideration paid by the customer for the cloth or the other goods purchased by him would

itself be the taxable turnover. Therefore, as already held in [1990] 76 STC 427 (Damodarasamy Naidu & Bros. v. State of Tamil Nadu) there is

no necessity to exclude the value of such services rendered in supply of food and drinks also.

13. Now, coming to the second submission of the learned counsel for the petitioners, which, as already indicated, had already been dealt with by

S. Ramalingam, J. in W.P. Nos. 9281 and 9282 of 1991, whose unreported decision dated July 18, 1991 [Since reported in [1994] 94 STC 568.

(Ramakrishna Lunch Home v. State of Tamil Nadu) has been relied on by the learned Advocate-General. The said submission is as follows :

Originally by Notification G.O. P. No. 570 dated June 10, 1987, total exemption was granted in respect of sale of food and drinks by any hotel,

restaurant or sweet stall, other than those classified or approved by the Department of Tourism, Government of India. The said notification was in

force till G.O. P. No. 198 dated March 25, 1989 was issued in supersession of the previous notification dated June 10, 1987. The said G.O. P.

No. 198 restricted the exemption to hotels and restaurants with a turnover not exceeding rupees ten lakhs per annum. The said G.O. P. No. 198

dated March 25, 1989, has also undergone amendments by raising the limit from rupees ten lakhs to rupees fifteen lakhs and once again to Rs.

18,25,000. Then G.O. P. No. 532 dated September 5, 1990 was issued, whereby G.O. P. No. 198 dated March 25, 1989 was ordered to be

cancelled. By the same G.O. P., the Government issued another notification

granting exemption in respect of tax payable on the sale of food and drinks other than those falling under the First Schedule, to any hotel, restaurant, sweet stall or any other eating house, whose total turnover does not exceed Rs. 18,25,000 per annum. This notification came into force on April 1, 1990. In the above context, the submission is that in view of the cancellation of the notification dated March 25, 1989, the notification dated June 10, 1987 granting total exemption on the sale of food and drinks by any hotel, restaurant, sweet stall or any other eating house has been revived and thereby the petitioners are entitled to exemption on the sale of food and drinks from March 31, 1987 till March 31, 1990.

14. This revival theory propounded by the learned counsel for the petitioners was negated by S. Ramalingam, J., in the abovesaid decision, after

dealing with the said question elaborately. The learned Judge observed that similar question came up for consideration in Indian Express

Newspapers (Bombay) Private Ltd. v. Union of India and after quoting in extenso the relevant observations in the said Supreme Court decision, he

came to the conclusion that the said decision of the Supreme Court was clear authority for the proposition that if a notification was superseded by

a later notification and if the latter notification came to be quashed which, in law would mean that the latter notification had never existed, it would

not have the effect of reviving the notification, which, by the latter notification, was superseded. No doubt, in the present case, the latter notification

G.O. P. No. 198 dated March 25, 1989, had not been quashed by any competent court. But, the Government itself had chosen to cancel it with

prospective effect. Under these circumstances, S. Ramalingam, J., held that it could not be contended that by G.O. P. No. 198 dated March 25,

1989 there was an automatic revival of G.O. P. No. 570 dated June 10, 1987.

15. We concur with the said view. In fact, the learned counsel for the petitioners did not at all refer to the said decision of S. Ramalingam, J., either

in their original argument or in their reply argument even after the learned Advocate-General drew our attention to the said decision of S.

Ramalingam, J. Therefore, there is no merit at all in any of the submissions of the learned counsel for the petitioners.

16. In the result, these writ petition are dismissed. No costs.

Raju, J.—I have gone through the judgment of my learned brother and I entirely

agree with the conclusions expressed that the above batch of writ petitions are liable to be dismissed. By way of further clarification, I would like to add something more on certain aspects by this separate opinion of mine.

2. The move of the petitioners in these writ petitions is not even a rethinking but a later thinking on certain points sought to be now raised on a plea

based upon legislative competence and the doctrine of eclipse. As held by my learned brother, such an issue may not arise at all in these cases in

the teeth of the specific provisions contained in clause 6 of the Constitution (Forty-sixth Amendment) Act, 1982. Even that apart, the Supreme

Court only declared in the cases prior to such constitutional amendment that under certain circumstances, the supply of food and drinks in hotels or

restaurants cannot satisfy the definition of "sale" and, therefore, cannot be legitimately brought to tax under the local sales tax law of a State. In

other words a restricted interpretation of the provisions of the Act was made. This hurdle, in my view, got cleared for the State Legislatures with

the enactment of the Constitution (Forty-sixth Amendment) Act, 1982. When such be the position of law, should there be any necessity for the

States to introduce any fresh or separate provision as such to bring to levy the class of transactions covered by sub-clause (f) of clause (29-A) of

article 366 of the Constitution of India after the Constitution (Forty-sixth Amendment) Act, 1982. In my view, it is not absolutely necessary; nor

could it be said to be necessitated on grounds of expediency as well.

3. The fact that some of the State Legislatures including the State of Tamil Nadu got a separate provision introduced in their respective State

enactments distinctly to provide for levy of sales tax on the works contract, by means of a separate charging provision is no reason or justification

for the contention that a separate charging section should have been introduced after the Constitution (Forty-sixth Amendment) Act, 1982, to

subject transactions covered by article 366(29-A)(f) to sales tax under the State law. As a matter of fact, some of the State laws have not

introduced any separate or fresh charging provision even in respect of levy of sales tax on works contracts. Even otherwise, there can be no

analogy or comparison of levy of sales tax on works contracts with the levy of sales tax on supply of food or any other article for human

consumption or drinks in a hotel or restaurant as part of any services. Even after the Constitution (Forty-sixth Amendment) Act, 1982, it is not the entire turnover or value of the works contracts that could be subjected to levy of sales tax under a State law. Sub-clause (b) of clause (29-A) of article 366 of the Constitution of India only provided that "tax on the sale or purchase of goods" includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. In view of this limitation, apparently some of the States thought it fit to introduce a separate charging provision for levy of tax on such transaction covered by sub-clause (b) of clause (29-A) not because the existing charging section in their legislations are not sufficient to rope in such transactions, but more by way of abundant caution and to avoid any plea of vagueness and doubts or possible inconsistency in or with the already existing charging section in the manner of its implementation or enforcement with the expansion of the concept and definition of "sale" in the local enactments themselves, on the basis of the extended meaning given to "tax on the sale or purchase of goods", the existing charging sections themselves effectively served the purpose and object sought to be achieved in subjecting those transactions covered by sub-clause (f) of clause (29-A) to levy of sales tax. As matter of fact, under the existing charging sections themselves such transactions were subjected to tax prior to the decision of the Supreme Court in Northern India Caterer's case [1978] 42 STC 386 rendered prior to the constitutional amendment.

4. Unlike the limited area of availability or enlargement of the powers of State Legislature to levy sales tax on works contracts even after the Constitution Forty-sixth Amendment, the levy of sales tax on transactions covered by sub-clause (f) of clause (29-A) of article 366 of the Constitution of India is wider in ambit and scope without any such limitations or restrictions. As a matter of fact, after the Constitution (Forty-sixth Amendment) Act, 1982, tax on the sale or purchase of goods included a tax on the supply, even 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. The element of supply by way of or any part of service which prior

to the Constitution (Forty-sixth) Amendment Act, 1982, entitled the transaction of such a nature to stand out of the normal concept of sale has lost its significance in the sense that it no longer constituted an attribute or element enabling the exclusion of such transactions from out of the concept of sale for purposes of levy of sales tax. Whether the supply or service is for cash or for deferred payment or other valuable consideration, such supply effected though as part of any service in a hotel or restaurant shall be deemed to be a sale and with the said deeming and expanded concept of sale there is hardly any room or scope for making any difference between supply by way of sale or a supply as part of any service. There is absolutely no need for making any provision to bifurcate the so-called service element and charges said to have been incurred therefore from the total turnover relating to supply of goods (food articles or drinks as the case may be). The transaction as a whole becomes subject to levy as sale and with the amended definition of sale introduced by the Tamil Nadu Act 28 of 1984, such transactions become also subject to levy of sales tax under the general and existing charging sections already in force, without there being any necessity for introducing a fresh or separate charging section in respect of transactions covered by sub-clause (f) of clause (29-A) of article 366 of the Constitution of India.

5. Mr. V. Ramachandran, the learned Senior Counsel appearing for the petitioner invited our attention to the decision in *Larsen and Toubro Limited v. State of Tamil Nadu* [1993] 88 STC 289 and certain observations made therein by a Division Bench of this Court to which I was a party, particularly those pertaining to the object as well as the scope of the new definition introduced in clause (29-A) of article 366 of the Constitution of India. In my view, those observations made in the context of and with particular reference to works contracts have no relevance to the nature of the transactions under consideration before us in these cases.

6. The plea that the States have no competence to disintegrate a transaction which is said to be of supply in the form of or as part of service, and on that account claimed to be an integrated whole, has no reason or meaning after the introduction of sub-clause (f) of clause (29-A) of article 366 of the Constitution of India which deems the very supply in a hotel or restaurant by way of or any part of service of food and drinks in its entirety as a

taxable transaction leaving nothing for exclusion on the purported claim of service or service charges. There is no necessity after the constitutional amendment and the Tamil Nadu Act 28 of 1984, to provide for any exemption or exclusion of the so-called element of service or turnover purporting to relate to such service.

7. Consequently, there is no need to have a different and separate charging section to deal with different clauses of transactions envisaged in sub-

clauses (a) to (f) of clause (29-A) of article 366 of the Constitution of India. The existing charging section, if sufficient, by itself to impose the

charge having regard to the amended definition of "sale" or "purchase" in the State law in the context of the constitutional amendment, it cannot be

further stated that the provisions suffer any further lacuna or drawback or infirmity, as such. There is no dispute in these cases that the definitions

under the Act of "dealer", "goods", "sale" underwent suitable amendments giving effect to the constitutional amendment which introduced clause

(29-A) of article 366 of the Constitution of India. The claim on behalf of the petitioners about the revival of the exemption notification dated June

10, 1987, has been rightly repelled by my learned brother based on the decision of a learned single Judge of this Court which in turn was rendered

on the basis of the decisions of the Supreme Court of India, and I am in entire agreement with the conclusions expressed in this regard.

Consequently, there are no merits in the submissions made on behalf of the petitioners in these batch of writ petitions.

8. Writ petitions dismissed.