(1990) 07 KAR CK 0039

In the Karnataka High Court

Case No : W.P. Nos. 2064 to 2067/1988 & connected cases

M/s. Designs and Constructions APPELLANT

Vs

State of Karnataka RESPONDENT

Date of Decision : 27-07-1990

Acts Referred:

Karnataka Sales Tax Act, 1957 — Section 5B
Karnataka Sales Tax Rules, 1957 — Rule 6, 6(4)

Citation : (1990) 34 KarLJ 97

Hon'ble Judges : S. Mohan, C.J.;M. Ramakrishna, J

Judgement

Mohan, CJ.-All these writ petitions can be dealt with under a common judgment since they question the validity of Section 5B of the Karnataka Sales Tax Act, 1957, introduced by the Amending Act No. 27 of 1985, with effect from 1-4-1986.

2. We propose to note the facts in Writ Petitions 2064 to 2067 of 1988:

The petitioners are Civil Engineering Contractors engaged in civil construction work in the State of Karnataka. In order to bring the activity of work contract within the purview of power to levy Sales Tax by the respective States, amendments were introduced extending the definition of ''sales'' under Article 366 (29-A) of the Constitution of India. Following the Constitutional amendment, the Karnataka Sales Tax Act was amended by the Amendment Act No. 27 of 1985. In pursuance of the amendment, the Karnataka Sales Tax Rules were also amended by the Karnataka Sales Tax (Amendment) Rules, 1986.

As a result of the aforesaid amendments, the activity of the petitioners in the nature of works contract in the State, has, been brought within the scope of the Karnataka Sales Tax Act.

The petitioners challenge the Constitutionality of the 46th Amendment, as well as the amendments made to the Karnataka Sales Tax Act. The challenge is in three stages:

(i) the Constitutional amendment of procedural and substantive aspect;

(ii) the power of the respective State Legislature to levy and determine tax on works contract without a law made under Art. 286(3)(b) of the Constitution; and (iii) the Karnataka Amending Act 27 of 1985 on various grounds of illegality.

By 46th Amendment, the definition of ''sale'' under Art. 366 (29-A) is not an enabling amendment. The power to levy Sales Tax can only be traced to Entry-54 of List-II in the State List of Schedule-VII. That entry has not been amended by 46th Amendment. Therefore, merely because Clause (29-A) of Art. 366 of the Constitution was amended, that will not enable the State Government to levy Sales Tax on works ''contract. This is because the said Article cannot be taken as a source of power, for the simple reason that the connected definitions of ''goods'' under the Sale of Goods Act, and ''sale'' under the Central Sales Tax Act have not been amended. Even assuming it is deemed to amend Entry-54 of List-II, there is no ratification by not less than one half of the State Legislature as required under Art. 368 of the Constitution.

The 46th Amendments also violative of the concept of basic structure doctrine. Though Art. 286 has been amended, till date the Parliament does not come out with any law fixing the rate of sales tax on works contract. Therefore, the State law will be unconstitutional. Coming to the definition of ''Sales Tax'' under Sec. 2(t)(ii), it is not only vague and arbitrary but the Explanation (3)(c) to Sec. 2(t) is a clear violation of the Sale of Goods Act. Hence it is repugnant to the State law. Therefore it violates Art. 254 of the Constitution.

The definition of ''works contract'' under sub-clause (v-i) of Sec. 2(1) is wider and ultra vires of the definition of ''sale'' under the Amendment Act 27/85.

Section 5B, the charging section on works contract, is ultra vires of Sec. 5(4) of the Act because of the non-obstante clause. As a result, the said Section contradicts Sec. 5(4) of the Act. In levying the tax, it is arbitrary and without any nexus.

The Rules are ambiguous and contradictory to various clauses provided in it. The nature of the civil contract is such that it is highly impossible to determine and calculate as any other transfer of property in goods, the actual quantum of the works carried over every month and to maintain stock books. Clauses (m) and (n) of Rule 6, while granting exemption, have imposed unreasonable restrictions which are violative of Art. 19(1)(g) of the Constitution.

The Rules have unnecessarily classified a second scheme of tax structure, one for ascertainable labour charges under the 6th Schedule and another for unascertainable labour charges under Rule 6(n). It is arbitrary because 6th Schedule provides 18 categories of works contracts while Rule 19 provides only 6 categories. Therefore, there is not only discrimination but there is no nexus, hence violative of Art. 14 of the Constitution.

On the above averments, a writ of declaration is prayed for to declare the provisions of Sections 2(k)(viii), 2(m), 2(t)(ii) & Explanation 3(c), 2(v-i), 5B, 6B and Schedule 6 of the Karnataka Sales Tax Act as amended by the Amending Act 27/85, and the Rules made relating to the levy of sales tax on works contract, as illegal, unconstitutional and violative Of Articles 14, 19(1)(g), 38, 39, 246, 254, 265 and 301 to 304 of the Constitution of India, in so far as the petitioners are concerned.

3. Mr. K.K. Venugopal, Senior Advocate and Counsel for the petitioners, submits in support of the above grounds raised in the writ petitions after drawing our attention to the relevant provisions, that the Amending Act 27/85 was passed at a time when the Supreme Court had not delivered the judgment in Builders Association of India v. Union of India (AIR 1989 SC 1371). The Supreme Court evolved the concept of transfer of goods in a works contract similar to transfer of goods by sale to a customer, the result being the Constitutional restrictions and provisions of the Central Sales Tax Act were made applicable. The Supreme Court ruled that the transfer of goods in a works contract will be a fictional sale. It had further ruled that those sales are subject to the same Constitutional limitations. Therefore, one cannot get away from them. Unfortunately, Explanation 3(c) to Sec. 2(t) lays down a different principle than what is contemplated under Art. 286(2) of the Constitution. The said Explanation 3(c) speaks of situs while dealing with the transfer of goods. The situs has been fixed as the place of delivery of goods. This is without regard to Art. 286(2) of the Constitution and Sections 4 and 5 of the Central Sales Tax Act. Therefore it is bad.

The provisions of Central Sales Tax Act, particularly Sections 3, 4 & 5, deal with computation of the various transactions. If that be so, neither the situs nor the transfer of property would be relevant. If, therefore, they are irrelevant for actual sales it should be so for fictional sale or a deemed sale as well.

The situs was fixed under Sec. 4 of the Central Sales Tax without reference to transfer of property. Since the existing laws would cover all sales, any attempt by the State Legislature to have a different concept in the State would be contrary to Sec. 4 of the Central Sales Tax Act. Hence it is unconstitutional. Even if Explanation 3(c) to Sec. 2(t) of the Karnataka Sales Tax Act is struck down, clauses (a) and (b) of the said Explanation will take care of fictional sales as well, leave alone they being covered by the actual sale.

Coming to Sec. 5B of the Karnataka Sales Tax Act, to deprive the contractor of single point is clearly discriminatory. The said section is void in so far as it refers to the sixth schedule because the said schedule itself refers to the nature of works done by a contractor and not the goods.

Secondly, the same item of goods used in the works contract is taxed differently. The end user is irrelevant. As a matter of fact, this is the dictum of the judgment reported in AIR 1989 SC 1371 (Builders'' case) (at 1390 para-36).

In view of the above submissions, the question that may arise will be, if the schedule is bad, the taxing provision cannot be worked out. Where therefore it is possible to sever Sec. 5B removing the non-obstante clause, even then rest of the section can remain by the application of doctrine of severability as was held in R.M.D.C. v. Union Of India (AIR 1957 SC 628).

Under Art. 286 of the Constitution, Parliament alone has been conferred with the power to levy the tax. If the fictional sales are brought in so as to enable the State Legislature to tax, it would be clearly violative of the said Article. Therefore, it is the Parliament which has to determine what is sale or purchase under Clause (29-A) of Art. 366.

Though Art. 286(2) says that parliament may by law formulate the principle for determining as to when a sale or purchase takes place, ''may'' in this context must mean ''shall''. In support of this submission, the learned counsel cites principles of Statutory Interpretation by Justice G.P.Singh, IV Edn. p. 244.

Further, explanation 3(c) to Sec. 2(t) is violative of Art. 286. Therefore, this Explanation has to be struck down as otherwise the State may claim immunity and proceed to levy tax eventhough such striking down does not advance the case of the petitioners.

4. Mr. K. Srinivasan supporting the arguments of Mr. Venugopal, submits that Art. 286(1)(a) of the Constitution talks of sale outside the State. This is what is contemplated under Section 4 of the Central Sales Tax Act. Therefore, Explanation 3(c) to Sec. 2(t) of the Karnataka Sales Tax Act is directly opposed to Sec. 4 of the Central Sales Tax Act.

The 46th Amendment of the Constitution says that even in case of works contract it has to be treated as a sale, the rate of taxation on transfer of goods involved, if is different in a labour contract or contract of service in comparison to ordinary sale, it would be discriminatory in nature and therefore must be held to be bad.

While construing Sec. 5B of the KST Act, it must be subject to Sections 5, 3 and 4. The non-obstante clause at the end of the Section will have to be struck down. The learned counsel draws our attention to Rule 6; a similar provision in Bihar Sales Tax Act was struck down as seen from Jamshedpur Contractors Association v. State of Bihar (75 STC 132).

Mr. Vijayan, learned counsel, supplementing to his arguments, would say that in the absence of situs of sale being demarcated in Article 286(2) or Article 269(3) of the Constitution, the State law is premature. Therefore, Sec. 5B of the KST Act is violative of these provisions.

The next submission of the learned counsel is that Explanation 3(c) to Sec. 2(t) of the KST Act prescribes a peculiar test which is violative of Article 286 of the Constitution. This is precisely what is criticised in AIR 1989 SC 1371 (Builder''s case)(at page 1388, para-32). The learned counsel further cites Goodyear India Ltd. v. State of Haryana (76 STC 72) and particularly the passages occurring at pages 85 & 86, and submits that there is no legislative authority for enacting Sec. 5B of the KST Act. Sec. 5B will have to go since it proposes to tax the conglomerate.

5. The learned counsel appearing in Writ Petition No. 4070/87 cites AIR 1989 SC 1371 and draws our attention to the facts in that W.P. He also adopts the arguments advanced by the other learned counsel.

6. Mr. M.R. Achar, learned Government Advocate appearing for the State of Karnataka, meets these points in the following manner:

Nowhere does the Supreme Court in AIR 1989 SC 1371 say that the State has no power to fix the situs. That ruling merely held that the State while proposing the tax on fictional sales must conform to the Constitutional provisions and also the limitations contained in the Constitution as well as the Central Sales Tax Act. The same question as is advanced by the petitioners, came up for consideration in Ranjit Kumar v. Commercial Tax Officer (71 STC 502). It was rejected as is seen from the passage occurring in pages 504 and 505. It is incorrect to contend that the State has no power in the absence of a law made by the Parliament under Art. 286(2) of the Constitution. It should be carefully noted that the said Article used the word ''may'': likewise Art. 286(3). Only when a law is made by the Parliament, should the State law be repugnant to such parliamentary enactment, it would be, to the extent of repugnancy, bad, but not otherwise. There is no possibility of construing this word ''may'' as ''shall''. In other words, Clauses (2) and (3) of Art. 286 of the Constitution are enabling provisions conferring power on the Parliament.

The argument of the petitioners that Explanation 3(c) to Sec. 2(t) of the KST Act lays down a different principle-and speaks of situs with reference to delivery of goods disregardful of Art. 286 of the Constitution and Sections 4 and 5 of the Central Sales Tax Act is fallacious. The Explanation uses the same words as occurring in sub-clause (b) of Clause (29A) of Article 366 of the Constitution. This is precisely what was held by the Supreme Court in AIR 1989 SC 1371 (paras 32 and 33 at pages 1388 and 1391), which he would press into service for the purpose of this case.

In more or less identical circumstances in 20th Century Finance Corporation v. State (75 STC 217-at pages 226 and 227), a similar argument came to be repelled. The ratio of the judgment squarely applies to the facts of this case. Therefore, the question of inter-State sale does not arise here. Only when the declared goods go into the contract of service as declared goods the limitations will apply, but not if they change their character.

The contention that different rates of taxation have been prescribed for transfer of goods in a works contract or contract of service than the actual sale, is factually wrong. On a comparison of the Second Schedule and the Sixth Schedule it would be seen that the rates are same excepting item-6 of Second Schedule, Part-p prescribing 8% and item-20 of Sixth Schedule prescribing 15%. On that score it cannot be urged that there is any discrimination because it is one of the fundamental postulates of law of taxation that the Legislature has a wide discretion in choosing the objects of taxation. There can be difference in rates. This is very clear if Twyford Tea Co. v Kerala State (AIR 1970 SC 1133-paras 15 & 16) are referred to.

The entire argument about the ''vires'' of Sec. 5B of the KST Act or that it is opposed to other Sections proceeds on a misapprehension. This section contemplates a separate kind of transaction. Therefore, it has so proceeded with reference to such or those transactions which are taken within it viz. what were not sales earlier. In order to fix the taxable turnover of transfer of property in goods in the execution of works contract, it is this section alone which has to be looked at. The rules only enable the fixation of such a turnover. Rule 6 deals with determination of total and taxable turnover. While arriving at the taxable turnover, Clause (n) of Rule 6 speaks of certain categories of works contract mentioned in the Sixth Schedule while Clause (n) takes care of other cases of works contract specified in items 18 and 20 of the Sixth Schedule. This is merely a method and the working out as to what should be deducted would depend upon the facts of particular case. Clause (n) speaks of actual incurring of labour charges. The excess of labour charges is an integral part of the sale price. As to how the reasonableness of classification must be approached can be gathered from Kerala Hotel & Restaurants Association v State of Kerala (AIR 1990 SC 913). Therefore, there is nothing axiomatic about these matters. That case helps the State greatly.

7. Mr. Srinivasan, in his reply, would submit that the ruling of 75 STC will have a bearing only on Sec. 5(1) and hence cannot be applied to a case arising under Sec. 5B of the KST Act.

With regard to applicability of Sec. 4 to transfer of goods in a contract of service one must have regard to the principles laid down in Kerala Hotels case-AIR 1990 SC 913 at 923 para-31.

The reply of the other counsel is that the judgment of the Supreme Court in Builders'' Case (AIR 1989 SC 1371) would apply only prospectively as laid down in Rajah V.V. Seetharamayya Bahadur v. Asst. Commissioner (98 LAW WEEKLY 896) and unreported judgment in Writ Appeal 826/88.

8. Having regard to the above arguments, the following points arise for our determination:

(i) Scope of the Constitutional provisions;

(ii) Scope of the Central Sales Tax Act, particularly Sections 3, 4 and 5;

(iii) Section 5B of the Karnataka Sales Tax Act, whether violative of the Constitution or is repugnant to the provisions of the Central Sales Tax Act;

(iv) Validity of the Karnataka Sales Tax Act;

(v) Prescription of different rates of taxation, whether valid?

9. Article 269(3) of the Constitution says that Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce. In exercise of this power the Parliament has enacted Sec. 3 of the Central Sales Tax Act, 1956. That lays down the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

The power to impose tax on such sales has been given exclusively to the Parliament in view of Art. 269(1)(g) of the Constitution read with Entry-92A of List-I. This clause also confers upon the Parliament the power to lay down the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce so as to be liable to the Union Sales Tax.

10. The next important Article to be looked at is Art. 286 of the Constitution. We would rather do well to extract the entire Article because it has undergone important changes by 46th Amendment:

"286. RESTRICTIONS AS TO IMPOSITION OF TAX ON THE SALE OR PURCHASE OF GOODS:

(1) No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place- (a) outside the State; or (b) in the course of the import of the goods into or export of the goods out of the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of- (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or (b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of Clause (29-A) of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

Clause (3) has been substituted by the 46th Amendment of 1982. The object of the amendment is to create a legal fiction to determine the situs of the sale. Since the law remained somewhat confusing that came to be settled by the Parliament enacting the Central Sales Tax Act in 1956. Section 4 of that Act provides a simple test of physical location of the goods by determining the situs of a sale as between more than one State. It should be noticed that Clause (2) did not take away the legislative competence of the State to impose a tax on sales taking place in the course of inter-State trade or commerce. But it merely subjected it to a legislation by Parliament. After introduction of Entry-92A of List-I by the 46th Amendment the legislative power to tax sales taking place in the course of inter-State trade or commerce has been vested exclusively in the Parliament.

In so far as Art. 286 lays down such limitations upon the power of the State to enact legislation for purposes of taxing sales it is required on our part to find out as to what those limitations are. In our view, the limitations can be stated as follows:

(i) In view of Clause (1)(a) no tax shall be imposed on a sale or purchase which takes place outside the State.

(ii) In view of clause (1)(b) equally no tax shall be imposed on a sale or purchase which takes place in the course of import into or export out of, India.

Even with regard to inter-State trade or commerce there are two other limitations:

(i) The power to tax sales taking place in the course of inter-State trade or commerce is within the exclusive competence of Parliament, and this is because of Art. 269(1)(g) read with Entry-92A of List-I.

(ii) Eventhough the sale does not take place in the course of inter-State trade or commerce, if the sale were to relate to goods declared by Parliament to be of special importance in inter-State trade or commerce or if it were to come under Article 366 (29-A)(a), (b), (c) and (d), such a State taxation would be subject to the restrictions and conditions imposed by Parliament.

Therefore, it will follow that so long as these limitations are not transgressed, should it be a case of intra-State sale that could be, the subject-matter of State sales tax.

Clause (29-A) of Art. 366 of the Constitution speaks of tax on the sale or purchase of goods. It reads:

"(29-A) ''tax on the sale or purchase of goods'' includes- (a) a tax on the transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a work contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration;

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

By this clause, the concept of sale had come to be enlarged. It is no longer confined to the sale as understood under the Sale of Goods Act.

11. The validity of the 46th Amendment of the Constitution came directly before the Supreme Court in AIR 1989 SC 1371 because, on the passing of the 46th Amendment the State Governments commenced to levy sales tax on the turnover of works contract entered into by the building contractors for constructing houses, factories, bridges etc. Two points were urged before the Supreme Court viz.

(i) the 46th Amendment was unconstitutional because it had not been ratified by the Legislatures of not less than one-half of the States; and (ii) it was not open to the States to ignore the provisions contained in Art. 286 of the Constitution and the provisions of the Central Sales Tax Act, 1956, while making assessments under the Sales Tax laws passed by the various States.

On the first point it was held in paragraph 29 that there has been due compliance of the provisions contained in the proviso to Art. 368(2) of the Constitution in that resolutions had been passed by the Legislatures of 12 States concerning which evidence was produced before the Court. As regards the second point, it was held that the object of the 46th Amendment is to convert what is not a sale into a sale. Originally, a transfer of property in goods involved in the execution of works contract was held to be not a sale. As is seen from State Of Madras v. Gannon Dunkerley & Co. (AIR 1958 SC 560) such a sale is deemed by fiction of law to be a sale and is made taxable. In no other respect does the 46th Amendment enlarge the power of the State to levy sales tax. In deciding the correctness of the submissions, in paragraph-32 the Supreme Court has stated as under:

"32. Before proceeding further it is necessary to understand what subclause (b) of Cl. 29-A of Art. 366 of the Constitution means. Art. 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression ''goods'' is defined in Cl. (12) of Art. 366 of the Constitution as including all materials, commodities and articles. It is true that in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (AIR 1958 SC 560)(supra) this Court held that a works contract was an indivisible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales-tax. It was in order to overcome the effect of the said decision Parliament amended Art. 366 by introducing sub-cl. (b) of Cl. (29-A). Sub-clause (b) of Cl. (29-A) states that ''tax on the sale or purchase of goods'' includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods in some other form). The latter part of Cl. (29-A) of Art. 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-cls. (a) to (f) of Cl. (29-A) the latter part of Cl. (29-A) says that ''such transfer, delivery or supply of any goods'' shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under sub-clause (b) of Cl. (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in Cl. (29-A) of Art. 366 of the Constitution is therefore to enlarge the scope of ''tax on sale or purchase of goods'' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-cls. (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression ''tax on the sale or purchase of goods'' in Entry 54 of the State List, therefore includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-cl. (b) of Cl. (29-A) of Art. 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry-54 of the State List is made subject to under the Constitution. The position is the same when we look at Art. 286 of the Constitution. Clause (1) of Art. 286 says that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Here again we have to read the expression ''a tax on the sale or purchase of goods'' found in Art. 286 as including the transfer of goods referred to in sub-cl. (b) of Cl. (29-A) of Art. 366 which is deemed to be a sale of goods and the leviable thereon would be subject to the terms of Cl. (1) of Art. 286. Similarly the restrictions mentioned in Cl. (2) of Art. 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods in Cl. (1) of Art. 286 would also be attracted to a transfer of goods contemplated under Art. 366(29-A)(b). Similarly, Cl. (3) of Art. 286 is also applicable to a tax on a transfer of property referred to in sub-cl. (b) of Cl. (29-A) of Art. 366. Clause (3) of Art. 286 consists of two parts. Subclause (a) of Cl. (3) of Art. 286 deals with a tax on the sale or purchase of goods declared by

Parliament by law to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under Cl. (29-A) of Art. 366 of the Constitution. If any declared goods which are referred to in S. 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in Cl. (29-A) of Art. 366, the sales tax law of a state which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in S. 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under sub-cl. (b) or sub-cl. (c) or sub-cl. (d) of Cl. (29-A) of Art. 366 of the Constitution. We do not find much substance in the contention urged on behalf of the States that since sub- clause (b) of Cl. (3) of Art. 286 of the Constitution refers only to the transactions referred to in sub-clauses (b), (c) and (d) of Cl. (29-A) of Article 366, the transactions referred to under those three sub-clauses would not be subject to any other restrictions set out in Cl. (1) or Cl. (2) or sub-cl. (a) of Cl. (3) of Art. 286 of the Constitution. It may be that by virtue of sub-clause (b) of Cl. (3) of Art. 286 it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales. That however cannot make the other parts of Art. 286 inapplicable to the transactions which are deemed to be sales under Art. 366 (29-A) of the Constitution. We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of Cl. (29-A) of Art. 366 of the Constitution are subject to the restrictions and conditions mentioned in Cl. (1), Cl. (2) and sub-cl. (a) of Cl. 3 of Art. 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of Cl. (29-A) of Art. 366 of the Constitution are subject to an additional restriction mentioned in subclause (b) of Art. 286 (3) of the Constitution. (Emphasis supplied)

In paragraphs 36 and 40, it is further observed thus:

"36..........After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the State to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above........... When the law creates a legal fiction such fiction should be arride to its logical end. There should not be any hesitation in giving full effect to it. If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which deemed to be a sale under Art. 366(29-A) of the Constitution should also be subject to the same restrictions and conditions.

40............We do not accept the argument that sub-clause (b) of Art. 366 (29-

A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the ''deemed'' sales and purchases of goods under Cl. (29-A) of Art. 366 is to be found only in Entry 54 and not outside it...........

Thus the resultant position is, the works contract as referred to in sub-clause (b) of Clause (29-A) Art. 366 of the Constitution is subject to tax and is subject to the same restrictions had it been a sale in the ordinary sense.

Secondly, what were originally considered to be an inseverable contract could now be separated into two-one for sale of goods and the other for supply of labour and services.

12. With this background, we pass on to the relevant provisions of Sections 4 and 5 of the Central Sales Tax Act. After stating in the opening words of Sec. 4 that it is subject to the provisions contained in Sec. 3 in sub-sec. (2) an intra-State sale is defined. It is an inside sale in terms of certain tests for its situs. A sale or purchase of goods is deemed to take place inside the State if the goods are within the State, in the case of specific or ascertained goods at the time when the contract of sale is made, and in the case of unascertained or future goods at the time of their appropriation to the contract of sale by the seller or by the buyer whether assent of the other party is prior or subsequent to such appropriation. The explanation to sub-sec. (2) says, where there is a single contract of sale or purchase of goods situated at more places than one the provisions of sub-sec. (2) shall apply as if there were separate contracts in respect of the goods at each of such places. Thus, in the case of ascertained goods, the place where the goods are situated at the time of the contract of sale fixes the situs. In the case of unascertained goods, when the appropriation is made fixes the situs. Once, therefore, the sale is so fixed inside the State with reference to the above, it should be deemed to have taken place outside all other States.

In order to determine whether a particular transaction is a sale in the course of inter-State trade or commerce, what is really decisive is whether the sale is one which has occasioned the movement of the goods from one State to another. It does not depend upon the circumstance as to in which State the property in the goods passes. It may pass in either State and yet the sale can be an inter-State sale.

In cases of inter-state sales falling under clause (a) or clause (b) of Sec. 3 of the CST Act, it is not material, for the purpose of the tax-levy, to consider the situs of the sale or the State in which the property in the goods happens to pass. Neither territorial nexus nor titular rights to the goods nor the theory of origin of the goods nor the theory of outside consumption can be taken to override ''the course of inter-State trade or commerce'' when the sale itself occasions the movement of the goods from one State to another. The rates and levy etc. follow the provisions of the Act independently of the situs.

There is no antithesis between a sale in the course of inter-State trade or commerce and a sale inside the State. Even an inter-State sale must have a situs and the situs may be in one State or another. It does not involve any contradiction in saying that an inter-State sale or purchase is inside a State or outside it. A sale which is in the course of inter-State trade or commerce cannot be taxed by a State Legislature even if its situs is within the State, because the State Legislature has no legislative competence to impose tax on sale in the course of inter-State trade or commerce.

In answering the question whether Sec. 4 fixes the situs of sale, the majority held in Tata Iron & Steel Co. Ltd. v. S.R. Sarkar (11 STC 655-SC) that sub-section (2) defines what sales or purchases shall be deemed to take place inside a State. The terms of sub-section (2) are quite general, and Parliament has thereby attempted to locate the place where a sale takes place. The clause does not deal with the conditions which ''effect'' a sale nor is there any warrant for the view that sub section (2) of Section 4 only seeks to locate the place of sales which are not in the course of inter-State trade or commerce. In enacting Section 4, sub-section (1), Parliament has sought to formulate principles for determining when a sale takes place outside a State. By sub-sec. (2), Parliament has attempted to define when a sale shall be deemed to take place inside a State and then, sub-section (1) provides that when a sale or purchase of goods was determined in accordance with occasions the movement of the goods from one State to another. The rates and levy etc. follow the provisions of the Act independently of the situs.

In other words, the terms of the section disclose that the purpose was to formulate the principles for determining when a sale takes place outside the State. This section was enacted by Parliament in exercise of authority under Art. 286(2) of the Constitution read with Clause (1)(a) of Art. 286. It is needless to say that Clause (1)(a) deals with sale outside the State. The object of Section 4 was to locate the place where the sale took place. Sub-section (2) merely seeks to locate the place of sales which are in the course of inter-State trade or commerce.

Now we come to the question, under Sec. 4 what tests are adopted to determine the situs. No concept of inter-State trade can be comprehensive without knowing what is an outside sale and, therefore, an inside sale. An inside sale or an outside sale is related to its situs and if the situs of an inside sale is on certain tests, what is not an inside sale will be an outside sale provided there is a completed contract of sale of goods. Sec. 4(2) defines an inside sale in terms of certain tests for its situs. A sale or purchase of goods is deemed to take place inside a State if the goods are within the State, in the case of specific or ascertained goods, at the time the contract of sale is made; and in the case of unascertained or future goods at the time of their appropriation to the contract of sale by the seller or by the buyer whether assent of the other party is prior or subsequent to such appropriation. An Explanation to sub-sec. (2) says that where there is a single contract of sale or purchase of goods situate at more places than one, the provisions of the sub-section shall apply as if there were separate contracts in respect of the goods at each of such places. The place where the goods are situate at the time when the contract of sale is made in the case of ascertained goods or when appropriation is made in the case of unascertained goods determines both the situs of such a sale as well as its character as an inside sale. Once a sale is fixed as having taken place inside a State with reference to such tests, it should be deemed to have taken place outside all other States. Even an inter-State sale or purchase or a sale in the course of export of goods out of the territory of India must have a situs. To fix the situs of a sale is a wholly different matter from taxing that transaction. The situs of a sale may fall to be determined both from the point of view of its exigibility to tax as also its exemption from tax either under the Constitution or under the taxing statute itself. The bans prescribed by Art. 286 operate only for the purpose of curtailing the taxing powers of the State and not for any other purpose. They would not alter the situs of a sale or purchase, and its situs would continue to be inside a particular State as determined by the principles formulated by Section 4.

13. With the above legal background, we go on to Sec. 5B of the Karnataka Sales Tax Act which is under challenge in these writ petitions. The Section may be quoted in full:

"5-B. LEVY OF TAX ON TRANSFER OF PROPERTY IN GOODS (WHETHER AS GOODS OR IN SOME OTHER FORM) INVOLVED IN THE EXECUTION OF WORKS CONTRACTS:

Notwithstanding anything contained in sub-section (1) or sub-section (3) of Section 5, but subject to sub-sections (5) and (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said schedule.

It opens with a non-obstante clause. Therefore, wherever there is a transfer of goods in a works contract one is obliged to look at this section alone. It has already been seen that these works contracts could not have been taxed prior to 46th Amendment of the Constitution and now these transactions have become taxable. Sec. 5B came to be introduced by Karnataka Act 27/85 with effect from 01-04-1986. The object and reasons behind this amendment are as follows:

"It is proposed in the budget speech for the year 1985-86, to levy tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, on the transfer of the right to use goods, on the delivery of goods on hire purchase or any other kind of payment by instalments; for payment of interest for belated refunds; to prescribe time limit for concluding assessments; to simplify summary assessments; and to give certain concessions and reliefs."

Therefore, the definition of sale had also to be enlarged. Sec. 2(t) of the Karnataka Sales Tax Act reads:

"2. DEFINITIONS: (1) In this Act, unless the context otherwise requires-

*** *** ***

(t) "sale" with all its grammatical variation and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes- (i) a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

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

(iii) a delivery of goods on hire purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

EXPLANATION (1)-A transfer of property involved in the supply or distribution of goods by a society (including a co-operative society), club, firm, or any association to its members, for cash or for deferred payment or other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

(2) *** *** (omitted)

(3)(a) The sale or purchase of goods other than in the course of inter-State trade or commerce or in the course of import or export, shall be deemed, for the purposes of this Act, to have taken place in the State Wherever the contract of sale or purchase might have been made, if the goods are within the State- (i) in the case of specific or ascertained goods at the time the contract of sale or purchase is made; and (ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of Clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places.

(c) Notwithstanding anything contained in the Sale of Goods Act, 1930 (Central

Act 3 of 1930), for the purpose of this Act, the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to have taken place in the State if the goods are within the State at the time of such transfer, irrespective of the place agreement for works contract is made within the assent of the other party is prior or subsequent to such transfer;

(d) Notwithstanding anything contained in the Sale of Goods Act, 1930 (Central Act 3 of 1930), for the purpose of this Act, the transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be deemed to have taken place in the State, if such goods are for use within the State, irrespective of the place where the contract of transfer of the right to use the goods is made.

(3A). Every transaction of supply by way of or as a 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, shall be deemed to be a sale of those goods by the person making the supply and purchase of those goods by the person to whom such supply is made.........."

At this stage it is necessary for us to note that Explanation (3) extracted above is a verbatim reproduction of Sec. 4 of the Central Sales Tax Act.

In the present case, we are concerned with transfer of property in goods, whether qua goods or in some other form, involved in the execution of works contract. The argument of Mr. Venugopal is that Sections 3, 4 and 5 of the CST Act cover all transactions of sale. Both the situs and the transfer of property are irrelevant for the purpose of taxation under those provisions. If that be so, for the actual sales, it should be a fortiari for a deemed sale as well. The learned counsel draws inspiration because in paragraph 32 of the judgment in AIR 1989 SC 1381 the Supreme Court held that all transfers, deliveries and supplies of goods referred to in Clauses (a) and (b) of Clause (29-A) of Art. 366 of the Constitution are subject to the same restrictions. Therefore, according to him, the situs was fixed under Sec. 4 of the CST Act, and if the existing laws would cover all sales any attempt by Legislature to add something different to its own State contrary to Sec. 4 of the CST Act is unconstitutional.

In opposing this stand, Mr. Achar, learned Government Advocate, would say that the State has the power to tax on such transfer of right to use the goods irrespective of whether the contract has taken place or not. In support of this submission reliance is placed on 75 STC 217. In that case, the validity of Maharashtra Sales Tax on the Transfer of the Right to use any goods for Any Purpose Act, 1985, came up for consideration. The object of that Act was to levy and collect sales tax upon the transfer of the right to use any goods for the purposes of cash or deferred payment or other valuable consideration within the State. In upholding the constitutional validity of that Act it was held as follows (at pages 226 and 227):

"By reason of the said explanation transfer of the right to use any goods shall be deemed to have taken place in the State of Maharashtra, irrespective of the place where the agreement for such transfer of the right to use took place, if the goods are in the State of Maharashtra at the time of their use. In other words, the situs or the location of the goods at the time of their use has been chosen as the basis of taxability under the Act. Thus, in view of the amended explanation to Section 2(10) of the impugned Act, the place where an agreement is made for transfer of the right to use goods is irrelevant and under the impugned Act, the State of Maharashtra has assumed power to levy tax on such transfer of the right to use goods which are located in the State of Maharashtra at the time of their use. In our view, the said provision contained in the explanation to Section 2(10) does not result in bringing inter-State sales or sales taking place outside the State of Maharashtra within the scope of the impugned Act. The reported decisions upon which the learned counsel had relied were rendered in the context of sale transactions which then only meant transfer of property in goods. We have already pointed out that after Clause (29-A) was inserted in Article 1366, tax on sale or purchase of goods included, inter alia, tax on transfer of the right to use for any purpose goods for cash, deferred payment or other valuation consideration. Therefore, the validity of a tax on such transfer of right to use ought not to be tested by applying these reported decisions regarding the meaning of sale. It would not be also appropriate to apply the tests applicable for deciding when property in goods passes in case of transfers of the right to use goods for any purpose. The legal concepts of transfer of the right to use goods are quite different."

No doubt an attempt was made by Mr. Srinivasan that this decision may apply to Sec. 5C but not to Sec. 5B. But, we are of the opinion that the ratio of that judgment would squarely apply because at pages 230 and 231 it is stated as follows:

"Only when the said goods are transferred by the petitioners for use by the lessees, the transfer becomes taxable. In other words, the impugned Act levies tax only when the lessee is put in possession for using the goods. According to the claim made by the petitioners themselves, therefore, the movement, if any, of goods pursuant to the orders placed by the 1st petitioner upon the manufacturers and suppliers precedes the transfer of the right to use in favour of the lessee. The impugned Act levies tax upon transfer of the right to use goods which are within Maharashtra at the time of their use."

Accordingly, should the goods involved in the execution of the works contract be within the State of Karnataka at the time of transfer the value of such goods would become taxable. Certainly should the declared goods go in as declared goods, the limitations contained in the other Acts would apply, but not if they change their character.

When Sec. 5B of the KST Act opens with a non-obstante clause, the intention of the Legislature is clear that the sales as understood generally are not to be tagged On to these deemed sales. It also requires to be noted here that the language used here is the same as in Art. 366(29-A), sub-clause (b). If, therefore, with reference to goods that are available within the State of Karnataka in a works contract, the State were to proceed to tax in exercise of its competence under Entry 54-A of List-II, we are unable to Say as to how it could be held violative of either the Constitution or the Central Sales Tax Act.

We are equally unable to accept the argument that unless the Parliament makes the law under Art. 286 of the Constitution, the power to tax cannot arise. Art. 286 only lays down certain restrictions. As to what those restrictions are, have already been noted. To our mind it is clear that there is no infringement of any one of those restrictions. If, therefore, Sec. 5B of the Karnataka Sales Tax Act is an independent provision with regard to taxing the value of the goods involved in works contract, we cannot accept this argument.

We are also of the view that there is no scope for striking down Explanation 3(c) to Sec. 2(t) of the KST Act. The said clause clearly states that if the goods are within the State at the time of transfer it would be taxable. It has already been noted that the ratio of the decision in 75 STC 217, though with reference to the user of the goods, would apply to the works contract as well. In such a case, therefore, we see no scope for an argument of this character.

For the same reasons, the argument of Mr. Vijayan that in the absence of situs of sale being demarcated in Art. 286(2) or 269(3) of the Constitution the State law is premature, does not appear to us to be tenable.

In 76 STC 72 it was held that the mere despatch of goods by a manufacturer to his own branches outside the State does not amount to sale or disposal of goods as such; the consignment or despatch of goods is neither a sale nor a purchase. In so far as Sec. 9(1)(b) of the Haryana General Sales Tax Act, 1973 provides for taxable event which is closely related to the despatch, it cannot be held to be a tax on sale or purchase. But the position here is different. In finding out the true nature of the goods under that Act it was found that the section itself does not provide for the imposition of tax on the transaction of purchase of taxable goods, and when further the said taxable goods are used up and turned into independent goods losing their original identity and thereafter when the manufactured goods are despatched outside the State of Haryana, only then tax is levied and liability to pay tax is created. In contra-distinction to this, under Sec. 5B read with Sec. 2(t), Explanation 3(c) of the KST Act, if the goods involved in the execution of the works contract are within the State at the time of such transfer, the State could levy the tax. Therefore, the levy has direct connection with the transaction of transfer of goods involved in the execution of works contract. Hence the decision in 76 STC 72 has no application to the facts of this case.

It is also incorrect to contend that Sec. 5B proposes to tax the conglomerate. On the contrary it merely seeks to tax the value of the property in goods, either as goods or in some other form, involved in the execution of works contract mentioned in column 2 of 6th Schedule. If this test could be adopted for purposes of local taxation, it is not necessary that Sec. 4 of the CST Act must be amended for the working of Explanation 3(c) of Sec. 2(t) of KST Act. The contention of Mr. Venugopal is that Sec. 5B is void in so far as it refers to 6th Schedule because that schedule refers to the nature of works done by the contractor and not the goods. In other words, according to him, the same item of goods used in the works contract is taxed differently; the end user is irrelevant. This argument ignores the power of the Legislature to treat the works contract alone as a separate entity and on that basis with regard to the value of the property involved in the execution of works contract to levy the tax depending upon the nature of the works contract. The petitioners cannot compare this with an ordinary sale and contend that the end user is irrelevant. What is taxed is only the value of the goods involved in the works contract which has resulted in the end product.

Only when we find any portion of the section is opposed to the Constitutional provision or the Central Sales Tax Act, that part of the section becoming ultra vires, the doctrine of severability can be pressed into service. But in this case we see no scope for application of the doctrine and consequently AIR 1957 SC 628 will have no application in the instant case.

We are also unable to accept the argument that though in Clauses (2) and (3) of Art. 286 of the Constitution the word ''may'' is used it must be construed as ''shall''. We have already set down the scope of this Article. S. 5B does not in any way infringe the Article.

Accordingly we hold that Sec. 5B of the KST Act is valid. Likewise, Explanation 3(c) to Sec. 2(t) does not violate either Art. 286 or any other Constitutional Provision, nor again is there any repugnancy between the provisions of the Central Sales Tax Act and these sections of the KST Act.

14. Now we come to the Karnataka Sales Tax Rules. Part-II of the Rules deal with turnover and assessment, Rule 6 occurring in that part speaks of determination of total and taxable turnover. While so determining, concerning the works contract, sub-rule (4) states that in determining the taxable turnover the amounts specified in Clauses (a) to (p) shall subject to the conditions specified therein be deducted from the total turnover as determined under Clauses (a) to (e) of sub-rule (1). Clause (m) of sub-rule (4) reads as follows:

"(m) in the case of works contracts specified in serial numbers 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 17 of the Sixth Schedule;

(i) all amounts for which any goods specified in the said serial numbers and falling under Second Schedule are purchased from registered dealers liable to pay tax under the Act, (ii) all amount actually expended towards ''labour charges'' for erection, installation, fixing, fitting out, or commissioning of the goods specified in the said serial numbers, (iii) all amounts paid to sub-contractors as the consideration for execution or works contract whether wholly or partly:

Provided that, no such deduction shall be allowed unless the dealer claiming deduction produces proof that the sub-contractor is a registered dealer liable to tax under the Act and that the turnover of such amounts is included in the monthly statement or return of turnover, as the case may be, filed by such sub-contractor."

The complaint before us is that while the second sub-clause of Clause (m) would take note of actual amounts expended towards labour charges, in Clause (n) sub-clauses (iv) and (v) a different treatment is accorded. We will now quote Clause (n) sub-clauses (iv) and (v):

"(n) in the case of works contracts specified in serial numbers 6, 13, 14, 15, 16 and 18 of the Six Schedule;

*** *** ***

(iv) such amounts towards ''labour charges and other like charges'' not involving any transfer of property in goods actually incurred in connection with the execution of works contract, or (v) such amounts calculated at the rate prescribed in column (3) of the Table below, if they are actually incurred towards ''labour charges'' and other like charges and are not ascertainable from the books of accounts maintained and produced by a dealer before the assessing authority.

TABLE

Sl. No. Type of contract Labour or other charges as a percentage of the value of the contract.

1 2 3

1. Civil works like construction of buildings, bridges, roads etc. Thirty percent

2. Construction of railway coaches on under carriages supplied by Railways. Thirty percent

3. Ship and boat building including construction of barges, ferries, tugs, trawlers and dreagers. Twenty percent

4. Sanitary fittings for plumbing for drainage etc. Fifteen percent

5. Painting and polishing Twenty percent

6. Construction of bodies of motor vehicle and construction of trucks Twenty percent

Provided that where the turnover of a dealer claiming deduction under Clauses

(m) and (n) in any year is not sufficient to cover the deduction, it shall be allowed to the extent of the turnover of the dealer in that year and the balance shall be carried forward to the year following next and so on."

A careful reading of the above rule shows that in cases where the actual expenditure is incurred in the case of works contract specified under Clause (m) the deduction could be claimed. In the case of other contracts, as per Clause (n), the labour charges and the other like charges actually incurred, could be deducted then again if they are not ascertainable from the books of account. This would depend upon the nature of contract and also how the accounts are maintained, that too for the purposes of deduction. Those are details to be established before the taxing authority and it cannot be argued in an abstract way. Therefore, leaving open that remedy in that his aspect could be decided in individual cases appending upon the nature of the contract and the method of keeping accounts we hold that Rule-6 is not ultra vires.

It is the contention of Mr. Srinivasan that a rule similar to sub-clauses (iv) and (v) of Clause (n) of Rule 6(4), under Bihar Sales Tax Act came to be struck down in 75 STC 132. We are unable to agree. That rule (Rule 13-A of Bihar Rules) stated that while providing for deduction in case of works contract, on account of labour charges depending upon different types of contract a percentage would be deducted. Therefore it was held in paragraph-9 as follows:

"Thus it will be noticed that the rule provides that for different types of works in works contract, different percentage of labour shall be presumed to have been used and amount spent to that extent shall be deducted from the gross turnover. Tax is payable on labour charges under this rule. Under this rule even if the contractor might have spent more on labour charges than the prescribed percentage stated in the rule the contractor shall not be entitled to claim deduction beyond what has been provided. In other words, tax is levied on labour charge. Neither sale nor purchase of any goods is involved when a contractor spends on account of labour. ''Labour'' cannot be said to be a goods even within the definition of ''goods'' in the Act. From the gross turnover, the total amount spent by the contractor as labour charges in execution of the works contract shall have to be excluded. Rule 13-A cannot be sustained and must be held to be ultra vires."

But, here it is not so. On the contrary the actual charges incurred is deducted and what is sought to be taxed is only the value of the goods in the execution of works contract after such deduction as is permitted under sub-clauses (iv) and (v) of Clause (n). Therefore, Rule-6 is intra vires.

15. The next question is whether the prescription of different rates of taxes is violative of Art. 14 of the Constitution. The arguments of the learned counsel for the petitioners proceed on a wrong hypothesis as though different rates have been prescribed. The rates under Second Schedule and Sixth Schedule are same, except with regard to item No. 6 of the Second Schedule Part-P where for pipes,

tubes and fittings of iron not falling under the Fourth Schedule cement and asbestos the rate of taxation is 8% while for the corresponding item No. 20 of the Sixth Schedule the rate of taxation is 10%. To the extent of this discrimination it may be bad. As a matter of fact, Mr. Achar, learned Government Advocate, does not seriously dispute this discrimination. Therefore, that alone has to be struck down. But, as a general principle, can it be said the prescription of different rates is bad? We do not think so, because it is one of the well settled principle that the Legislature has freedom to choose the object of taxation. In Twyford Tea Co. v. Kerala State (AIR 1970 SC 1133-paragraphs 15 and 16), the Supreme Court has observed thus:

"15. We may now state the principles on which the present case must be decided. These principles have been stated earlier but are often ignored when the question of the application of Article 14 arises. One principle on which our Courts (as indeed the Supreme Court in the United States) have always acted, is nowhere better stated than by Willis in his "Constitutional Law" page 587. This is how he put it.

''A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably .....The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation.''

The principle was approved by this Court in East India Tobacco Co. v. State of Andhra Pradesh, (1963) 1 SCR 404 at p. 410-AIR 1962 SC 1733 at p. 1735. Applying it, the Court observed:

''If a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation.''

This indicates a wide range of selection and freedom in appraisal not only in the object of taxation and the manner of taxation but also in the determination of the rate or rates applicable. If production must always be taken into account there will have to be a settlement for every year and the tax would become a kind of income-tax.

16. The next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. This was also observed in the same case of this Court at page 411 (of SCR)=(at p. 1735 of AIR) approving the dictum of the Supreme Court of the United States in Madden v. Kentucky, (1940). 309 US 83-84 Law ED 590:

''In taxation even more than in other fields, Legislatures possess the great freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.''

As Rottaschaefer said in his Constitutional Law at p. 668:

''A statute providing for the assessment of one type of intangible at its actual value while other intangibles are assessed at their face value does not deny equal protection even when both are subject to the same rate of tax. The decisions of the Supreme Court in this field have permitted a State Legislature to exercise ''an extremely wide discretion'' in classifying property for tax purposes ''so long as it refrained from clear and hostile discrimination against particular person or classes.''

The burden is on a person complaining of discrimination. The burden is proving not possible ''inequality'' but hostile ''unequal'' treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be ''hostilely or unequally'' treated. A uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of tax is, the profits it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat Taxi give different out turns in terms of money and mileage. Cinemas pay the same show fee. We do not take a doctrinnaire view of equality. The Legislature has obviously thought of equalising the tax through a method which is inherent in the tax scheme. Nothing has been said to show that there is inequality much less ''hostile treatment''. All that is said is that the State must demonstrate equality. That is not the approach. At this rate nothing can ever be proved to be equal to another."

This fully supports the stand of the State that there is a wide discretion to pick and choose the objects for purposes of taxation. There cannot be any uniformity about the same. Therefore, except the discrimination pointed out with regard to item No. 6 of the Second Schedule and item No. 20 of the Sixth Schedule, the rates of taxation with regard to other items of Schedules 2 and 6 are to be upheld.

16. One more question posed before us is as to from what date our judgment is to be effective? The complaint of the petitioners is that they had not charged their customers the sales tax and they are obliged to pay from their pocket. On this aspect of the matter, when we put it to the learned Government Advocate, a memo was filed with regard to a composition for the years 1986-87 to 1989-90 (i.e. upto 31-3-1990). We passed a separate order on 19th July, 1990 in respect of the dealers who had agreed for the composition, and other dealers in terms of the memo. This means that our judgment would be effective from 1-4-1990 onwards.

17. Subject to the above, we dismiss all these writ petitions with costs. Counsel''s fee Rs. 250/- in each petition.

