(2001) 05 RAJ CK 0089

In the Rajasthan High Court

Case No : Sales Tax Revision No''s. 646, 647, 648, 652, 653, 654, 655, 656, 660 1384, 1385, 1386 and 1387 of 1999 and 407 and 408 of 2001

Karyapalak Engineer and Others APPELLANT

Vs

Rajasthan Tax Board and Others RESPONDENT

Date of Decision : 08-05-2001

Acts Referred:
Constitution of India, 1950 — Article 141, 143, 246, 285, 287

Citation : (2007) 3 WLN 339

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—Question No. 1:

The precise controversy which has been raised by the petitioners in this group of cases is whether Article 285(1) of the Constitution of India, which exempts the property of the Union of India from imposition of all taxes by the State extends to the levy of Sales tax imposed by any enactment of the State on any transaction which can properly constitute a sale for the purpose of levy of tax on sale or purchase of goods. In exercise of the powers conferred under Entry-54 of the State list through the Law enacted by the State legislature.

2. Provision Of The Constitution:

For appreciating the contours of the controversy whether the immunity from imposition of tax envisaged Under Article 285 of the Constitution of India is absolute in terms irrespective of the nature of tax and reaches in-direct taxes also or the immunity is confined to the taxes leviable on property directly, it will be profitable to refer to the provisions of Articles 285, 287 and 289 of the Constitution of India in extenso, before embarking upon an enquiry to find the answer:

Article 285. (1) The property of the Union shall save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in Clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

Article 287. Save in so far as Parliament may be law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Govt. or other persons) which is

(a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government; or

(b) consumed in the construction, maintenance or operation or any railway by the Government of India or a railway company operating that railway or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway. and any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the construction, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

Article 289(1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in Clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in Clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.

3. In the first instance, attention of the court has been invited to a decision of the Supreme Court in Re: Sea Customs Act (1878) Section 20(2) AIR 1963 SC 1760, which was an advice tendered by a Bench of 9 Hon''ble Judges on a reference made u/s 143 of the Constitution of India to the Supreme Court by the President of India seeking advice on the authority of the Parliament in amending Section 20 of the Sea Customs Act, 1878, a central legislation. The necessity of making that reference arose because under Sub-section (1) of Section 20 of the Sea Customs Act, 1878 levy of customs duty on goods imported or exported by

sea was envisaged. Sub-Section(2) of Section 20 further made imposition of Customs Duty applicable in respect of all goods belonging to Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government. By the proposed amendment, it was proposed to extend the levy of customs duty in respect of all goods belonging to the Government of a State irrespective of whether such goods are used or not for the purposes set out in the said Sub-section (2) as was in force. In the aforesaid circumstances, the question that directly arose was whether the proposed amendment would be violative of Article 289 of the Constitution of India. It was in the aforesaid background, following three questions were referred for the opinion of the Supreme Court by the President of India:

Now, therefore, in exercise of the powers conferred upon me by Clause (1) of Article 143 of the Constitution of India. I, Rajendra Prasad, President of India, hereby refer the following question to the Supreme Court of India for consideration and report of its opinion thereon:

(1) Do the provisions of Article 289 of the Constitution preclude the Union from imposing or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in Clause (2) of that article?

(2) Do the provisions of Article 289 of the Constitution of India preclude the Union from imposing or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article?

(3) Will Sub-section (2) of Section 20 of the Customs Act, 1878 (Act 8 of 1878) and Sub-section (1-A) of Section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of Article 289 of the Constitution of India.

In that case, four separate opinions were delivered by the Hon''ble Judges of the Bench. B.P. Sinha, C.J. I., speaking for himself and three other Hon''ble Judges, on construction of the provisions of Articles 285 and 289 of the Constitution of India opined as under:

We are, therefore, of opinion reading Article 289 and its complementary Article 285 together that the intention of the Constitution-makers was that Article 285 would exempt all property of the Union from all taxes on property levied by a State or by any authority within the State while Article 289 contemplates that all property of the States would be exempt from all taxes on property which may be leviable by the Union. Both the Articles in our opinion are concerned with taxes directly either on income or on property and not with taxes which may indirectly affect income or property. The contention, therefore, on behalf of the Union that these two Articles should be read in the restricted sense of exempting the property or income of a State in one case and the property of the Union in the other from taxes directly either on property or on income as the case may be, is correct.

Rajagopala Ayyangar, J. concurred with the opinion expressed by B.P. Sinha, C.J. by his separate judgment. Rajagopala Ayyangar, J. in his concurring judgment has only dealt with the specific contention raised on behalf of the State, which does not appear to find place in the leading judgment of Hon''ble Chief Justice. The contention raised on behalf of the State was that the non-obstante Clause with which Clause (2) opens should be taken to indicate that but for that Clause, the exemption would be operative so as to deprive the Union of the power to levy tax in the converse circumstance. In other words, but for Clause (2) even where tax related to a activity of trade of commerce in which the State engages, it would be entitled to claim exemption from Union taxes. Thus, Clause (2) of Article 289 of the Constitution of India is by way of exception to Clause (1). This argument centres round the reason that if indirect taxes were not included in immunity envisaged in Clause (1), the empowering of Parliament to levy tax in respect of transactions and operations connected with trading or business activity of the State would be surpulsage and superfluous, which cannot be imputed to any part of the Constitution. However, noticing the last part of Clause (2) of Article 289 of the Constitution, Ayyangar, J. did not accept the contention to read Clause (2) of Article 289 as an exception restricting operation of Clause (1) of Article 289 of the Constitution of India itself. It was observed as under:

There is also another angle from which the relevance of Clause (2) to the construction of Clause (1) of Article 289 might be tested. One of the more serious arguments put forward on behalf of the States to which I have adverted was that if the expression ''taxes'' in relation to the exemption of property from tax were confined to direct taxes on property, the exemption would be unmeaning, as such taxes could not be imposed by the Union. Now let me take the taxes specified in Article 289(2). They include, for instance, taxes on property used or occupied for the purpose of such trade or business." A tax on the use of property or on the property itself which is occupied for the purpose of trade would obviously be a direct tax on property which ex concessis the Central legislature under the Government of India Act and Parliament under the Constitution are incompetent to impose. It is not contentions of the States that the Centre has such a power to levy a tax on occupation or use of property where it is in connection with trade or business. This would at least show that it is not justifiable to imply from Clause (2) that but for that provision Parliament would be entitled to impose such a tax.

The aforesaid two opinion constituted majority view. The minority opinion also consisted of two separate opinions: one rendered by S.K. Das, J. for himself and on behalf of two other Hon?ble Judges and the other by Hidayatullah, J. The minority opinion did not make any distinction between the direct taxes and in direct taxes to be within the immunity envisaged Under Article 285(1) or Article

289 of the Constitution of India. The principle reason which prevailed with the minority opinion delivered by S.K. Das.J. was that:

the word ''property'' does not qualify the expression all taxes occurring in Articles 285(1) or taxes in Article 289 of the Constitution of India.

S.K. Das.J. said:

that the word ''property'' in Clause (1) of Article 289 has a comprehensive connotation and refers to all property and assets of a State. Article 294 which occurs in the same part of the Constitution states that as from the commencement of the Constitution, all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor''s Province shall vest respectively in the Union and the corresponding State. It is clear therefore, that in the Constitution, the word ''property'' is used in a comprehensive sense to include all assets, movable or immovable. Apart from those assets, which vested in the Union or a State at the commencement of the Constitution, the Union or a State may acquire new assets. This is also provided for in Articles 296 to 298 of the Constitution. Therefore, in both Articles 285 and 289, the word ''property'' means all properly and assets which may thereafter, be acquired by the Union or a State. In Clause (1) of Article 289 the subject of the sentence is ''property and income'' and the predicate Is shall be exempt from Union taxation''.

He further considered the expression ''taxation'' in its comprehensive meaning and said:

Grammatically, the Clause can only mean this: all property and income of a State shall be exempt from all taxation by the Union, giving the word ''taxation'' its comprehensive meaning, as required by Article 366(28). It Is necessary to emphasise here that the word ''property'' used in the sentence is not used as a word qualifying the word ''taxation'':

rather it is used as a subject which gets the benefit of a exemption from Union taxation. One can understand that when one says that State income shall be free from Union Income Tax, particularly when there is only one legislative item with regard to a tax on income (other than agricultural income) which is Entry-82 in list-4. But we fail to appreciate how the word ''property'' can be used as qualifying the word ''taxation'' and thereby restricting the ambit of Its comprehensive connotation. The Union power of taxation on or in relation to property of various kinds ranges over a wide field, see Entries-82 to 92-A of the Constitution. Why then should the use of the word ''property'' in Articles 285 and 289 refer only to those items which enable the imposition of a direct tax on property and not to others? We find no legitimate ground for such restriction in the context of Article 289. Such a restriction would, in our opinion, be clearly against the plain language of the article." With this premises, it was further observed in that opinion as under: "If Clause (1) of Article 289 has a restricted meanings as is contended for by the learned Solicitor-General on behalf of the Union, then the distinction drawn between trading or business activities on one hand and governmental functions on the other in Clause (2) and Clause(3) of Article 289 loses its full significance; for Clauses (1) and (2) distinguish between trading and other functions and Clauses (2) and (3) distinguish between ordinary trading and trading which is really governmental function. If all that the Union is prevented from doing so to put a tax on property as such, what was the purpose of drawing a distinction between the trading or business activities of Government and its governmental functions? If the tax is to be levied on property as such, then obviously there cannot be any impost on a trading or business activity, as for example, on the production or manufacture of goods etc. Why was it necessary then to make a reference to trading or business activities or operations in Clauses (2) and (6) of Article 289? It would have been enough merely to say that property used or occupied in connection with a trade or business will be liable to a tax, but not other property. But the ambit of Clause (2) is much wider than the mere use or occupation of property in connection with trade or business. It has reference to trading or business activities, such as, the production and manufacture of goods, transportation of goods etc. Why was it necessary for the Constitution-makers to refer to such trading or business activities in Clause (2) if all that they had in mind in Clause (1) was a direct tax on property in our opinion, the learned Solicitor-General has given no satisfactory explanation with regard to this aspect of the case. He suggested at first that Clause (2) was no, an exception, but merely explanatory of Clause (1). It is difficult to understand why there should be a reference to business or trading activities in Clause (2) if the entire intendment was to confine the exemption to a direct tax on property. The learned Solicitor General then said that even if Clause (2) was an exception, it was an exception only in the matter of property tax. That would mean that only the last portion of Clause (2) which refers to property used or occupied for the purpose of trading or business activities of a State Government has any significance and not the other parts which relate to trading or business activities, such as, production or manufacture of goods etc.

The third reason which weighed with the minority opinion reads as under:

If, therefore, we look to the context of Article 289, particularly Clauses (2) and (3) thereof, it becomes manifest that there is nothing in Article 289 which restricts the comprehensive meaning to be given to the word ''taxation'' in Article 289. Similar is the position with regard to Clause (2) of Article 285. That again creates an exception to Clause (1) of Article 285 and saves any tax on any property of the Union to which such property was immediately before the commencement of the Constitution liable or treated as liable to tax, so long as that tax continues to be levied in that State.

Hidayatullah, J. in his separate opinion reached the same conclusion:

My answers to the questions are:

(1) The provisions of Article 289 of the Constitution preclude the Union from imposing of authorizing the imposition of customs duties on the import or export of the property of a State used for purpose other than those specified in Clause (2) of that Article, if the imposition is to raise revenue but not to regulate external trade.

(2) The provisions of Article 289 of the Constitution of India preclude the Union from imposing or authorizing the imposition of excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in Clause (2) of that Article.

The aforesaid details have been noticed as they have relevant bearing on the reading the ratio of subsequent decisions on the issue inasmuch as while all the cases that have been referred to this Court during the course of arguments have arisen in relation to immunity claimed by the State in respect of imposition of taxes levied by the Parliament whether in exercise of its powers to legislate on subjects referred to the union list proper or it related to the law made by the Parliament in relation to State list with reference to its authority to legislate Under Article 246(2) of the Constitution of India as Legislature for Union Territory, latter part of controversy not relevant for the present purposes.

4. Decision In Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad, and Another, One has to keep in mind that the aforesaid decision not being of adjudicating nature but only in the nature of an advice to President does not bind the Court tendering the advice. For the purpose of Article 141 it binds all other Courts in India, as declaration of law subject to any judgment tendered by Supreme Court is an adjudication of the issue. The opinion rendered by Supreme Court in Re: Sea Customs Act, 1878, Section 20(2) was referred to by the Supreme Court in Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad, and Another, . That was a case where Andhra Pradesh State Road Transport Corporation also claimed" exemption from union taxes on its income by dint of the provisions of Article 289(1) of the Constitution of India. The Constitution Bench of 5 Judges of the Supreme Court, four of whom were members of 9 Judges Bench which has rendered the opinion in Re: Sea Customs Act, 1878, Section 20(2), opined as under:

(14). The scheme of Article 289 appears to be that ordinarily the income derived by a State both from governmental and nongovernmental or commercial activities shall be immune from Income Tax levied by the Union, provided, of course, the income in question can be said to be the income of the State. This general proposition flows from Clause (1).

(15) Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf: that is to say, the income from trade

or business carried on by the Government of a State or on its behalf which would not have been taxable under Clause (1) can be taxed, provided a law is made by Parliament in that behalf. If Clause (1) has stood by itself, it may not have been easy to include within its purview income derived by a State from commercial activities, but since Clause (2) in terms, empowers the Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in Clause (1) and that alone can be the justification for the words in which Clause (2) has been adopted by the Constitution. It is plaint that Clause (2) proceeds on the basis that but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under Clause (1). That is the result of reading Clauses (1) and (2) together.

Thus, in the aforesaid case, the Court accepted the premise which was not accepted by Ayyangar, J. in his opinion in Re: Sea Customs Act, 1878 (supra) that Clause (2) of Article 289 of the Constitution is to be read as an exception of Clause (1) and Clause (3) is to be read as an exception of Clause (2) of Article 289. In other words, the court accepted that all the three Clauses of Article 289 do not stand independent of each other but are integral part of the whole scheme. On this ground as well as on the ground that the Corporation cannot be equated with the State, the plea of the Corporation was rejected.

5. Decision In New Delhi Municipal Committee v. The State Of Punjab (1977 7 SCC 339

The matter of inter-relation between Clauses (1), (2) and (3) of Article 289 again came before a 9 Judges Bench of Hon''ble Supreme Court in New Delhi Municipal Committee Vs. State of Punjab, etc. etc., . In this case, the minority as well as majority judgment Laid it clear that the three Clauses of Article 289 are not independent but are interdependent and successive Clause acts as an exception to preceding Clause. For the purpose of understanding, the ratio of two opinions and territory of difference, it would need a closer look to the controversy and the two opinions emanating in that context. The issue related to liability of properties of State situated in Union Territory of Delhi whether can be subjected to tax by laws extended to the Union territory of Delhi by Delhi Laws Act, 1912 on the premise, shorn of details of historical background in which Union Territory of Delhi came in existence and various provisions under which various Punjab enactments were extended to Delhi, that laws extended to and prevailing in Union Territory of Delhi vide Delhi Laws Act 1912 by various Central Legislative enactments are law made by Parliament as if made by virtue of power of Parliament to legislate for Union Territory of Delhi by virtue of Clause (4) of Article 246 of the Constitution of India.

On this undisputed premise, the question arose whether properties of Punjab State situated within Union Territory of Delhi could be subjected to any tax by such an Act of Parliament in view of exemption of State properties from Union taxation envisaged Under Article 289(1) of the Constitution. Question of difference in treatment for exemption between direct taxes and indirect taxes under the Scheme of Article 289 was not under direct consideration, but the direct question that arose was whether Clause (2) of Article 289 provides an exception to Clause (1) so that but for the exception envisaged Under Clause (2), all such taxes will be falling in general immunity envisaged Under Clause (1), to make the immunity absolute from all taxation, or Clause (1) itself did not grant absolute immunity, and Clause (2) stood by itself independently without curtailing the ambit of Clause (1).

It may be recalled here that the latter view was the additional reason that prevailed with Ayyangar, J. in his concurring opinion with Sinha, CJ. in Re:Sea Customs Act''s case (supra), that Clause (1) itself did not grant an absolute immunity, like the one envisaged Under Article but the Constitution Bench in A.P. State Road Transport Corporation''s case (supra) has found otherwise.

In the aforesaid background. I find that New Delhi Municipal Committee''s case offers a unanimous opinion in considering Clause (2) as an intergral part of the whole scheme of Article 289 and can only be read as an exception carved out from the general immunity envisaged Under Clause (1). Firstly, the Majority opinion stated by B.P. Jeevan Reddy, J. holds:

So far as Article 289 is concerned, the position is different. Clause (1), had it stood, would have been similar to Clause (1) of Article 285. It says that "the property and income of a State shall be exempt from Union taxation". But it does not stand alone. It is qualified by Clause (2) and Clause (3) is an exception to Clause (2). But before we refer to Clause (2), a word with respect to the meaning and ambit of the expression ''property'' occurring in this articles. Expression ''property'' is wide enough to take in all kinds of property. In Sea Customs Act, 1878, Section 20(2), Re. all the learned Judges (both majority and dissenting) were agreed that the expression must be understood in its widest sense. There is no reason to put a restricted construction thereon. Indeed there is no controversy about this proposition before us; Coming to Clause (2), it says that the ban imposed by Clause (1) shall not prevent that Union from imposing or authorising the imposition of any tax to such extent, if any, as Parliament may be law provide, in respect of (a) trade or business of any kind carried on by or on behalf of the Government of a State or (b) any operations connected with such trade or business or (c) any property used or occupied for the purposes of such trade or business or (d) any income accruing or arising in connection with such trade or business. (The inspiration for this provision may perhaps be found in certain United States decisions on the question of he power of the units of a federal polity to tax each others'' properties.) Clause (3) empowers Parliaments to declare, by law, which trade or business or any class of trades or businesses is incidental to the ordinary functions of the Government, whereupon the trades/ businesses so specified go out of the purview of Clause (2).

It would be appropriate at this stage to notice the ratio of two judgments of this Court dealing with Article 289 . In Sea Customs Act. Re., a Special Bench of nine learned Judges, by a majority, Laid down the following propositions: (a) Clause (1) of Article 289 provides for exemption of property and income of the States only from taxes imposed directly upon them; it has no application to indirect taxes like duties of excise and customs: (b) duties of excise and customs are not taxes on property or income: they are taxes on manufacture/production of goods and on import/export of goods, as the case may be, and hence, outside the purview of Clause (1) of Article 289 . The other decision in Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad, and Another, is the decision of a Constitution Bench.... It is held that Clause (2) is an exception or a proviso to Clause (1) and as such whatever is included in Clause (2) must be deemed to be included in Clause (1). In other words; the trading and business activities referred to in Clause (2) are included in Clause (1) and precisely for this reason the exception in Clause (2) was provided. Clause (3) it was held, is an exception to Clause (2).

The majority view reiterated with aided emphasis the decision of Constitution Bench in Andhra Pradesh State Road Transport Corporation Vs. Income Tax Officer, B-I B-ward, Hyderabad, and Another, that scheme of Article 289 is different from Article 285 and while immunity to the union properties from State imposition Under Article 289 is absolute in term, such immunity would have equally been absolute to the State properties from Union Taxation Under Article 289(1) but for provisions contained in Clause (2), taking out tax imposed in relation to trading or business activity of the State, affecting the property of the State. It may be recalled that the reference made in Sea Customs case (supra) was related to imposition of tax on activity of import or export outside India, which was an indirect tax imposed by Union and related to trading activity of import export business primarily and selling of confiscated goods by the State was merely incidental to main nature of levy.

The minority opinion expressed by Ahmadi, C.J. for himself and three other Hon''ble Judges, after referring to previous decision in Re: See Customs Act (supra) and Andhra Pradesh State Road Transport Corporation''s case (supra) (a judgment delivered in a litigated dispute) and of the two latter forming the precedent, concluded:

51. There observations of Gajendra Gaadkar, CJ having been made in the context of income tax levied in the facts of that case, mention only taxes relating to income. They are equally applicable to the taxes relating to property referred to in Article 289 . The essense of this analysis is that Clause (3) of Article 289 is an exception to Clause (2), which in turn is an exception to the first Clause of the article.

After recounting the reasons mentioned in the majority opinion and referring to the position that Article 299 uses the wider expression ''property'' and that exemption in Clause (1) of Article 289 is subject to Clause (2) of Article 289 . Clause (2) is further analysed and is interpreted as having been included for the purpose of removing the trading and business activities of State Governments from the purview of the exemption in Clause (1).

Ahmadi, CJ noticed the area of difference of opinion that while the majority opinion held that provision of Clause (2) automatically become operative on the trading and business activity of the State to bring it out of the immunity circle of Clause (1) but the minority opinion did not accept this proposition and held that the operation of Clause (2) of Article 289 requires a specific declaration to the effect that tax is imposed on trading and business activities for the purpose of Article 289(2). It is in this context that the court analysed the principle that where two views are possible, one which satisfies the constitutional validity of the provision must be upheld. One view was stated to be to adopt the position that since neither of these enactments are purported to have been made Under Article 289(2), they should not be treated as having been enacted for that purpose and, consequently, should be held to be incapable of levying taxes on any property, whether occupied for governmental or trading purposes, of the State Governments. The second view, which majority adopts is to take the position that the doctrine of presumption of constitutionality of legislations points in favour of holding that the Delhi Laws Act and the Delhi Municipal Corporation Act are laws made by Parliament Under Article 289(2) and taxes imposed by them upon the properties occupied for trading and business activities by State Governments would be valid and effective.

On this aspect of the matter Hon''ble the Chief Justice recorded his conclusion as under:

It is, therefore, clear that Clause (2) of Article 289 was a well considered compromise which was arrived at after balancing the demands of those who sought complete exemption of commercial activities of State Governments from Union Taxation and those who were in favour of levying such Union taxes. The Framers desired that the issue whether the trading and business activities of State Governments should be subject to Union taxation, be left to the wisdom of Parliament. As is evident from the reference to New York. v. United States 326 US-572. in the extracted portion, the Framers were conscious of the difficulty in drawing a line between the governmental arid commercial functions of State Governments and they hoped that Parliament would take into account a host of relevant factors before enacting a law which would specify the trading activities of State Governments making them liable to Union taxation. It is important to note that the Framers did not expressly confer upon the Union the power to tax commercial activities of State Governments. The exercise of such a power is made conditional upon the enactments of a special duly considered, legislation. It is also important to note that Clause (2) of Article 289 has made a departure from the proviso to section 155(1). Under, the present scheme, the power to tax is not automatic and the responsibility of specifying the trading and business activities of State Governments which would be liable to Union taxation is expressly vested in Parliament.

121. The Act and the Delhi Municipal Corporation Act are ordinary municipal

legislations. They do not, and cannot, purport to be laws made by Parliament under Article 289(2). There is no reason why such a strained reasoning should be employed to save some of the taxes that may be capable of being imposed on certain properties of State Governments. There seems to be no pressing reason for invoking the doctrine. Reddy, J. has, in the earlier part of his opinion, held that a large number of properties of State Governments would be exempt from taxes leviable under these Acts due to the operation of Article 289(1). To employ such reasoning to construe Article 289(2) in a bid to save what only be a reduced amount, does not seem justified.

Thus, it is apparent that so far as ambit and scope of Article 289 of the Constitution about the immunity enjoyed by the State from imposition of tax by the Union was concerned, there existed no real difference including on the point that Clause (2) of Article 289 is not an independent Clause but provides an exception to Clause (1), an integral part of the scheme of Article 289 of the Constitution of India. This view adopted by the Supreme Court in the litigated Us obviously discards reasonings adopted by Ayyangar, J in Sea Customs case (supra) to the extent it holds Clause (2) of Article 289 as separate and independent provision and not as an exception to Clause (1).

6. Contention on Question No. 1:

It is in the aforesaid premise, it has been contended by the learned Counsel for the petitioners that while immunity from Union taxation enjoyed by the State in respect of its properties is not absolute but is restricted to the extent it imposes tax on the trade or business activities of the State, which is governed by the provisions of Article 289(2) of the Constitution of India and there being no corresponding provision in Article 285 of the Constitution, the immunity enjoyed by the Union of India in respect of imposition of tax made by the state legislature by any sort which affects the properties of the Union of India does not loose its immunity merely because it can be considered to be a transaction of sale.

In support of this contention, the learned Counsel appearing for the petitioners have drawn our attention to a decision of the Supreme Court in State of Punjab and Ors. v. Union of India and Ors. (1990) 79 STC-437. It was a case which concerned levy of sales tax under the Punjab General Sales Tax Act on the sales of food stuffs by the railway departmental catering which were sale within the meaning of Punjab General Sales Tax Act, 1948. The immunity from sales tax imposed by the State legislation was invoked by the railway as the Department of the Union of India Under Article 285(1) of the Constitution of India. The Punjab & Haryana High Court held that it enjoys the immunity Under Article 285(1) of the Constitution of India. The Supreme Court affirmed the judgment with the following statement:

There is no dispute that the Union of India is the owner of the Northern Railway Departmental Catering, Railway Station, Pathankot. The goods were purchased by the railways and were sold by the railways. The tax was imposed on the sale of goods. At the time of the sale, the goods belonged to the Railways. In view of the provisions of Article 285(1) of the Constitution, such sales were immune from taxation under the State law.

Moreover, the contention of the learned Counsel for the petitioners is founded on the premises that the scope and ambit of Clause (1) of Article 285 of the Constitution and Clause (1) of Article 289 of the Constitution of India is concerned, the exemption is enjoyed by the properties of the Union or the State, as the case may be, from the imposition of taxes by the respective legislations and on that premise, it has been urged that since Article 285(1) exempts the property of the Union from ''all taxes'' imposed by the State, or by any authority within the State and such exemption from all taxes is not subject to like exemption as has been provided Under Article 289 . Hence operative field of Article 285(1) is much wider than Article 289 and without exception. The controversy that has directly arisen and answered in all the above cases referred to except in the State of Punjab v. Union of India (supra) relates to interpretation of Article 289 concerning exemption granted to State from imposition of tax by Parliament. There is difference in the basic scheme of the two provisions. While Article 285(1) uses exemption of Union property from taxation at the hands of State in widest possible term by using expression ''exemption from All taxes'', all pervasiveness inherent in expression The ''All Taxes'' is amiss in Article 289(1). The exemption is confined to ''exemption of property and income from taxes''. And Clause (2) of Article 289 operates as exception to Clause (1). If indirect taxes including Sales Tax fall outside the purview of Clause (1) of Article 289 , then the provision of Clause (2) will be rendered superfluous, inasmuch as it brings within the ambit of taxing power of the Union such taxes which relates to trading or business activity of the State, a Tax on sale or purchase is a tax in relation to trading or business activity. Hence if such taxes were not included in the immunity Under Clause (1), there was no reason to provide for such exception. Even otherwise use of expression ''exemption from all taxes'' in Clause (1) of Article 285, and different phraseology used in Clause (1) of Article 289 by not envisaging immunity from ''all taxes'' but referring to property and income as different subject of immunity, the operative field of Clause (1) of Article 285 cannot be compared with operative field of Clause (1) of Article 289 of the Constitution of India.

In Re: Sea Customs Act''s case (supra), the court categorically noticed that the learned Counsel appearing for parties have agreed and addressed the court on the premise that ambit and scope of Clause (1) of Articles 285 and 289 of the Constitution of India are the same and there is no change in them. Therefore, the question has not been in fact decided by the court about the ambit and scope of respective Clause (1) of Articles 285 and 289 of the Constitution of India.

7. Considerations:

The contention that Clause (1) of Article 285 in fact exempts the Union of India from imposition of all taxes by the State whether direct or indirect is founded on the premises that imposition of any tax clearly do affect the properties as it is recoverable only from the properties of the tax payer and, therefore, no restriction can be read into Clause (1) of Article 285 of the Constitution of India.

8. However, this contention of the learned Counsel for the petitioner cannot be sustained. Firstly, it is to be seen that what is exempted under Article 285(1) is property of the Union from imposition of tax and what is exempted Under Clause (1) of Article 289 is the property and income of the State from imposition of tax. If exemption is considered to be all pervasive to include all taxes affecting property of the Union or the State as the case may be, it is difficult to explain why the expression ''income'' has also been used in the case of Clause (1) of Article 289 , if any credence is given to the contention of the learned Counsel, any tax whether it is tax on income or property or on sale or other transaction, which can be recovered from the property of the assessee ultimately affects the property. Therefore, if respective Clause (1) of Articles 285 and 289 of the Constitution were to be identified as identical, the use of term ''income'' In Clause (1) of Article 289 will be superfluous. So also, if the expression property in two Clauses being exempt all taxes affecting the property, whether on account of direct or indirect taxes, then also the use of word ''income'' in Clause (1) if Article 289 becomes superfluous. Secondly, it can only indicate that under the two provisions exemption is from taxes imposed directly on property and to no other taxes. All taxes on property will obviously not include tax on income or other in-direct taxes. To uphold the validity of petitioners contention would require to hold that the expression ''property of Union is exempt from'' used in Clause (1) of Article 285 conveys different meaning than the expression ''property of State is exempt from'' used Under Clause (1) of Article 289 , by giving different meaning to term ''property'' in two Articles. It has not even been the contention or explained nor stand to reason that in the scheme of these provisions, the expression ''property'' has been used in different senses in Articles 285 and 289 of the Constitution of India. ''Property'' in its wide sense as explained by the Supreme Court in Delhi Municipality''s case (supra) has been used both in Articles 285 and 289 . If the contention of the petitioners is accepted that Article 285(1) exempts all the property of Union from tax has been used not as a subject of tax itself but as a thing which has been immuned from impact of any tax over it whether as a subject of tax or from recovery, then not only the expression ''income'' used in addition to ''property'' is rendered superfluous but it also renders Article 287 a surplussage. In the scheme of thing envisaged in petitioners'' contention whether tax is imposed on income, or tax is imposed on sale of electricity or sale of goods, ultimately property of tax payer become liable for its recovery then envisaging exempting Union Govt. from tax on sale or consumption of electricity that may be imposable by State as well as tax on income imposed by Union, befalls on the property of Union as buyer of electricity or property of State as earner of income, and would be within the sphere of immunity of property from tax. The use of term ''income'' in Clauses (1) of Article 289 is explainable, without rendering any of the provisions

appearing to be superfluous and explains the decotomy envisaged by Ayyangar, J. in Re: Sea Custom''s case by reading last part of Clause (2) of Article 289 referring to levy of tax on property occupied by the State in connection with trade or business to repell the construction suggesting Clause (2) of Article 289 as an exception to Clause (1) and not independent by construing the expressions ''property'', ''sale'' and ''consumption'' of electricity and income by itself as ''subject of tax'' and not as something on which befalls incidence of tax of whatever nature ultimately, whether it be a tax ''on property'' or ''on income'' or ''on sale'' or ''on consumption'' of electricity or not. To be explicit, Article 285 envisages property of Union to be immune from being subject of any tax to be imposed by State, Under Article 287 sale and consumption of electricity to Union by the State enjoys the same immunity from being subject of tax and Article 289 immunes property as well as income both from being subject of any tax by Parliament. Clause (2) in that scheme of Article 289 also be read only as an exception to Clause (1) both in the field of ''tax on property'' and ''tax on income'', where income earned by the State in connection with any transaction relating to trade or commerce and where the property of State is so used by it in connection with trade or commerce, will be exempt from immunity of Clause (1) unless notified as in the course of ordinary discharge of its functions as State, distinct from trade or commerce Under Clause (3).

9. Article 285 exempts the property of the Union from all taxes imposed by the State which are directly impasable on the property and not otherwise, and likewise the property as well as the income of the State is exempt from the incidence of all imposition of taxes which is on the property or the income levied by the Union. This construction also explains the scheme of Clauses (1), (2) and (3) of Article 289 . Clause (1) of Article 289 refers only to exemption from the imposition of ''tax on property'' or ''on the income of the State,'' as held unanimously by the Apex Court in the case of New Delhi Municipal Committee''s case (supra). Clause (2) of Article 289 is only an exception to Clause (1) of Article 289 and not an independent provision and, therefore, the conclusion is irresistible and the construction which appears to be more nearer home, that Clause (2) also relates to exception to exemption granted to imposition of taxes directly on the property or the income of the State by the Union. So far as the taxes which are not otherwise governed by the exemption Under Clause (1) are concerned remain unaffected by Clause (2) or (3). Various provisions of the Constitution forming integral part of broad scheme of giving effect to immunity enjoyed by one sovereign authority from being subject to tax by another sovereign authority in a federal structure of the Constitution as explained by Reddy.J., while speaking for majority in New Delhi Municipal Committee''s case (supra):

A Federation presupposes two coalescing units: the Federal Government/Centre and the States/Provinces. Each is supposed to be supreme in the sphere allotted to it/them. Power to tax is an incident of sovereignty. Basic premise is that one sovereign cannot tax the other sovereign. Articles 285 and 289 manifest this mutual regard and immunity but in a manner peculiar to our constitutional scheme.

10. Viewed in that light, it is more reasonable interpretation to adopt in the scheme of the Constitution so as no part of the provision is rendered surplus that the provision granting exemption to the Union from imposition of taxes by the State or by any authority within the State must refer to all taxes imposed by the State on property. The Property of the State shall be exempt from incidence of such imposition by the State and what is the tax not on the property does not come within the ambit of Article 285 merely because ultimately the recovery of the tax is to be made through the property of the Union. Had that been the scheme of the Constitution, the phraseology would have been differently used like no tax shall be imposed by the State on Union. The very fact that the Constitution does not impose such an absolute restriction on the exercise of legislative authority of imposing the tax affecting the property but has given the expression to its scheme by restricting the exemption to the property from imposition of State taxation.

11. Mr. J.P. Joshi, the learned Counsel for the petitioners vehemently urged that all the aforesaid decisions having been rendered directly in relation to context of Article 289 , the ratio of aforesaid decision ought not to be imported automatically while interpreting Article 285, as a binding precedent Under Article 141, but the issue needs to be examined independent of it. In this connection, he also urged that so far as Re:Sea Customs case (supra) is concerned, it is an opinion rendered Under Article 143 and cannot be considered as law declared by Supreme Court within the meaning of Article 141. It is only the litigative adjudication by the Apex Court that falls within the purview of Article 141 as a binding precedent. On that premises, it has been contended that in view of later adjudicating decisions, the same cannot be treated as binding precedents. He has further contended that since New Delhi Municipal Committee''s case (supra) was about the exemption of property of State from Union taxation Under Article 289 and no question was before the Supreme Court about the ambit and scope of Article 285 envisaging exemption of Union properties from the State taxes. A case is precedent on a point which it actually decides and not in respect of incidental reference to other issues which did not arise directly for its consideration. On this premise, he argues that for interpreting Article 285, the decisions interpreting Article 289 of the Constitution cannot be treated as a precedents Under Article 141 of the Constitution.

12. This contention has been stated to be rejected. So far as first limb of the argument is concerned, the answer comes from Chandrachud, CJI in his opinion in Re: Special Courts Bill 1978 In Re: The Special Courts Bill, 1978, Though pointing out question may have to be considered fully at some future date, after referring to a number of earlier references, it was said:

We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, in so far as all other courts in the terriroty of India are concerned, they ought to be bound by the view express by this Court even in the exercise of its advisory jurisdiction Under Article 143(1) of the Constitution.

This question was again noticed but left unanswered by the Apex Court in Re: In the matter of : CAUVERY WATER DISPUTES TRIBUNAL,

Even otherwise this contention need not detain us any further. In the case of Collector of Customs v. State of West Bengal (1999) 113 STC 167, the question arose in SLP from the decision of West Bengal Taxation Tribunal upholding the contention of the State of West Bengal that Collector of Customs was a ''dealer'' within the meaning of the definition of that word in the Bengal Finance (Sales, Tax) Act, 1941, when he sold goods confiscated under the provisions of the Customs Act because of non-payment of customs duty thereon. The only contention raised before the Supreme Court was to claim immunity for Union of India from imposition of all taxes by the State Under Article 285 of the Constitution. The Court explaining its earlier opinion to the contrary in State of Punjab v. U.O.I. (1990) 79 STC 437, as having been rendered without, noticing its earlier decision in Re: Sea Customs Act case (supra), said:

It would appear that no real arguments was advanced before this Court by the appellant-State and the Judgment of this Court in Re: Sea Customs Act, 1878 (1964) 3 SCR 787 was not pointed out. In Sea Customs Act case (supra), a 9 Judges Bench opined by a majority that Article 285 envisaged immunity from direct taxes and not from indirect taxes such as sales Tax. With specific reference to sales tax, this Court said:

We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different impost; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case, therefore, can it be said that the excise duty or sale tax is a tax directly on the goods for in that event they will really become the same tax.

The Court also referred to the decision in New Delhi Municipal Committee Vs. State of Punjab, etc. etc., as affirming the aforesaid view.

Thus, the Court by considering its own earlier judgments called out the ratio for rejecting the plea of the Customs Department of Union of India seeking protection Under Article/285 of the Constitution. This decision rendered in a litigative adjudication in which issue directly arose and answered on applicability of Article 285 of the Constitution to exclude sales Tax and other indirect taxes from its ambit.

13. In view of this speaking order rejecting SLP, further contention of the learned Counsel that decision was rendered while discussing a SLP and that the two decisions referred by the Court in fact did not concern Article 285, is not for this

Court to countenance.

14. Learned Counsel has placed reliance on Union of India Vs. Purna Miunicipal Council and others, and Union of India (UOI) and Another Vs. Ranchi Municipal Corporation, Ranchi and Others, for contending that Railways have been immuned from paying municipal taxes in connection with various different subject matters. Suffice it to state that those cases were decided in the light of the special provisions made u/s 135 of the Indian Railways Act providing for the contingency under which Railways shall be subject to local/taxes imposed by the local authorities. The Railways Act itself was not a law made by State for imposition of local Taxes, but was a Central Act and only envisaged levy of such local taxes as may be so notified. The Court in the two cases held that Section 135 itself is not a local law envisaged Under Clause (2) of Article 285 and authority of Parliament does not come into operation until notification as envisaged u/s 185 of the Railways Act is issued. It left it for the appropriate authority for approaching Central Govt. for acting u/s 185 of the Railways Act.

15. So far as Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, is concerned, it did not raise this issue at all whether the provisions of Article 285 of the Constitution extends to in-direct taxes. It was a case where the municipal taxes were levied on the property of Union by Bellary Municipality situated within its precincts. While the Union sought immunity Under Article 285(1) of the Constitution of India, the Bellary Municipality defended its levy by dint of exception Under Clause (2) of Article 285 of the Constitution of India. The High Court upheld the contention of the Union of India by holding that the case do not invite application of Clause (2) of Article 285 of the Constitution of India. We are not facing with any such question in the present case and, therefore, the ratio of the decision in Union of India v. Bellary Municipality''s case (supra) is of little assistance for resolving the controversy involved in the instant case.

16. Reliance on a decision of this Court in Union of India v. State of Rajasthan AIR 1991 Raj. 96 is also misplaced inasmuch as that case related to the claim of immunity on the motor vehicles owned by the Union of India from any direct levy of taxes under the Rajasthan Motor Vehicles Taxation Act, 1951. In this connection, it is pertinent to note here that the said Act was enacted in the field under Entry-57 of List-II of Schedule VII of the Constitution and undoubtedly the tax imposed was directly on the Motor Vehicles, movable property of the owner, who in that case happened to be Union of India. The fact that the motor vehicles are movable does not detract from the fact that it is a property. The term ''property'' Under Article 285 within its campus include immovable as well as movable property and the incidence of tax under Entry-57 of List-41 of Schedule VII of the Constitution is directly on the property and is not a specie of indirect tax.

17. He further relied on a decision of the Allahabad High Court in Union of India v. State of U.P. (1999) 114 STCO 288. Suffice it to say that the above decision did not notice the decision of the Supreme Court in Collector of Customs v. State

of West Bengal (1999) 113 STC 167 which clearly rules out the applicability of Article 285 to in-direct taxes.

18. Another Judgment to which reliance has been placed is the decision of the Madhya Pradesh High Court in Union of India v. State of M.P. (2001 121 STC 163. In that case, the Madhya Pradesh High Court did not record reasons of its own but has followed the decision of the Supreme Court in State of Punjab v. UOI 1979 STC 437 which as discussed above has been explained in a later decision of the Supreme Court in Collector of Sea Customs v. State of West Bengal (supra) a later decision of wherein it has been held that Article 285 does not grant immunity to the Union of India from in-direct taxes imposed by the State. This Judgments, therefore, cannot be said to be laying down correct law.

19. Conclusion on Question No. 1:

49. The upshot of the aforesaid discussion is that it is held that Union of India in any of its Department does not enjoy immunity from imposts of indirect taxes like sales tax and others and the immunity Under Article 285 is only in respect of all taxes imposed on property directly. Consequently, it must be held that the petitioners in con case in relation to their derivities of sale of goods for the purpose of Rajasthan Sales Tax Act are ''Dealers'' within the meaning of that Act and are liable to be registered in accordance with the provisions of that Act.

20. Question No. 2:

The next question that arises for consideration in this case is whether supply of some of the materials made by the petitioners to their respective contractors who are engaged in execution of the works for them, primarily to be used in execution of that contract only by the Contractor but the costs of such supply or the amount chargeable for such supply is adjusted in the Bills against which the payment is to be made to the Contractors amount to a ''sale'' within the meaning of that term under the Rajasthan Sales Tax Act, 1994.

21. Contentions on Question No. 2:

The contention of the petitioners in each case is that under the terms of the agreement, the ''property'' in goods never passes to the Contractor, the goods always remain under the control and property of the Department and in absence of any transfer of property in the goods to the contractor at any point of time, it does not amount to sale, merely because for accounting purposes and for the purpose of making payment to the contractor for the sum due for the work done by him, the amount of costs of material supplied by the contractee is to be reduced from his bill, it does not convert into a transaction of sale by of any transfer of property in the goods to the contractor. It is urged that it lacks existence of necessary animus of the parties to transfer property in the chattel as chattel from the contractee to contractor.

On the other hand, it has been urged by Mr. Sangeet Lodha, the learned Counsel for the Revenue that under the terms of the contract, the contractor is required to execute the work and the obligation to obtain material to be used in execution of such work from whatever source was of the obligation of the contractor. The price for consideration of the contract has been fixed on that basis. Whether the contractor obtains such material from the market or from the Department for whom the work is being executed, it makes little difference so long as he is made to pay for acquisition of such goods whether for his own purposes or for the purposes of making its use in the execution of contract for the Department. The element of acquiring the goods for consideration for the purposes of executing the works is inherent in terms of such agreement. Where the contractor is under an obligation to execute the work for consideration which is inclusive of material to be used therein, the responsibility of acquiring necessary goods for executing the contract rests with the contractor. The fact that to ensure speedy execution of works and maintain quality control, some or such material, the contractor may be required to obtain from the contractee makes little difference. The undisputed facts which emerge are that the contractor in each case obtained material from the Department at an issue rate and the Department charged its consideration (issue rate) by adjusting prices of such goods supplied to the contractor by reducing the same from the amount payable to the contractor under the contract and making the payment to the contractor only of the balance.

22. Principle In N.M. Goel & Co.''S Case (1989) 72 Stc 268

At this juncture it would be proper to notice the principle enunciated by the Supreme Court in Goel & Co. v. Sales Tax Officer, Rajnandgaon and Anr. (1989) 72 STC 268. In that case, the appellant before the Supreme Court was a building contractor at Rajnandgaon in Madhya Pradesh and was a registered Dealer under the Madhya Pradesh General Sales Tax Act, 1958. The appellant agreed to construct ''foodgrain godowns'' and ancillary buildings at Rajnandgaon for the Central Public Works Department. The contract was an item rate tender and in the tender submitted by the appellant. The prices of the material to be used for construction included the costs of iron, steel and cement. The CPWD, however, agreed to supply from its stores the iron, steel, and cement for the construction work and to deduct the prices of the materials so supplied and consumed in the construction, from the final bill of the appellant. Clause (10) of the Contract, relevant for our purposes and for the purpose of deciding this case reads as under:

Clause (10). If the specification or Schedule of terms provides for the use of any special description of materials to be supplied from Engineer-in-charge''s stores, or if it is required that the contractor shall use certain stores to be provided by the Engineer-in-charge as shown in the Schedule of materials hereto annexed, the contractor shall be bound to procure and hall be supplied such material and stores as are from time to time required to be used by him for the purposes of the contract only, and the value of the full quantity of materials and stores to supply at the rates specified in the said Schedule of materials may be set-off or deducted from any sums then due or thereafter to become due to the contractor under the contract or otherwise, or against or from the security deposit, or the proceeds or sale thereof if the same is held in Government securities, the same or a sufficient portion thereof being in this case sold for the purpose. All materials so supplied to the contractor shall remain the absolute property of Government and shall not be removed on any account from the site of the work and shall be at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-charge at a place directed by him, if by a notice in writing under his hand he shall so require; but the contractor shall not be entitled to return any such materials unless with such consent and shall have no claim for compensation on account of any such materials so supplied to him as aforesaid not being used by him or for wastage in or damage to any such materials. Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the Government within the scheduled time for completion of the work plus 50 per cent thereof [scheduled time plus 6 months if the time of completion of the work exceeds 12 months] but if a part only of the materials has been supplied within the aforesaid period, then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-Charge whose decision in this regard shall be final.

It may be noticed that it was a case in which the tender submitted by the contractor was inclusive of the prices of materials to be used in execution of the work. The Department had undertaken to supply iron, steel and cement materials to be used in execution of the work by themselves, for, the costs of the same to be adjusted in the final bill and all the materials so supplied to the contractor to remain absolute property of the Government throughout and were not to be removed on any account from the site of the work. A like plea was raised as has been raised before us that in view of the aforesaid term there being no transfer of the property in the goods, which were supplied by the Department to be used in the execution of the work and all materials so supplied were to remain absolute property of the Govt. and, therefore, the supply of goods did not amount to sale within the meaning of Madhya Pradesh General Sales Tax Act. This plea was concluded in favour of the Revenue and against the assessee as under:

Therefore, from the above decisions, it follows that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the Government, or the appellant in this case but there should be an independent contract - separate and distinct-apart from mere passing of the property where a party purchases or procures goods from the Government. Merely passing of property from the contractor to the Government would not suffice. There must be sale of goods. The primary object of the bargain judged in its entirety must be viewed. In the instant case, Clause (10) is significant as we have set out hereinabove. For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due thereafter to the contractor. Mr. Virmani, appearing for the appellant, submitted before us that in the instant case, there was no such independent and separate sale. But we are unable to accept. Though in a transaction of this type there is no inherent sale; a sale inheres from the transaction. Clause (10) read in the proper light indicates that position.

The court further concluded:

that in the instant case, by use or consumption of materials in the work of construction, there was passing of the property in the goods to the assessee from the P.W.D. By appropriation and by the agreement, there was a sale as envisaged in terms of Clause (10) set out hereinabove. Therefore, in our opinion, there was a sale which was liable to tax.

23. Cooch Behar Contractors Association v. State Of West Bengal (1996) 103 STC 477.

This principle was again followed and applied by the Supreme Court in Cooch Behar Contractors'' Association v. State of West Bengal (1996) 103 STC 477. It was a case in which a contention was put forth on behalf of the appellant Contractors'' Association before the Supreme Court that value of the stores and materials supplied by the contractee to the contractor for the specific purpose of use in the execution of works contract should not be included in the ''contractual transfer price'' u/s 60 as according to the learned Counsel, in such supplies there is no transfer of property in the goods so supplied, the property always remains with the contractee. In support of this contention, reliance was placed on Section 6-D of the West Bengal Finance Sales Taxi Act, 1941, which was enacted giving effect to amendment made in Article 366 by inserting Clause (29-A) of the Constitution of India, which brought within the purview of tax on sale or purchase of goods, the transfer of property in goods involved in the execution of the work contract. The contention was once again very much I seem to be one raised before me in this case. That contention was rejected. In coming to this conclusion, the Court has relied on its earlier decision in Builder Association of India v. Union of India (1989) 73 STC 370 held that:

It is clear that goods used in the execution of the works contract stand transferred from the contractor to the contractee at the time the goods are incorporated in the construction.

It was further held:

We are, therefore, in agreement with the conclusion reached by the Tribunal that having regard to all aspects of the matter, we hold that a sale within the meaning of Section 2(g) of the 1941 Act, namely, a transfer of property in goods supplied by the owner/contractee to the contractor for use in the execution of a works contract takes place in the cases under our consideration, when such goods are actually used in the construction work provided prices of such goods are deducted from or adjusted against bills or dues of the contractor.

On this premise, the Court applied the principle Laid down in N.M. Goel & Co.''s case [supra] and held that such supplies fell within the definition of ''sale'' affecting the sales tax under the West Bengal Finance [Sales Tax] Act, 1941.

24. Case of Rashtriya ispat Nigam (1998) 109 STC 425

The Supreme Court again reiterated this view in Rashtriya Ispat Nigam Ltd. v. State of A.P. (1998) 109 STC 425. In that case, the appellant-company, a Government Undertaking, which was engaged in manufacture of steel, was entrusted the work relating to the construction of its administrative building and erection of plant to contractors. One of the condition of the contract with the Contractor was that the appellant-company would supply cement, steel, and A.C. sheets from its stores and deduct the price thereof from the bills of the contractors on actual cost basis. The decision in N.M. Goel & Co.''s case (supra) was sought to be distinguished by pointing out three different circumstances existing in N.M. Goel & Co.''s case (supra) and which allegedly did not exist in that case: (1) the contractor had the liberty to retain the goods that were supplied to him by the employer, the deduction of the value thereof was on supply not on use; (ii) there was no penal provision which would operate the non-return of such, goods; and (iii) the contract used the word ''sale'' whereas there was no restriction in the use of the goods. The Supreme Court said:

We find no material difference between the contracts that we are to construe here and the contract in M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, Their effect overall, is the same.

25. Applicability of Principles To The Present case:

So far as these ingredients are concerned, there is no dispute before us. The contract in question under which the works were executed for the petitioners in each case was item rate contract in which the costs of materials used in the execution of the work is included in the rate. However, some of the material to be used in execution of the works has been supplied by the petitioners contractees and the costs of such supplies had been adjusted by reducing the same from the final bill of the amount payable to the contractor. The goods so supplied are to be used in the execution of the works and the remaining goods required to be returned to the contractee as per the directions of the Officer named in the respective terms of the agreement. The petitioners by pointing out two different Clauses in two sets of contracts: one used for M.E.S. contractors relating to Garrison Engineer''s cases and the other used for Contractors of Central Public Works Department that N.M. Goel & Co. case [supra] and other two cases referred to above on facts. It was urged as in the Ashtrays Ispat Nigam''s case (supra), that in N.M. Goel & Co.''s case (supra), (i) the contractor was not under an obligation to return the unused goods in all circumstances but his obligation rested only on a demand being made in that regard, (ii) further that non-return of unused goods invited penal consequences in the present cases, but such term was also not a feature in N.M. Goel & Co.''s case (supra); (iii) that in the present case, there was a claim that property in goods were to remain throughout with the contractee and contractor was not entitled to remove from the site nor to use them for any other purposes. However, it may be noticed that all these facts, for the purpose of considering the different sets of agreements for distinguishing the decision rendered by the Supreme Court in N.M. Goel & Co.''s case [supra] and deviating from that view in the present case a detailed journey with different Clauses, in my opinion, need not be under-taken in view of the unequivocal declaration made by the Supreme Court in Rashtriya Ispat Nigam Ltd.''s case [supra], that none of these factors make material difference to take a different view because over all impact of the conditions are the same as in N.M. Goel & Co.''s case [supra]. Therefore, I am of the view that the principle Laid down by the Supreme Court in N.M. Goel & Co.''s case [supra] is fully applicable to the facts of the present case.

26. Learned Counsel contended that the decision in Brij Bhushan Lal Parduman Kumar Vs. Commissioner of Income Tax , Haryana Himachal Pradesh and New Delhi III, has not been taken into consideration while deciding N.M. Goel & Co.''s case [supra]. The contention of the learned Counsel for the assessee is misconceived. Brij Bhushanlal Parduman Kumar''s case arose under the provisions of the Income Tax Act, 1961 where the question before the Supreme Court was whether the costs of material supplied by the Govt. [MES Department] for being used in execution of works is liable to be taken into consideration while estimating goods profit of a contractor. The Court answered that in such supplies made by the Govt. for being used in execution of the works for them for the price to bed adjusted, no profit is involved in charging the price of that material and therefore, in estimating the profit, the question of estimating the profit on the costs of such material would not arise. It is on this premise that the court said that since no element of profit was involved in the turnover represented by the costs of material supplies by the Govt. to the appellant, the income or profit derived by the appellant from such contracts is to be determined on the basis of the contracts represented by cash payment received by the appellant from the Govt. exclusive of the costs of material received being used or fixed or incorporated in the works. It nowhere touches the controversy with which we are concerned in these cases viz., whether such supplies constitute a sale within the meaning of term ''sale'' as defined under the relevant Sales Tax Law of the State, the Rajasthan Sales Tax Act, 1954 in''the present case. Under the provisions

defining ''sale'' under the Act of 1954 running a business for profit is not a necessary criteria for construing any transaction ''a sale''.

27. Learned Counsel for the petitioners have relied on a series of decisions from Allahabad High Court'' in support of their contention that supplies of material to a contractor under similar contracts as are subject matter of these petitions were held to be not amounting to ''sale'' under U.P. Sales Tax Act.

In support of his contention, he has placed reliance on the decision of the Allahabad High Court in Hindustan Housing Factory v. Commissioner of Sales Tax, U.P. 1(1989) 75 STC 2331. It was a case in which Allahabad High Court was considering the question whether transaction was a contract of sale independent of works Contract or a part of indivisible works. Contract relating to a period prior to amendment in Article 366 was effected, so as to bring transfer of property in goods involved in execution of works within the purview of taxing field. The Court found that supply of material being a part of works contract did not amount to sale.

He further placed reliance on U.P. Avas Evam Vikas Parishad Karyalaya v. Commissioner of Sales Tax, U.P. Lucknow (1990) 78 STC 417, which is again a case of the same nature as was before that court in Hindustan Housing Factory''s case (supra) and the learned Judges in the light of earlier Judgment in Hindustan Housing Factory''s case [supra] remanded the case for holding an enquiry whether supply of raw material at fixed ''issue rate'' to the contractor was a term of works contract or as a result of a separate contract of sale independent of it.

It is true that decision of Allahabad High Court in O.N.G.C. v. Commissioner of Sales Tax 1(1996) 102 STC 466 supports the view advanced by the petitioners. However, it may be noticed that the decision in O.N.G.C. case {supra] was referred to by A.P. High Court in its Judgment in Rashtreeya Ispat Nigam Ltd. v. State of Andhra Pradesh (1996) 102 STC 454 and was dissented from. The decision in Rashtriya Ispat Nigam Ltd. case [supra] has since been affirmed by Supreme Court in appeal in the decision reported in Rashtriya Ispat Nigam Ltd. v. State of Andhra Pradesh (1998) 109 STC 425 which has discussed above follows N.M. Goel & Co. case by overruling minor differences in terms of agreement pointed out by the contractee to be not material.

Likewise, ONGC case (supra), a later decision of Allahabad High Court in Indian Farmers Fertiliser Co-op. Ltd. v. Commissioner of Sales Tax (1997) 106 STC 479 is also founded on drawing distinction from N.M. Goel & Co. case [supra] on points which have not been approved by the Supreme Court in Rashtriya Ispat Nigam''s case from A.P. In this view of the matter. I regret my inability to be persuaded to agree with the view taken by Allahabad High Court in the aforesaid two decisions.

28. Attention was also invited to a decision of this Court in Ganpat Ram & Co. v. State of Rajasthan (1997) 105 STC-305. It was a case in which raw material for manufacture was supplied by the contractee, for whom the bricks were

manufactured free of costs and property in bricks always remained with contractee. Thus, it was a case where basic feature of ''consideration'' for supplies was missing, and was a case of labour contract.

29. Learned Counsel next referred to the principle enunciated by Bombay High Court in Sarvodaya Printing Press v. State of Maharashtra (1994) 93 STC 387. It was a case in which Bombay High Court has found as a fact that it was a case of job contract and not a case of works contract. Hence, question of any sale of goods in doing job work for mere incidental use of some material does not amount to sale. Again this was not a case of rate item contract under which procuring of raw material to be used in execution of works contract was obligation of the contractor. In other words, it was a case of contract of labour only. On fact, the judgment has been affirmed by Supreme Court in State of Maharashtra v. Sarvodaya Printing Press Fine Art Printer (1999) 144 STC 242.

30. As a result of the aforesaid discussion, we reach to the following conclusions: (1) that Clause (1) of Article 285 provides immunity only from taxes imposed on property directly by the State and not from in-direct taxes; (2) that the petitioners are dealers within the meaning of Section 2(f) of the Act of 1954 and Section 2(xiv) of the Act of 1994 and are liable to be registered under the provisions of the Rajasthan Sales Tax Act in connection with the transactions of sale with them; and (3) that the supplies of material by the contractees to be used in execution of their work and charging its price by adjusting against the amount payable to the contractor on the basis of final bill in a case arising out of a rate contract which includes the cost of material, amounts to sale within the meaning of terms used in Rajasthan Sales Tax Act and is liable to be taxed as per other provisions of law.

31. In this view of the matter, I do not find any merit in any of the contentions raised before me in these revision petitions.

32. Accordingly these revision petitions are dismissed with no order as to costs.

