
(2008) 02 AHC CK 0034
In the Allahabad High Court

Oriental Bank of Commerce	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15
Constitution of India, 1950 — Article 266, 366
Sales of Goods Act, 1930 — Section 2

Citation : (2008) 12 STR 423 : (2009) 20 STT 529 : (2010) 33 VST 117

Hon'ble Judges : Sushil Harkauli, J;Sudhir Agarwal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—In all these writ petitions, the common question involved is whether the petitioners-Banks are liable to pay trade tax under U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Act") for renting Lockers to their customers. The incidental question is whether Lockers are "goods" and right to use Locker can be said to be "transfer of right to use any goods" attracting liability of tax under the Act.

2. In some of these cases, assessment orders have been passed, and in some cases, notices for assessment have been issued. Since, the principle question involved in all these writ petitions is common, therefore, as requested and agreed by learned Counsel for parties, all these writ petitions have been heard together at this stage under the Rules of the Court and are being decided finally by this common judgment. The writ petition No. 840 of 2005, for the purpose of referring to the documents and pleadings is taken as the leading case.

3. The petitioner, M/S Oriental Bank of Commerce after execution of agreements with its customers, provide facility of using Lockers installed in the Bank on rent to the said customers. It is not disputed that Lockers are installed inside the strong room of the bank, permanently attached to the earth and inseverable by the customers. It is said that the relationship of the Bank and the customers is

that of landlord and tenant and not that of bailor and bailee. The Lockers can be operated with two keys, one key remains in possession of the customer and another in the possession of the bank and can be operated when both the keys are simultaneously inserted in the key hole of the Locker. Entry in strong room for operating Locker is restricted as per the rules of the Bank. A letter was issued on 11.2.2005 by respondent No. 2 requiring the petitioner to furnish details of the operation of Lockers and rental accrued during the assessment years 1998-99 to 2004-05. The Assistant Commissioner, Trade Tax, Meerut, however, issued a notice dated 21.2.2005 to the petitioner for assessment year 2002-03 to show cause as to why trade tax be not charged on rental accrued to the Bank on the Lockers allotted to different persons as it amounts to "sale" under the extended definition of "sale" being "transfer of right to use the goods". Similar notices were issued on 17.3.2005 u/s 21(2) for the assessment year 1998-99. The petitioner submitted reply dated 19.3.2005 stating that neither the petitioner is a "dealer" nor the Lockers can be said to be "goods" nor facility of use of Locker can be said to be "transfer of right to use goods" and, therefore, the petitioner is not liable to pay any trade tax. Details of operation of Locker etc. were also mentioned therein. However, respondent No. 2 passed an assessment order dated 22.3.2005 for the assessment year 2002-03 holding that the petitioner is liable to pay tax as the right to use Locker by customer on rent amounts to "transfer of right to use goods" and, therefore, is taxable u/s 3-F of the Act. Similar assessment orders or notice proposing assessment have been issued in other cases. Aggrieved, the petitioners have filed these writ petitions challenging the proceedings.

4. All the petitioners are banks providing facility of use of Locker to their customers on rent and basic facts are common. The respondents have filed counter affidavit raising a preliminary objection that against the assessment order, the petitioners have an alternative remedy of filing Appeal u/s 9 of the Act and, thereafter, Second Appeal u/s 10(2), therefore, the writ petitions are liable to be dismissed on the ground of alternative remedy. On merits, it is said that the Bank is a "dealer" in view of the decision of Apex Court in State of U.P. and Anr. v. Union of India and Anr. 2003 (22) NTN 175 renting out Lockers to their customers is taxable u/s 3-F of the Act and, therefore, the assessments made or proposed against the petitioners are absolutely valid and in accordance with law. Reliance is also placed on the following authorities:

1. State Bank of India and Others Vs. State of Andhra Pradesh,
2. 20th Century Finance Corporation Ltd. and Anr. v. State of Maharashtra 2000 16 NTN 425
3. Bank of India v. Commercial Tax Officer Central Section Calcutta 1987 (67) STC 199.
4. Sanda Tent House Association v. State of U.P. and Ors. 2004 UPTC 133
5. A supplementary counter affidavit has also been filed wherein it is said that

the petitioners-Banks are engaged in business of transfer of right to use bank Lockers and other commercial activities and, thus, they are "dealer" within the meaning of Section 2(c)(vii) of the Act, the transaction of renting out Lockers amounts to "sale" within the meaning of Section 2(h)(iv) and activities of the petitioner is "business" within the meaning of Section 2(aa) of the Act. It is also said that the Bank Lockers are "goods" within the meaning of Section 2(d) of the Act. Reference is also made to the Article 366(29-A)(d) of the Constitution of India, which defines "tax on sale or purchases of goods" and it is said that the present dispute is covered by the said definition. It is also averred that Bank Lockers are made of iron and are really in the nature of shelf in a big cabinet, each shelf having its own door. However, for security and secrecy during the course of operation of the Bank Lockers by the customers, the Bank keep the cabinet in a strong room and entry and exit thereto is also restricted, but that would not detract from the fact that it is a movable property purchased by the Bank for the purpose of carrying out business of letting it on hire to its customers, hence, it is taxable under the Act.

6. We propose to deal first with the preliminary objection raised by the respondents that the petitioners have a statutory alternative remedy of appeal and, therefore, the writ petitions are liable to be dismissed on the ground of availability of alternative remedy. From the pleadings of the parties, it is evident that the pure and simple question of law involved in these cases is whether renting out a Locker amounts to "transfer of right to use goods" and is taxable under the Act. If it is not taxable under the Act, the entire proceedings are wholly without jurisdiction. One of the exceptions to the principle of exhaustion of alternative remedy is where the order impugned is wholly without jurisdiction. Since, there are no disputed questions of fact involved in this case and pure legal question has been raised which if decided in favour of the petitioners, the entire proceedings and the impugned orders would be wholly without jurisdiction, we are of the view that the matter deserves to be considered on merits and it is not a case where the petitioners should be non suited on the ground of alternative remedy.

7. Now we proceed to consider the matter on merits. The term "goods" and "tax on the sale or purchase of goods" are defined under Article 366 (12) & (29-A) of the Constitution. The relevant provisions thereof are reproduced as under:

366. Definitions.-...

(12) "goods" includes all materials, commodities, and articles;

(29-A) "tax on the sale or purchase of goods" includes-

(a) ...

(b) ...

(c) ...

(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) ...

(f) ...

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

Section 2 (aa) of the Act defines "business" and the relevant part, which been pressed in service in the present case, reads as under:

2. Definitions.-...

(aa) "business", in relations to business of buying or selling goods, includes-

(i) ...

(ii) the execution of any works contract or the transfer of the right to use any goods for any purpose (whether or not for a specified period);...

Similarly, the term "dealer" is defined u/s 2(c) of the Act and according to the respondents, the present transaction is covered by provisions of Section 2(C)(vii) (viii), which are reproduced as under:

2. (c) "Dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-

(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) every person who carries on business of 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;

The "goods" are defined u/s 2(d) of the Act which reads as under:

2. (d) "Goods" means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things attached to, or fastened to anything permanently attached to the earth which, under the contract of sale, are agreed to be severed but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department;

Since, the respondents have also placed reliance on the definition of "works

contract" as contained in Section 2(m), therefore, the same is also reproduced as under:

2. (m) "Works contract" includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;

The charging provision attracting tax liability in the present case is Section 3-F and relevant part thereof reads as under:

3-F. tax on the right to use any goods or goods involved in the execution of works contract.-(1) Notwithstanding anything contained in Section 3-A or Section 3-AAA or Section 3-D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of-

(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; or

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

at such rate not exceeding twenty percent as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

8. Thus, from a combined reading of all the aforesaid provisions, the very first indicia to attract the Act is that there has to be "goods" in existence with which a person is carrying on the "business" of buying, selling, supplying or distributing directly or indirectly, for cash or deferred payment or for commission, remuneration etc. Therefore, the first question would be whether Lockers of the Bank can be said to satisfy the definition of "goods" under the Act. The reply of the respondents is that Locker is nothing but a vault fixed in a big cabinet, which is movable item when it is purchased by the Bank, though it is affixed for the purpose of security and safety, but that would not detract from the fact that it is a movable property which the contention of the petitioners is otherwise.

9. We have to examine the correctness of the rival submissions to find out whether a Locker can be said to be "goods" i.e. a "movable property" in the light of the provisions in the Constitution, Act and the admitted facts borne out from the pleadings. It would be appropriate, first to consider as to what is taxable under the Act. Entry 54 List II Schedule-VII of the Constitution confers legislative competence upon the State legislature to make law on taxes on the sale or purchase of "goods" other than newspapers, subject to the provisions of entry 92-A of List I. Prior to 46th Amendment of the Constitution, whereby Clause 29-A was inserted in Article 366, the law as laid down by the Apex Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, was holding field as to

the meaning of the words sale of "goods". Interpreting Entry 54 in the light of Entry 48 of List II, Schedule VII to the Government of India Act, 1935, the Apex Court held that the old and known concept of sale of goods would apply to the entry in the legislative list which must have three essential components to constitute a transaction of sale of goods, namely, (i) an agreement to transfer title, (ii) consideration, and (iii) actual transfer of title in the goods. It was held that in the absence of any one of these elements, there would be no sale. Considering whether a contract under which a contractor agreed to set up a building would be a contract for sale, the Court held otherwise and said that in law there cannot be an agreement relating to one kind of property and a sale as regards another. The parties could have provided for two independent agreements, one relating to the labour and work involved in the execution of the work and erection of the building and the second relating to the sale of the material used in the building in which case the latter would be an agreement to sell and the supply of materials thereunder. However, where there is a composite contract, it was not classifiable as a sale. The Court held that the words "sale of goods" have to be interpreted in their legal sense. That sense can only be what it had in law relating to "sale of goods". Consequently, the word "sale" was construed and given the same meaning which it had in the Sale of Goods Act, 1930. This view was followed with respect to "meals" served at hotels in *The State of Punjab Vs. Associated Hotels of India Ltd.*,

10. Considering, that the aforesaid position had resulted in evasion of tax in various ways, the matter was considered by the Law Commission, who submitted its report in 1974 and, thereafter, Article 366 was amended inserting Clause 29-A, i.e., the definition of "sale or purchase of goods". The effect of the said amendment is that certain transactions, which were not sale or purchase of goods earlier are now included therein. By legal fiction, the composite contracts like work contracts, hire purchase contracts and catering contracts are deemed to be "sale or purchase of goods" and subjected to sale tax under the relevant State legislation under Entry 54 List II Schedule VII. This development has been noticed by the Apex Court in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, , but the Apex Court observed that though to some extent the principle enunciated in *Gannon Dunkerley* stood modified by 46th Amendment yet it has survived in two respects. In para 43 of the judgment the Court has said that with respect to definition of "sale", for the purpose of Constitution in general and for the purpose of Entry 54 of List II in particular, except to the extent that the clause in Article 366(29-A) operate otherwise, the position continue to be the same. Even in separate categories of "deemed sale", the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations.

11. It is said that 46th Amendment has not given a licence to assume that a transaction is a sale and then to look around for what could be the "goods". Words "goods" has not been altered by the 46th Amendment and that ingredient of a sale continues to have the same definition. The second aspect, in which

Gannon Dunkerley (*supra*) has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as "sales" within the meaning of Sales of Good Act, 1930 for the purpose of levy of sales tax. The Court has further explained some of the composite transactions, which would not be covered by Clause 29-A of Article 366 and in para-44 of the judgment in Bharat Sanchar Nigam Ltd. (*supra*), the Apex Court said:

Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in Clauses (b) and (g) of Clause (29A) of Article 366, there is no other service which has been permitted to be so split. For example the clauses of Article 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

12. Recently, in respect to an Advertising Agency, the applicability of Karnataka Value Added Tax Act, 2003 in view of the fact that it was already subject to payment of service tax under Finance Tax Act, 1994 came up for consideration in Imagic Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others, Relying on Tata Consultancy (*supra*) and Bharat Sanchar Nigam Ltd. (*supra*), the Apex Court held that where it is the question of changeability of a service contract, the Court must have in mind a distinction between an indivisible contract and a composite contract. It in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and Clause 29A had to be inserted in Article 366, must be kept in mind. It further held that a legal fiction is created by the said provision and such a legal fiction should be applied only to the extent for which it was enacted. Though it must be given its full effect, but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

13. Since the above law has been enunciated after considering the amendment in the Constitution as well as in the Act, and the effect thereof, hence, we have to apply the same to the facts and circumstances of the present case to find out the answer to the question which has been raised in this bunch of writ petitions. The first indicia for attracting liability of tax under the Act is that there must be a

"goods" in respect where to a transaction of sale or purchase has taken place. The "goods" as observed earlier has been defined in the Constitution under Article 366(1), which is an inclusive definition providing that it includes all materials, commodities and articles. u/s 2(7) of the Sale of Goods Act, 1930, the word "goods" has been defined as under:

2. (7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

14. Similar definition of "goods" has been incorporated under the Act vide Section 2(d), though with minor variations. An incorporeal right has been held to be goods in *H. Anraj Vs. Government of Tamil Nadu*. It was held that a goods may be a tangible or intangible property in *Tata Consultancy Services Vs. State of Andhra Pradesh*, where considering validity of sales tax on computer software, the Apex Court in para 81 of the judgment held that the "goods" may be tangible or intangible property provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. The aforesaid view has been followed by the Apex Court for the purpose of judging what are "goods" for attracting tax liability under the Act in *Bharat Sanchar Nigam Ltd. (supra)*. Therefore, in order to constitute "goods" attracting tax liability under the Act, it is no doubt true that only a movable property would constitute goods and not an immovable property. The learned Counsel for the petitioners have contended that the Lockers attached in a Safe Deposit Vault of the Bank embedded with earth is an immovable property and not a kind of movable property attracting liability of tax under the Act. The term "movable property" has not been defined in the Act. The General Clauses Act, 1987, however, defined "immovable property" and "movable property" vide Section 3(26) and 3(36), which read as under:

3. definitions.-...

(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

(36) "movable property" shall mean property of every description, except immovable property;

The term "immovable property" is also defined u/s 3 of the Transfer of Property Act, 1882, which reads as under:

"immovable property" does not include standing timber, growing crops or grass:

15. The definition of "goods" under the Act referring to every kind of movable property and including growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale takes away some items which would otherwise be immovable

property under the General Clauses Act, 1897 inasmuch certain items which are attached to the earth or permanently fastened to anything permanently attached to the earth, but if are agreed to be severed before sale or under the Contract of sale are treated to be a kind of "movable property" constituting "goods" under the Act, though under the General Clauses Act, it may not be. To that extent, the definition of "goods" under the Act is wider but in all other respects, there is not much difference inasmuch if any other thing, if permanently attached to earth or fastened to anything attached to earth, which is not agreed to be severed before sale or under the contract of sale, that would continue to be an immovable property and, therefore, outside the purview of the term "goods" under the Act. It is not the case of the respondents that the Bank Locker, which is hired by a customer is intended to be severed from earth for user or at the time of user or at any other point of time. On the contrary, the Locker continue to be a part and parcel of a thing attached and embedded with earth and, therefore, in the absence of any material otherwise to show that it has to be severed before sale or under the contract of sale, it cannot be said that it is a movable property included within the definition of "goods" under the Act. We are, therefore, inclined to hold that in the absence of any otherwise material or pleading or record, the Locker, which is part of Safe Deposit Vault embedded to earth in the strong room of the Bank is an immovable property inasmuch it is to be used by the customers in the fixed condition and not by severing it from earth or the things attached to earth. This fact that at the time of purchase of Safe Deposit Vault of which the Lockers were a part, it was a movable property and brought from one place to another would make no difference inasmuch it is not the Safe Deposit Vault purchased by the Bank from its manufacturer, which is hired by the customer, but it is a Locker forming part of a Safe Deposit Vault, which is embedded with earth in the strong room of the Bank, which is hired by the customer for keeping his valuables therein in safe custody. This reason itself is sufficient to keep the Locker of the Bank outside the purview of the Act and non taxable. The view we have taken herein that the Lockers of the Bank are not a kind of movable property, which may constitute "goods" under the Act finds support from the meaning assigned to the "goods" in Tata Consultancy Services (supra) and Bharat Sanchar Nigam Ltd. (supra).

16. The issue can also be examined from another angle. The transfer of right to use any goods for any purpose must be for cash, deferred payment or other valuable consideration. Can it be said that the rent charged by the Bank for entering into an agreement with the customers assigning right to use Locker of the Bank amounts to such consideration. This would require us to examine as to what is the principle object of the customer in hiring the Locker of the Bank. In other words, we have to examine what actually is the contract between the Bank and its customers with respect to user of Bank Lockers and the kind of transaction involved therein. In para 22 of the writ petition, it is averred that the Bank is not selling Lockers to its customers for rent. Locker is a part of big vault attached and embedded to earth. The whole extent of the vault is embedded to

the strong room which has been specifically designed to ensure proper security and safety to the valuables of its customers. In order to provide security, the Bank has to construct strong room with prescribed specifications necessary for attaining highest security and safety and it is attached to earth. The specifications necessary for security are as per the norms and standards of global standard security. The Bank further installs security alarm surveillance device and ensure constant electric supply for the working of security alarm surveillance device. A regular security guard is employed for round the clock for guarding of Lockers. The customers have limited right to access during specific hours and specific days. The Locker is operable with the use of a key which is in possession of the customer and a master key possessed by the Bank without which, the Locker cannot be opened and operated by the customer. The Bank has every right to stop operation of the Lockers in certain cases. The agreement is said to be a lease-deed wherein the customer is in the capacity of lessee and the Bank in the capacity of lessor. A copy of the draft agreement is on record as Annexure 7 to the writ petition. It is admitted by all the parties concerned that the agreements executed by all the Banks for renting out Lockers are in similar terms. It provides that the Bank reserves right of having the working of the Safe Deposit Vault and of making changes therein without any previous notice or information and the Lockers can be operated by the customer or his authorized agent during such working times as are prescribed by the Regulations or the Bank. Clause 5 of the lease deed reserves rights to the Bank of closing Safe Deposit Vault under extra-ordinary circumstances such as civil commotion, riots and other similar circumstances for such time as may be necessary. Clause 20 provides as to what shall not be kept in the Locker and reads as under:

20. The lessee shall not assign or subject the locker or any part thereof, or use or permit it to be used for deposit of any liquid or any thing of explosive dangerous or offensive nature or which may become a nuisance to the Bank or any of its tenants or customers or for any other purpose than for deposit of valuables or other property and shall on demand permit the bank to inspect the contents of the safe for the purpose of ascertaining if the condition is being complied with.

17. Clause 22 provides that in case of receipt of an order from a competent Court, the bank shall have right to refuse access to the customer to the Locker. Clause 23 clearly reads that the relationship of the Bank and the lessee shall be that of a landlord and a tenant and not that of bailor and bailee. The Bank has no responsibility or liability of any kind whatsoever in respect of the contents of the Locker and shall not be responsible for any loss or damage etc.

18. The facts as above are not disputed in the counter affidavit. From the pleadings of the parties as well as arguments advanced on both the sides, three things are evident. Firstly, that Lockers are part of a Safe Deposit Vault embedded to earth. Secondly, that the public go to Bank for hiring Lockers not because they lack a Locker at their residence, but because of the safety and

security, which is maintained by the Bank and which is not available at the individual residence. Judicial cognizance can be taken of the fact that normally steel almirah is fitted with a Safe Deposit Locker of high thickness and couched safety. The class of customers, who go to Bank for depositing their valuables in Lockers must have the capacity to possess such almirahs in their house and even otherwise can afford to purchase a steel almirah fitted with such Safe Deposit Locker, but instead of making this arrangement at their residence, people prefer to go to a Bank to hire a Locker thereat in order to keep their valuables in such Lockers. One would not like to keep his valuables at a place which is not in his control or possession instead of keeping it in his house under constant watch unless the reasons for such are so compelling. The foremost compelling reason which can easily be conceived in this case is safety and security available to the Bank Lockers. The Safe Deposit Lockers of Banks are located in impregnable strong rooms and a stranger cannot get access into these strong rooms of the Bank. The high security alarms installed by the Bank provides a feeling of safety to the customers who prefer to have a Locker in the Bank for keeping his valuable therein instead of a Locker at his residence. Even several Government Departments hire Bank Lockers to keep their valuables/important documents due to high degree of safety available therein. Therefore, the rental paid by such person to the Bank cannot be said to be mere rental charges for hiring the Locker but it includes comprehensively the cost of maintaining high safety standards and arrangements at the Bank. In other words, it can be said that a person pay rent for the locker not only for right to use the Locker but also of a host of other services closely associated with maintenance of Lockers by the Bank. In fact the use of Lockers is predominant by other services available at the Bank. In other words, the Bank collect higher charges which represents a consolidated charge levied by the Bank for variety of services and facilities, of which, use of Locker forms a small part.

19. The various services and items are inseperable due to the nature of such services and purpose involved in the transaction. The third aspect of the matter is that the customer is not given exclusive control of the Locker inasmuch the Bank retains control over the Locker all through and a double locking system ensures that the locker cannot be opened by a customer except with the aid and assistance of the Bank. The agreement clearly provides that the relationship is clearly of lessor and lessee though in fact, it is slightly a bid complex in nature inasmuch the Locker can be used by the customer for keeping his valuables but he can not operate the same according to his free will as and when he likes and is bound to follow the regulations and conditions imposed by the Bank in this regard. Neither the strong room nor the steel cabinet in which the Lockers are fitted is rent out to any particular person. Even the Locker cannot be opened by the customer on his own unless it is first unlocked by the Bank with master key kept by it. The arrangement, therefore, made by the customer with the Bank with respect to Locker cannot be equated with that of hiring of an Almirah or drawer of an Almirah, and, rental for the Locker cannot be said to be

consideration for only use of storage space in the cabinet. The dominant aspect involved in the transaction is the security and safety of valuable which is kept by the customers in the Locker of the Bank instead of keeping it at their residence. These services are admittedly not taxable under the Act. The services rendered by the Bank and the charges levied therefore from its customer would not amount to valuable consideration in order to cover transaction in question within the purview of Section 2(c) of the Act read with Article 266(29-A) of the Constitution.

20. There is another aspect of the matter. As we have already discussed, rental charges includes various other aspects which are in the nature of service rendered by the Bank to its customers. The State is not entitled to entrench upon the Union List and "tax services" by including the cost of such service in the value of the goods. Even if we assume that the transaction answers the description of "goods", it is not disputed that Banks are in List I and it is the Parliament, which is competent to make law with respect to banking services. Where the charges are inseparable, the value of goods involved in the execution of whole transaction cannot be assessed to sale tax for the reason that the charges pertaining to services rendered by the Bank are not the taxable under the Act. In *Larsen & Toubro v. Union of India* 1993 (1) SCC 365, in para-47 of the judgment the Court held:

The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods;

21. That being so, the rent charged by the Bank for user of the Lockers also cannot be taxed under the Act and that is another reason vitiating the impugned orders of assessment and notices issued by the respondents to the Banks attracting liability of tax upon the petitioners under the Act. Moreover, the entire transaction of hiring of a Locker by a customer or letting out a Locker by the Bank to its customers involves service with primary object of safety and security of the valuables of the customers kept in the Lockers. It is an indivisible contract and not a composite contract. Even in those cases, where sales tax would have been chargeable on that element of a contract which is part of a composite contract but is distinct, but in case of an indivisible contract, the amount cannot be separated to attract the liability of sales tax at all. In *Imagic Creative Pvt. Ltd.* (supra), the Court with reference to payment of service tax as well as sales tax observed "Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of

the entire contract; irrespective of the element of service provided.

22. Applying the aforesaid dictum also in the nature of the transaction involved in the present case, we are clearly of the view that the rent paid by the customers to Bank for hiring a Locker amounts to the charges paid for an indivisible contract and, therefore, is not at all taxable under the Act.

23. The learned standing counsel at this stage sought to contend that letting out of a Locker by the Bank to its customer amounts to "works contract" u/s 2 (m) but on being required to show as to how it would amount to works contract, he could not explain at all as to in what manner, the said transaction can be termed as "works contract" as defined u/s 2(m) of the Act. The "works contract" u/s 2 (m) is an exclusive definition and covers an agreement for carrying out for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property. The learned Standing Counsel could not at all show us as to in what category, namely manufacture, processing, erection, fabrication etc. letting out of Locker by the Bank to its customer would fall so as to be covered by the definition of "works contract" u/s 2 (m) of the Act. Therefore, we have no hesitation in rejecting the said contention.

24. Now we proceed to consider whether right to use Locker of a Bank can be said to be "transfer of right to use goods". In support of the submission that it constitute "transfer of right to use goods", reliance is placed by the respondents on the Apex Court decision in State of U.P. v. Union of India (supra) and 20th Century Finance Corporation Ltd. (supra). However, we find that the Apex Court decision in State of U.P. v. Union of India (supra) rendered by the two Hon'ble Judges of the Apex Court was overruled by a three-Judge Bench of the Apex Court in Bharat Sanchar Nigam Ltd. (supra). Similarly, 20th Century Finance Corporation Ltd. (supra) is cited for the proposition that delivery of possession of goods is not a necessary concomitant for completing a transaction of sale for the purpose of Article 366(29-A)(d), but in BSNL's Case, the Apex Court in para-73 of the judgment has clearly held that the aforesaid decision is not an authority for the said proposition. Therefore, both the aforesaid judgments do not help the respondents at all. On the contrary, the Court said that in order to constitute "goods", it must be capable of being bought and sold and capable of being transmitted, transferred, delivered, stored and possessed. It has held that goods must be available at the time of transfer, must be deliverable and delivered at some stage. It further says that transaction must also show intention to transfer the right to use freely. In State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd., , the contractor was allowed to use machinery for execution of the project and the user of machinery was claimed to be transfer of right to use goods by the sale tax authorities. Negating, the Court said that:

The transaction did not involve transfer of right to use the machinery in favour of contractors...the effective control of the machinery even while the machinery

was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or....

25. The Apex Court in BSNL's Case in para 97 of the judgment has crystalised the following attributes in order to constitute a transaction as "transfer of the right to use the goods", which reads as under:

97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

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

26. Applying the aforesaid to the facts involved and as discussed above, in letting out Bank Lockers to the customers, we are clearly of the view, that there is no transfer of right to use Lockers but only a licence to use and does not answer the requirement of "sale" to attract tax liability under the Act. There is no "sale" element involved in the matter and in effect, it is only a service rendered by the Bank by providing the facility to the customers to keep his valuables in a safe and secured place at the Bank and Locker is only a place specified for such purpose.

27. In two judgments cited on behalf of the petitioners, one is that of a Division Bench judgment of Hon'ble High Court in Bank of India and Ors. (supra) and another of an Hon'ble Single Judge of Calcutta High Court in Bank of India (supra), it has clearly been held that the hiring of Bank Lockers is not taxable under the relevant sales tax statutes of those States. We are in agreement with the ultimate conclusion reached by the Hon'ble Courts, though with slight different reasons. The Act would not apply to the petitioners for including transaction in question within its ambit.

28. In the result, all these writ petitions are allowed. The impugned orders of assessment and notices issued by the taxing authorities with respect to the various years of assessment are hereby quashed and it is declared that the petitioners-Banks are not liable to pay trade tax under the Act on rent charged for hiring of Safe Vault Lockers to its customers. The respondents are restrained

from proceeding ahead for making any assessment against the petitioners with respect to the rent charged by the Bank for user of Lockers from its Customers. There shall be no order as to costs.