

(1997) 08 PAT CK 0030
In the Patna High Court
Case No : C.W.J.C. No. 3648 of 1996 (R)

Rungta Projects Limited and Another	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 21-08-1997

Acts Referred:

Bihar Finance Act, 1981 — Section 17, 17(5), 2, 2(10), 25A
Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5
Constitution (Forty-Sixth Amendment) Act, 1982 — Article 286
Constitution of India, 1950 — Article 366, 366(29A)
Contract Act, 1872 — Section 148
Representation of the People Act, 1951 — Section 160(1)
Sales of Goods Act, 1930 — Section 4
Tripura Sales Tax Act, 1976 — Section 3

Citation : (1997) 2 PLJR 893

Hon'ble Judges : S.K. Chattopadhyaya, J; M.Y. Eqbal, J

Bench : Division Bench

Advocate : S.B. Gadodia and Pradeep Modi, for the Appellant; R.N. Sahay and Indrani Sen Choudhury, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In this writ application the Petitioners have prayed for issuance of appropriate writ declaring that the Petitioners are not liable to pay sales tax for the works executed by them under contract dated 14.10.1993 and 24.11.1994 entered into by and between the Petitioner No. 1 and Damodar Valley Corporation, Respondent No. 4, for removing overburden, namely, earth/loose debris and stone at Bermo Mines in the district of Bokaro with the help of heavy earth moving machinery. The stand taken by the Petitioners is that the contract did not involve hiring of machineries or any sale within the meaning of Section 2(t) of the Bihar Finance Act, 1981 (hereinafter to be referred to as "the Act" for short). A further prayer has been made for quashing the orders dated 30.8.1996 and 2.9.1996 whereby demand for payment of sales tax have been raised by the Respondents, the sales tax authorities.

2. Petitioner No. 1, M/s. Rungta Projects Limited is a Company incorporated under the Indian Companies Act and carries on business of removal or overburden from different mines situated in various parts of the country as a contractor and for the purpose of the said business the Petitioner-company uses its Heavy Earth Moving Machines (in short HEMM), such as excavators, dozers, pay-loaders, dumpers, tippers, drills etc. In 1993 the Petitioner was awarded a contract by Respondent No. 4, Damodar Valley Corporation (hereinafter to be referred to as "the D.V.C for short) for removal of overburden namely earth/loose debris and stone from its Bermo Mines in the district of Bokaro. The said contract was awarded pursuant to a public tender. An agreement to that effect was executed by and between the Petitioners and the D.V.C. on 18.1.1994 and work order was issued on 14th October, 1993. It is stated that upon successful completion of the job awarded under the contract the Respondent-D.V.C. awarded Anr. contract for a further period of 12 months for the same job subject to certain modification as regards the rate. According to the Petitioners, the first contract was given in the year 1993 and the second contract was given in the year 1994 which were for all practical purposes renewal of the first agreement. The Petitioner alleged that under special terms and conditions of the agreement the Petitioners were allotted the work for removal of overburden from Bermo Mines of Respondent No. 4. The total quantity of overburden to be removed by the Petitioners was to be measured in cubic metre and the rate at which the Petitioners was to be paid was to be calculated on the basis of volume of work measured in cubic metre. It was further stipulated in the agreement that the Petitioner was required to remove not less than 70,000 cubic metre per month and there was a penalty clause in the said agreement for shortfall in the removal of targeted quantity of overburden every month. Under the said agreement the Petitioner was required to engage heavy earth moving machinery and whole operational cost of the machines and maintenance were to be borne by the Petitioner-company. The Petitioners' further case is that the company did not give on hire its machines to D.V.C. and there was no question of giving on hire its machines as the work of removing the overburden from mines was to be done by the Petitioner-company and not by the Respondent D.V.C. It is further stated that at no point of time during the execution of both the contracts, the Petitioners transferred the machines either permanently or temporarily for use by the D.V.C. It is stated that notwithstanding this factual position and the fact that the Petitioner-company was not liable to pay sales tax under any of the contracts, the Respondent No. 4 was deducting sales tax at source from the running bills of the Petitioner-company under 1994 contract. The Petitioners objected to the said deduction by writing letters to the Coal Superintendent and Agent of Bermo Collieries of Respondent No. 4 stating, inter alia, that the machine was never hired or leased out to the Respondent under the contract and, therefore, no sales tax was deductible. It is stated that Respondent No. 3 being satisfied with the contention of Petitioner No. 1 and after examining various clauses of the contract issued a certificate on 29.6.1994 certifying that no sales tax was payable by the Petitioner-company and no tax was deductible at source. On the basis of the

said certificate the Respondent-D.V.C. stopped deducting taxes at source from the running bills of the Petitioner-company. However, to the utter surprise the Respondent No. 3 directed the Respondent No. 4 to deduct Rs. 65,00,000/- and odd from the bills of the Petitioner-company and to deposit the same with the treasury. On enquiry, the Petitioners learnt that Respondent No. 3 had taken recourse to Section 27 of the Act which provides special mode of recovery without initiating any assessment proceeding u/s 17 of the Act or under any other provisions of the Act. Aggrieved by the said order the Petitioners moved this Court in CWJC No. 391 of 1996 (R) challenging the demand notice for payment of sales tax and also penalty imposed on it. The Petitioners filed Anr. writ application being CWJC No. 926 of 1996(R) after having learnt that a proceeding u/s 17(5) of the Act had been drawn up against the Petitioners. Both the aforesaid writ applications were disposed of by this Court by judgment and order dated 10.5.1996. This Court, while quashing the order, gave liberty to the Respondent No. 3 to proceed after serving notice on the Petitioners. Thereafter Respondent No. 3 served notice on the Petitioners and in the said assessment proceeding a final assessment order has been passed on 30.8.1996 against the Petitioner holding that it is liable for payment of sales tax to the extent of Rs. 6577613.44 including penalty of Rs. 45750/-. The Petitioners challenged the aforementioned order of assessment on various grounds, particularly on the ground that the contract is a works contract and is not a contract for hiring machineries and no sale of any goods had taken place and, therefore, the same is not exigible to tax.

3. A counter affidavit has been filed on behalf of Respondents 1 to 3, the Commercial Taxes Department, challenging the maintainability of the writ application on the ground, inter alia, that disputed questions of facts are involved in the writ application and thus the impugned order of assessment is appellable under the said Act. According to the Respondents, the Petitioners entered into an agreement with D.V.C. pursuant to the tender notice dated 29.4.1993. In the tender notice the rates were called for from various tenderers for hiring the HEMM by D.V.C. On the basis of such notice the Petitioners submitted the rates for hiring different machines both on hourly and volume basis. The agreement was for hiring of machines to be deployed by D.V.C. at Bermo Mines for removal of earth/debris and stone. Annexures A, B and C, form parts of the enclosures of the annexures which will show Anr. work allotted to the Petitioners. The Respondents further stated in the counter affidavit that during the pendency of the writ application in order to ascertain certain more facts the Respondent No. 3 gave letter to the Coal Superintendent and agent of D.V.C. and a query was made as to whether the contract job given to the Petitioners was hiring or labour contract and what was the mode of payment thereof. Respondent No. 4, D.V.C. in reply thereof, specifically stated that there was hiring contract for HEMM from the Petitioners and not a labour contract. It was also stated in the said letter that engagement of operation of machines in the mines were as per direction of the management of D.V.C. In other words, effective control and right to use

remained in the hand of the Respondent, D.V.C. It is further stated that various bills paid by D.V.C. to the Petitioner-company was on the basis of hiring charges of machines. In support of contention the Respondents have annexed various documents as annexures to the counter affidavit. It is further stated that work of the Petitioners is covered under the provision of Section 2(t)(iv) of the Act and, therefore, the Petitioner-company is liable to pay tax and further that Respondent-D.V.C. cannot be stopped from demanding statutory sales tax as payable u/s 3(i)(b)(iv) read with Section 2(t)(iv) of the said Act. It is further stated in the counter affidavit that after disposal of the aforementioned two writ applications, namely, CWJC Nos. 391 at 1996 (R) and 926 of 1996 (R), a fresh show cause notice u/s 17(5) of the Act was issued by the Respondents and thereafter hearing of the case was from time to time adjourned on various dates but instead of filing show cause the Petitioners filed a time petition praying adjournment of hearing of the case in order to enable it to produce records. The Petitioner ultimately filed show cause praying therein that it is not liable to pay sales tax on the ground that machineries deployed in executing civil works contract and it is not a hiring contract. The Respondents seriously denied the allegation that an ex-parte assessment order has been passed against the Petitioner. It is stated that the Petitioner was given sufficient opportunity by the Respondent authority but the former avoided to produce all the documents and ultimately on the basis of the evidence brought on records, the assessment order was passed.

4. Mr. S.B. Gadodia, learned Sr. Counsel appearing for the Petitioner-company, made a very exhaustive argument and tried to establish that the contract in question was not hiring contract, rather it was a works contract, where there was no involvement of "sale". Learned Counsel brought to our notice the relevant provisions of the Constitution of India and the Bihar Finance Act and submitted that the Petitioners' case does not fall within the definition of Clause 29A of Article 366 of the Constitution of India and since it was purely a labour and service contract no tax is payable. Learned Counsel further submitted that the use of the word "deploy" in the caption of the agreement and the description of the nature of the work goes to show that the machineries belonging to the Petitioners were to be deployed by the Petitioners for execution of work under the contract and this, by no stretch of imagination, can be said to be hiring and/or giving possession and/or control/custody of machineries by the Petitioners to the Respondent-D.V.C. According to the learned Counsel, barring the name/nomenclature of the agreement, all other terms of the agreement clearly demonstrate that it was a pure and simple labour and service contract where transfer of goods was not involved. It is contended that the Petitioner-company was executing the work of removing overburden by deploying its own machineries, and at no point of time possession and/or custody/control of the machineries was handed over to the D.V.C. by the Petitioners, which is sine-qua-non for holding the transaction as "sale". Learned Counsel further submitted that the Petitioners had to carry out the work of drilling as and when required by the

Respondents with the help of dozer, drillers etc. belonging to the Petitioner-company and as such the work carried with the help of machineries cannot be said to be hiring of the machineries by the Petitioners to the Respondents merely because for the use of these machineries Petitioner-company has been paid on the basis of hourly charges; i.e. number of hours for which the machinery was used by the Petitioners for doing the work.

Mr. Gadodia then drawn our attention to various documents brought on record and submitted that there is nothing on the record to show that possession and control of heavy machineries were delivered to the Respondent-D.V.C. rather it is the Petitioners who undertook the job of removal of overburden by using its own machineries which always remained in the control of the Petitioners. Learned Counsel then submitted that the Petitioners never raised bill for hiring charges; rather on the basis of the volume of the debris removed from the site which was the terms of the agreement. Similarly payment received by the Petitioner was made on the basis of the cubic metre on the volume of earth/stone removed by the Petitioner from the site specified in the contract and not for hiring of machines. According to the learned Counsel, had it been a hiring contract then there would have been in the agreement the specification or particulars oh the machineries, the number of machineries to be engaged or deployed. In the contract document and other correspondences, the caption "hiring of heavy earth removal machine" was used, though no hiring of any machine was involved, in fact the word "hiring" used in the contract is for identification for deploying heavy earth removing machines.

Learned Counsel further submitted that all the necessary expenses, man power and labour were engaged by the Company and were under the control of the Company. The payments to all the man power engaged for the works contract were made by the Petitioner-company. The consumable stores, diesel, lubricants etc. were purchased by the Company either on payment of full sales tax or exclusive of sales tax.

Learned Counsel also submitted that even assuming that the contract was a hiring contract even then there is no transfer of right to use the goods involved and, therefore, ingredients of sale is absent in execution of the contract. Learned Counsel lastly submitted that there was a penalty clause in the agreement to the effect that in the event the Petitioners fail to remove the particular quantity of overburden from the site, then it shall be liable for payment of penalty. This penalty clause itself completely demolishes the case of the Respondent-Commercial-Taxes Authorities that it is hiring contract and not the works contract where there was no involvement of "sale" within the meaning of the Act.

5. On the other hand, Mrs. Indrani Sen Choudhury, learned Standing Counsel No. 1, appearing for the Respondent-Commercial-Taxes Authority firstly submitted that the writ petition is not maintainable because of the availability of the alternative remedy. Learned Counsel further assailed the maintainability of the writ petition on the ground that serious disputed question of facts are involved

there-in.

Learned Counsel has drawn our attention to Annexures A, B and C to the counter affidavit and submitted that the three Annexures form part of the agreement and the said documents will show that in fact the Respondent-D.V.C. took heavy machineries from the Petitioners on hiring basis and the mode of payment was only on the basis of volume of the overburden removed from the site by use of the said machineries. Learned Counsel further submitted that the effective control of the machineries was with the Respondent-D.V.C. which is evident from the terms of the agreement. Learned Counsel put heavy reliance on the decisions of: *Rashtriya Ispat Nigam Ltd. v. Commercial Taxes Officer* (1990) 77 STC 182, *CESC Ltd. v. Commercial Taxes Officers* (1995) 99 STC 446 and *Rohini Panicker v. State* (1997) 104 STC 498.

Learned Counsel lastly submitted that from the impugned order of assessment it would appear that sufficient opportunity was given to the Petitioners to prove its case that it was not a hiring agreement and all the documents were demanded from the Petitioners and for that purpose hearing of the case was adjourned from time to time. Despite the aforesaid fact, the Petitioner-Assessee failed to produce all the documents, rather avoided the hearing on one pretext or the other. Ultimately on the basis of the documents produced before the assessing authority it was found that it was a hiring contract and, therefore, the Petitioner was liable for payment of sales tax. According to Mrs. Sen Choudhury, therefore, any payment received by the Petitioners for hiring of the machineries is exigible to tax and the impugned demand raised by the Respondent is perfectly legal and valid.

6. Before appreciating the rival contentions of the counsel appearing for the parties it would be useful and appropriate to look into the relevant provisions of law which conferred power upon the State Legislature to impose tax in the execution of works contract where the transfer of goods is involved.

7. The power to impose tax in case of transfer of right to use the goods in the works contract became available to the State Legislature by virtue of amendment made in the Constitution, namely, Constitution (46th amendment) Act, 1982. The relevant historical background leading to the enactment of the 46th Amendment has been fully discussed by the Apex Court in the case of *Builders' Association of India v. Union of India* AIR 1989 S.C. 1317 and the Apex Court in that case upheld the validity of the 46th Amendment to the Constitution. Prior to the forty-sixth amendment of Constitution there were conflicting views of different High Courts on the question of imposition of sales tax in execution of works contract. The Apex Court in the case of *State of Madras v. Dunkerley and Co. (Madras) Ltd.* (1958) 9 STC 353 held that in a building contract there is no sale of goods because in such a contract the agreement between the parties is that the contractor should construct the building according to the specification contained in the agreement and in consideration thereof the contractor will receive payment and no sale of building materials used in the construction of building is

involved. After the decision of the Apex Court in *Ganon Dunkerley* (supra) the matter with regard to the imposition of tax on the goods used in execution of the works contract was examined by the Law Commission and pursuant to the recommendation of the Law Commission the Constitution was amended by the 46th amendment. By virtue of the said amendment Clause (29A) has been inserted in Article 366 of the Constitution which reads as under:

366. In this Constitution, unless the context otherwise requires, the following expressions have meaning hereby respectively assigned to them, that is to say-

(1)

(2)

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

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

(c) a tax on the delivery of goods on hire-purchase or any system of payment of 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, 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.

After the 46th amendment of the Constitution came into existence, various State Legislators including the State of Bihar amended their sales tax laws for the purpose of making provision for imposition of sales tax in relation to the works contract. In the Bihar Finance Act, 1981 the definition of "sale" u/s 2 of the Act has been substituted by necessary amendment. The definition of "sale" as provided u/s 2(t) of the Act reads as under:

2(t) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration but does not include a mortgage or hypothecation of or a charge or pledge of goods, and includes-

- (i) transfer of property in any goods, otherwise than in pursuance of a contract;
- (ii) transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract;
- (iii) delivery of goods on hire purchase or any system of payment by instalments;
- (iv) transfer of the right to use any goods for any purpose (whether or not for a specified period)
- (v) supply of goods made by a society, trust, club or association whether incorporated or not, to its members or otherwise;
- (vi) supply by way of or as part of any service or in any other manner, whatsoever, of goods being food or any drink whether or not intoxicating;

And such transfer, delivery or supply of any goods shall be deemed to be sale of those goods by the persons making the transfer, delivery or supply, and all grammatical variations and cognate expression shall be construed accordingly.

And purchase means such acquisition of property in goods or purchase of those goods by the persons to whom such transfer, delivery or supply is made.

Explanation I.- A transfer or acquisition of goods on hire purchase or under any other system in which payment of valuable consideration is made by instalments, shall, notwithstanding the fact that the seller retains the title in the goods as a security for the payment of the valuable consideration or for any other reasons, be deemed to be a sale or purchase.

Explanation II.- Notwithstanding anything contained in any law for the time being in force, two independent purchases or sales shall, for the purpose of this part, be deemed to have taken place-

- (a) When the goods are transferred from principal to his selling agent and, from the selling agent to the purchaser; or
- (b) When the goods are transferred from the seller to a buying agent and, from the buying agent to his principal, if the agent is found-
 - (i) to have sold the goods at one rate and to have passed on the sale price to his principal at Anr. rate; or
 - (ii) to have purchased the goods at one rate and to have passed them on to his principal at Anr. rate; or
 - (iii) not to have accounted to his principal for the collections and deductions made by him in the sales or purchase effected by him or on behalf of his principal; or
 - (iv) to have acted for a fictitious or non-existent principal.

8. Some other constitutional provisions are necessary to be looked into in order

to appreciate the correct position of law. Entry 54 of List II of Seventh Schedule of the Constitution, which empowers a State to levy sales tax, is as under:

Tax on the sale or purchase of goods other than newspaper, subject to provision of entry 92A of List I.

Entry 92-A of List I of Seventh Schedule vests with the Union the power to levy:

Taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in course of inter-State trade or commerce.

By the 46th amendment, Clause (3) of Article 286 of the Constitution has been substituted by the followings:

(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 be in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause (29A) of Article 366,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidence of the tax as Parliament may by law specify.

As stated above, the validity of 46th amendment of the Constitution has been upheld by the Apex Court in the case of Builders' Association of India v. Union of India (1989) 73 STC 370 : 1989 PLJR 31 (SC). The Apex Court considering the object of the definition introduced, Clause 29A of Article 366 of the Constitution held as under:

The object of the new definition introduced in Clause (29A) of Article 366 of the Constitution is, therefore, to enlarge the scope of "tax on the sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in Sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. 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 forms) involved in the execution of a works contract also. The tax leviable by virtue of Sub-clause (b) of Clause (29A) of the Article 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.

9. The matter again came for consideration before the Apex Court in the case of Gannon Dunkerley and Co. v. State of Rajasthan and Ors. (1993) 88 STC 204. In that case the validity of Section 5(3) of the Rajasthan Sales Tax Act was challenged. The Apex court after discussing in detail its earlier decision in

Builders' Association's case (supra) came to the following conclusion:

The aforesaid discussion leads to the following conclusions:

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of the State List read with Article 366(29A)(b), the State Legislature, while imposing 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 is not competent to impose a tax on such a transfer (deemed sale) which constitute a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Sections 3, 4, 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29A)(b).

(3) While defining the expression "sale" in the sales tax legislation it is open to the State Legislature to fix the suits of a deemed sale resulting from a transfer falling within the ambit of Article 366(29A)(b) but it is not permissible for the State Legislature to define the expression "sale" in a way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in the execution of works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29A)(b) it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services, (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract, (iv) charges for planning, designing and architect's fees, and (v) cost of consumables used in the execution of the works contract, (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses relatable to supply of labour and services, and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the

assessing authority the Legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the Legislature to prescribe varying sales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix an uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article.

10. In the case of *Tripura Bus Syndicate v. State of Tripura* (1997) 105 STC 409 a question came for consideration before the Gauhati High Court was as to under what circumstances payment of hire-charges will be exigible to tax. The fact of the case was that during the Parliament Election in 1989 a large number of motor vehicles belonging to different operators were requisitioned for election purposes by order passed in exercise of power u/s 160(1)(b) of the Representative of Peoples Act, 1961. The vehicles were requisitioned with drivers. The rates of hire were fixed by the Chief Election Officer on the basis of mileage and the cost of fuel was to be borne by the owners. While making payment of hire-charges 4% thereof was withheld as sales tax u/s 3 of the Tripura Sales Tax Act, 1976. The Gauhati High Court allowing the writ application held as under:

6. I have considered the submission made by Mr. Saha. His argument is sound legally, however, in the facts of this case, according to me, the provision of the Tripura Sales Tax Act as amended from time to time and the amended rules framed thereunder and Article 366(29A) has no application whatsoever. It was not a case where any goods or the right to use the same was transferred in favour of the Respondents. The Petitioners were forced to give the vehicles on hire at the rate fixed by the State Government for the use of the vehicle by the Election Commissioner. The property is requisitioned does not mean transfer of right to use accrued in favour of the Government bodies without anything further. No attempt was made by the authorities to register such user with the Motor Vehicle Department, inasmuch as of running of a vehicle are controlled by the said provision of the Motor Vehicles Act, 1988 nor any attempt was made to get the vehicle insured under the said Act for the limited period in their name inasmuch as no vehicle can be run by any person without insurance policy. In the absence of the endorsement of the registration certificate, i.e. blue book and on the insurance policy the Respondent in law cannot acquire any right to ply the said vehicle on roads. Such blue book and policy stood in the name of the operator, as such there was no transfer of the right to use the same for any purpose in favour of the Respondents at any stage. In the fact of this case the

entire transaction was a transaction of hiring by the authority at a rate fixed on the mileage basis along with the driver and the petrol or diesel was also to be provided by the operators. The rate fixed itself discloses how the money was to be paid to the owner on hire of the vehicle, its driver and fuel for hiring the same. According to me the entire transaction was between a person who has hired the vehicle at a rate fixed and it cannot be stated that the said vehicle was transferred with right to use for any purpose. Even the requisition order does not show, nor it discloses the requisition of the said vehicle for any purpose other than for using the same for the election purpose. Moreover, it is very pertinent to note that the Respondent No. 2 while requisitioning the said vehicle did not state that they were taking those vehicle on transfer with the right to use for any purpose, if that were so, question of requisitions the services of operator driver and the cost of fuel to be provided by the owner would not have arisen.

8. ...The character of hiring of the vehicle to the Electoral Officer would not make any change. But vehicle is not only requisitioned, driver of the vehicle were also being asked to assist in running of the said vehicle who is an employee of the operators or the owners. The petrol or diesel is also provided by the operators. As such the operators and/or owners directly control the said vehicles and running of the same through the supervision and control of his driver. In the facts of this case the requisitioned vehicles which were paid on the basis of the rate fixed is pure and simple, a transaction in the nature of hiring or rental charges and nothing else. At no stage any right or interest in the said vehicle evolved or vested or transferred to the Respondents. The condition precedent to the imposition of tax is the "transfer" of the right to use any goods for any purpose. It is not a tax on right to use or the use of vehicle. It is a tax on "transfer" of the right to use the vehicle. No materials or facts have been brought to the notice of the court that any of the parties to requisition intended any transfer of the right to use of the vehicles. The Respondents have been given or forced to give in hire the vehicle for a limited purpose. Like any other hirer on the street may use the vehicle and pay the rental charges at the end of his journey. Similarly, a vehicle can be hired by any person from private sources during the tour for a particular day or days and at the end of the journey accrued hiring charges or halting charges are to be paid to the operators or the owners of the vehicles. In the instant case no transfer of the right to use has been conferred by the Petitioners to the Respondents inasmuch as the most vital thing relating to transfer of a vehicle for whatsoever limited purpose on the street such as blue book, insurance cover, road tax stood at all times in the names of the operators and/or owners and the said vehicle remained under the control and supervision of the operators and/or owners through its driver who was an employee of the operators. The operator also provided the petrol and diesel for running and using the same.

11. In the case of Century Finance Corporation Ltd. v. State of Maharashtra (1989) 75 STC 217, a question came for consideration before the Bombay High Court as to when the transaction of hiring will amount to sale and exigible to

sales tax. In that case, the Petitioner was carrying on business of leasing diverse equipments. The Petitioner agreed to give on lease diverse equipments/ machineries listed in the lease subject to terms and conditions stipulated in the agreement. As per the agreement, the first Petitioner was required to place orders to individual equipments at the instance of the lessee and that the equipments to be leased will be despatched by the manufacturer or supplier to the location specified by the lessee. At the instance of the first Petitioner the supplier delivers the equipment to the lessee at the specified location for use. The question of payment of sales tax on the aforesaid transaction was raised. The court has held as under:

... After Clause (29A) was inserted in Article 366, the legislature under entry 54 has legislative competence subject to entry 92A to impose tax upon sale and purchase of goods including deemed sales. The transfer of the right to use goods under Article 366(29A)(d) of the Constitution and also u/s 2(10) of the impugned Act does not involve passing of property in the goods. There is a conceptual distinction between a contract of sale as defined in Section 4 of the Sale of Goods Act and a transfer of the right to use goods without being accompanied by transfer of ownership in the goods in favour of the hirer, such transfer of the right to use goods is a species of bailment. According to Section 148 of the Indian Contract Act, a bailment is delivery of goods by one person to Anr. for some purpose upon a contract. Such transfer of the right to use goods, no doubt, produces some of the effects of the sales and also achieves some of the objects for which sales and purchases of goods are made. But unlike sale, in case of a transfer of only right to use goods, proprietary rights in the goods the transferee becomes legally possessed of such goods and the hirer or the transferee becomes entitled to enjoy the use of the goods upon periodic payment or other valuable consideration to the transferor. Such transaction of hiring has been described as disguised sale. Absence of transfer of ownership in favour of the hirer distinguishes such a transaction from a sale proper. Since the substance of the right is the enjoyment of the goods, the said transfer is completed only upon the delivery of the goods. In other words, only after acquiring possession of the goods hired out, the transferee begins to exercise right to use the same. Unlike the sale proper, on mere entering into an agreement to transfer the right to use goods, i.e. to hire or lease the goods, the transaction would be still inchoate and incomplete. An agreement which may precede delivery of goods for use would be in the nature of promise to deliver goods to the lessee. Only after the goods in question are delivered to the lessee, he becomes legally entitled to possess and use the goods.

12. In the case of *Rashtriya Ispat Nigam v. Commercial Taxes Officer* (1990) 77 STC 182, a Division Bench of the A.P. High Court considered a similar question raised by the Petitioner regarding payment of taxes arising under a hiring transaction. In that case, Petitioner *Rashtriya Ispat Nigam Ltd.* owing to *Vishakhapatnam Steel Project* for the purpose of steel project allotted different works of the project to the contractors. To facilitate the execution of work by the

contractor with the use of sophisticated machinery the Petitioner undertaken to supply machinery to the contractor for the purpose of being used in the execution of contract work of the Petitioner and received charges for the same. The Taxation authorities made assessment levying tax on the hire-charges u/s 5E of the A.P. General Sales Tax Act, 1957. In the writ application the Petitioner challenged the imposition of tax as illegal and unconstitutional. The case of the Respondent was that the machinery was given in possession of the contractor and he is responsible for any loss or damage to it. It was further contended that in view of the terms and conditions there was transfer of property of goods for use, for a specified purpose and for a specified period for money consideration. The A.P. High Court declaring the imposition of tax ultra virus has held as under:

In our view, whether the transaction amounts to transfer or right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the Petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the Petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the Petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor. As the fundamental requirement of Section 5E is absent, the hire charges collected by the Petitioner from the contractors are not exigible to sales tax.

13. Having discussed the law on this subject, we shall now analyse the agreement in the present case and interpret the same in accordance with the principles laid down by the various authorities referred to above in order to find out whether the use of the machineries in the execution of contract was in fact a "sale" and exigible to sales tax.

14. Both the Petitioners and the Respondents have brought on record by their affidavits various documents including the agreement entered into by and between the Petitioners and the Respondent-DVC. Admittedly, the first agreement is dated 18.1.1994 and the second agreement is dated 10.9.1995. There is no dispute that the first and the second agreements are similar in nature having similar terms and conditions. First of all, I will take up the tender notice dated 29.4.1993, a copy of which has been annexed as Annexure A to the counter affidavit. From perusal of the tender notice, it appears that the name of the work as described as "Hiring of Heavy Moving Machinery to be deployed at the DVC. for removal of debris and stone". By the said notice sealed tender was

invited for the above mentioned work as per the details given below:

- (1) Estimated value of work: Rs. 4.47 crores
- (2) Earnest Money: Rs. 50,000/-
- (3) Value of tender paper: Rs. 2000/-
- (4) Time of completion of work: One year.

The tender notice further provides that the tenderers should be bonafide, experienced contractors of DVC, Government, Quasi Organisation having the experience of successful execution of similar nature of work. The tenderers were further required to furnish details in support of their competence in respect of financial capacity, past experience and organisational capacity. In the tender notice the DVC reserved its right to reject any or all the tenders and split up or award the work to more than one contractor, if necessary without assigning any reason.

15. Another document, annexed with the tender notice (Annexure A) is the annexure to the tender notice in which some more details have been given for information. It was specifically provided in the Annexure B that the tenderer shall give rate both in figure and in words. The following general information has been given in the said document:

(i) Area to be worked

Lenght: 500 Mtrs. (may be extended)

(ii) Width: 150 Mtr.

(iii) Overburden to be removed: 8,50,000 (8.5 lac) cubic metres.

Besides the above, this annexure to the tender notice further provides that the rate shall be quoted on the basis of the per cubic metre for removal of earth/ loose debris and stone.

16. Another document annexed with the tender notice (Annexure A) is described as Annexure B-2. From this document it appears that the Respondent-DVC also invited separate rate for hiring of machineries, namely drilling machine, Dozer, Pay-loader, Shovel machine.

17. The next document which forms part of tender notice is Annexure A to the tender notice, copies of which have been filed by the Respondent and marked as Annexure B/1 and B/2. These documents consist of general terms and conditions.

18. Annexure B to the counter affidavit is the copy of the agreement dated 19.1.1994. The agreement states, inter alia, that the contractor has accepted the terms and conditions vide Annexures A, B and C, which are made part of the agreement. Annexures A and B of the agreement are general terms and conditions. Annexure C to the Agreement (Annexed as Annexure B/4 to the

counter affidavit) is the special terms and conditions governing the tender. The said document reads as under:

Heavy Earth Moving Machineries as detailed in para-2 hereunder shall have to be engaged by the "Tenderer" hereinafter call "the Agency" for the work as detailed in Annexure "A" as follows:

- (i) Cutting, drilling and excavating earth, stone from places fixed by the Colliery Manager and the Agent.
- (ii) Loading the same into dumpers.
- (iii) Transporting and unloading of the same to a site fixed by the Colliery Manager/Agent within a distance of 1 K.M.
- (iv) The overburden so transported should be dozed properly levelled by equipments by the Agency as per direction of the Manager/Agent.
- (v) Cutting, drilling from benches and loading, transporting and unloading to a site fixed by the Colliery Manager/Agent within a distance of 1 K.M.

Besides the aforesaid terms and conditions, the Agency was required to deploy his Heavy Earth Moving Machineries consisting of shovel/Draglines/scrapers, Dumper, Dozer/Craders Wagon drills, J.H. drills and Compressor.

Condition Nos. (5), (7) and (10) are worth to be quoted hereinbelow:

(5) Operation of M.E.M.M. shall be carried out between the hours as may be fixed by the Colliery Manager/Agent of the Colliery.

(7) P.O.L. and other stores necessary for operation, maintenance and repairs of the machineries shall be the responsibility of the Agency and the cost of the same should be borne by him.

(10) Water for maintenance of machineries and for drinking purposes will have to be arranged by the Agency.

Clause (13) of the aforesaid special terms and conditions lays down the provisions for quantity of work and validity etc. which is quoted hereinbelow:

13. Quantity of Work, Validity etc.:

(i)

(ii) Not less than 70,000.00 Cu.m. per month and 3,000.00 cu.m. per day of work will have to be done by the Agency. The quantity may have to be increased in the exigency of work for which the Agency would be liable to bring additional equipments without any increase in rate, claim for compensation, etc.

(iii)

(iv) The Management shall have liberty to terminate the hiring/contract arrangement of the Heavy Earth Moving/Equipments of the Agency without prior

notice and without compensation whatsoever in lieu of notice in the following events:

- (a) If the execution of work be found unsatisfactory
- (b)
- (c)
- (d)
- (e) If the Agency fails to pay full wages to his workmen as per prevailing Act/awards from the managements premises and in presence of managements authorised representative.

Clause 14 of the said agreement provides the procedure for calculating the value of the work done, which is reproduced hereinbelow:

14. Rates: (1) The rates shall be related to the performance of HEMM flat with matching equipment for removal of earth/loose debris and stone upto distance of 1 (one) K.M. The quantity so removed shall be calculated by measurement. The rates quoted by the tenderer should be inclusive of all works completed in all respect as detailed in Article I of the Annexure "C"

(2)

(3)

(4)

(5) It will be the responsibility of the Agencies to provide drilling equipment.

Clause (15) of the said agreement provides the manner of preparation of bills and payment. Clause 15 is as under:

(15) Bills and Payment:

(i)

(ii)

(iii)

(iv) 2% of the value of work done will be deducted from each of the running bills as Income tax as per provision of the Income Tax Act and 4% Commercial Tax.

(v)

Clause (16) of the said agreement speaks about the responsibility of the Agency in relation to Machinery and the employees engaged by the contractor/Agency. Clause 16 reads as under:

16. Persons employed in relation to machinery on Hire.-

(i) All persons engaged by the Agency in relation to operation, maintenance,

repair and transportation/shifting of machinery from one place to Anr. shall be their responsibility and the management shall have no responsibility whatsoever with respect to them, provided that he shall withdraw from the job, such person or persons the employment of whom may be objected to by the Chief Engineer-I, BTPS or the Colliery Manager/Agent. Instruction issued by the Colliery Manager/Agent for control and operation will have to be strictly followed by them, their representatives and employees.

(iii) The Agency will obtain from the appropriate authority a licence for execution of the above job, if so required, and shall abide fully by the provisions of the status/rules that may be applicable.

(vii) It will be the sole responsibility of the Agency to pay full compensation to the workers in case of any accident as per Workmen's Compensation Act and rules made thereunder and the management will take no responsibility whatsoever in this regard.

(vii) It will be sole and exclusive responsibilities of the Agency to withdraw employees, equipment and installation on completion of this job and it will be his exclusive liability to pay retrenchment compensation or such other compensation as may be admissible to the workmen/employees engaged by him for the job.

Besides the above, Clause 18 of the said terms and conditions provides that the management reserves its right to appoint additional firm on this job at its own discretion or allot part of the job to other firm. It further says that the Agency will execute the whole and every part of the job in the most workmen-like manner in every respect and strictly in accordance with the instruction given from time to time by colliery Manager/Agent or Chief Engineer-I, BTPS or their authorised representatives.

19. From analysis of the documents referred to hereinabove including the agreement, the following facts emerge:

(i) The tender notice clearly shows that the tender was invited from the contractors having sufficient experience and financial capacity, past experience and organisational capacity for doing the work of overburden removal from the mines of Respondent-DVC.

(ii) The Respondent-DVC in the tender agreement reserved its right to reject the tender and split up or award the work to more than one contractor.

(iii) This condition suggests that had the contract been a pure contract for hiring of Heavy Machines, then there was no question of splitting up the work and to allot it to more than one contractor.

(iv) This tender notice further suggests that the contractor was required to deploy his own machineries to carry out the work of removal of over-burden.

(v) From Annexure B/2 it is manifest that the tenderer was required to expose atleast 50% of the over burden removed; in other words the successful tenderer

shall have to remove overburden in such a manner that 50% of the material is exposed by removing atleast 10,000 cubic metre over-burden.

(vi) The tenderer who has been awarded the work has to bear all the costs of materials, labour charges and expenses for carrying out the work, which means that successful tenderer has to carry out the entire work by meeting all the expenses at his own.

(vii) It further reveals that the Petitioner-company had to work over an area of 500 metres x 150 metres, and had to remove 8,50,000 (8.5 lakhs) Cu. Mt. of overburden for which it has to be paid on the basis of per cu. metre at the rate of Rs. 34/- for earth and loose debris and Rs. 56/- for removal of stone.

(viii) It is further evident that the Petitioners had to carry out the work of cutting/drilling and excavating the earth/stone from the places fixed by the Colliery Manager and the Agent and loading the same into dumpers and then transport and unload the same to the site fixed by the Colliery Manager/Agent within a distance of 1 KM and thereafter the Petitioners had to properly level the overburden so transported with the help of the equipments as per the direction of the Manager/Agent.

(ix) It is further manifest that the entire personnel required for running the operation and maintenance of HEMM shall be the responsibility of the Petitioner-Company and it was to be paid on the basis of volume of overburden removed by it during the month at the rate approved by the Respondents and the Petitioner-Company was to carry out the entire work in a most workman like manner.

It does not appear from any of the documents filed by the parties that the control, custody and possession of the Heavy Moving Machineries were handed over by the Petitioner-Company to the Respondent-DVC and the work was executed by the DVC by using the said machineries and by deploying its personnels and workmen.

20. It would be worth to further analyse the transaction of hiring in different angle. If we look into the various mode of transfer provided under the different law we find that by virtue of transfer right, title and interest may be vested from one person to Anr. . In case of sale all the right, title and interest in the corpus vested in the transferee absolutely. In case of Jease of immovable property, right and interest to enjoy the property is transferred. Under the Contract Act, the property is transferred from one person to Anr. for limited purpose by way of bailment. In case of bailment the goods are transferred/delivered by one person to Anr. for the same purpose with a condition that on completion of the purpose the goods are returned or otherwise disposed of according to the direction of the persons delivering the goods. In case of hiring, therefore, there must be delivery of goods from one person to Anr. on payment of hire charges.

21. In Black Law Dictionary (sixth eddition) the word "Hire" means to purchase the temporary use of anything or to arrange for the labour or services of Anr. for

a stipulated compensation. An act of hiring means a bailment in which compensation is to be given for the use of a thing or labour and services about it.

In Webster's Dictionary the term "Hire" means to obtain the use of something temporarily for an agreed payment, or to obtain the services for an agreed wage.

In Readers' Digest, Great Encyclopaedia Dictionary, 2nd Edition, the word "Hiring" has the following meaning:

Hiring means contract under which movable property is taken for use in return for an agreed or a reasonable sum; the hirer must take reasonable care of the property.

From the book-Cheshire and Fifoot's Law of Contract (ninth edition) the following passage is worth to be quoted:

The House of Lords held that as X could determine the hiring at any time, he was not under an obligation to buy the Piano but had only an option of purchase.... henceforth manufacturers and dealers preferred to adopt not the first but the second form of contract...a bailment coupled with option of purchase.

22. As stated above, the word "bailment" has been defined as "the delivery of goods by one person to Anr. for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the directions of the person delivering it."

23. From bare reading of Clause (29A) of Article 366 of the Constitution and the definition of 'sale' as given in Section 2(t) of the Act, I find that in all cases either the transfer of property in goods or transfer of right to use any goods is the important ingredient for the purpose of holding the transaction as 'sale'. Even in case of hire purchase the delivery of goods is the condition precedent. The transfer of right to use the goods, therefore, necessarily involves delivery of possession therefore, to the transferee.

24. As noticed above, the Respondents have not shown anything from the agreement nor produced any document to show that in fact the control/custody or possession of all the Heavy Moving Machineries were given by the Petitioners to the Respondent-DVC on payment of hire charges for a limited period and the work in question was executed by the DVC by deploying its own man power and personnel.

25. From reading of paragraphs 1, 2 and 4 of Annexure C to the agreement itself, it is evident that the Petitioners had to carry out the work of cutting/drilling and excavating earth and stone from the place fixed by the Colliery Manager/Agent and load the same into dumpers and then transport and unload the same to the site fixed by the Colliery Manager.

26. In my opinion, the reason for giving the name of the contract as "Hiring of Heavy Mechines for cutting and removal of earth overburden" was given only for the purpose or prohibiting the contractor from engaging the contract labour. This

fact is evident from the letter dt. 22.11.1996 written by the Coal Superintendent, DVC, Bermo Mines, to the Commissioner of Commercial Taxes stating that as the work of removal of overburden in coal mines is perennial nature of job for which contract labour cannot be engaged as per Contract Labour (Regulation and Abolition) Act, 1970. One more important fact supports the stand of the Petitioners that the agreement in question was a works contract, and a penalty clause is contained in the agreement. As noticed above, the Petitioners had to carry out the work of removal of overburden from the mines of the DVC by deploying its own heavy earth moving machineries in the hours fixed by the DVC by using its own POL and other stores necessary for the purpose of operation, maintenance and repairs of machineries and it had to attain the minimum target of 70,00,00 cu. metr. per month otherwise the Petitioner-company was liable to pay penalty @ 2% on the total monthly bill.

27. In course of hearing of the writ petition, it was found that the Respondent-DVC did not file any affidavit nor took any stand. Accordingly, by order dated 15.7.1997 the Respondent-DVC was directed to file affidavit and produce all the documents concerning the contract. In compliance of the said order, the DVC filed an affidavit and produced the documents which have been perused by me. In the affidavit, the DVC took the stand that the agreement of the DVC with the Petitioners was for hiring of heavy machineries for removal of earth, loose debris and stone so that the coal may be exposed to enable the employees and officers of the DVC to undertake the mining operation for extraction of coal. However, from perusal of the documents, which are the originals of the annexures filed by the parties, it does not appear that payment was made to the Petitioner-company by the DVC for hiring of heavy moving machineries; rather from the bills submitted by the Petitioners, it appears that the amount was claimed on the basis of the quantity of overburden removed by using the machineries. On the contract after the work was started by the Petitioner-company and running monthly bill was submitted by it, the Respondent-DVC started deducting sales tax at source @ 4% as required u/s 25A of the Act taking the contract as the works contract. Moreover the letter of the Coal Suptd. and Agent, Bermo Mines dt. 3.7.1995 clearly specifies that it has been admitted that the Petitioner-company was engaged to remove the overburden only and the coal was being produced departmentally. Although in the said letter, it is stated that the Petitioners submitted the bills for hiring of dozers and drills, but from perusal of the said bill it appears that the same does not relate to the work in question. The original bills produced by the Respondent-DVC show that the name of the contract although shown as hiring agreement but the bills have been raised on the basis of the quantity of earth/overburden removed from the site. The said letter does not show that the Petitioner-company has hired its machineries to the Respondent-DVC, which stand has now been taken in the affidavit.

28. The whole argument of the learned Standing Counsel appearing for the Respondent-commercial taxes department is based on the fact that the tender was invited for hiring of machineries and the agreement was entered into

between the Petitioners and the Respondent-DVC for hiring of machineries for the purpose of removal of overburden from the given site. According to the learned Counsel, therefore, use of machineries in execution of work will amount to transfer of right for using the goods for that purpose and is exigible to sales tax. I am afraid the Court shall not be guided by the nomenclature of the agreement; rather the contents of the agreement. It is the terms of the agreement which are to be looked into for the purpose of deciding nature of the contract. Reference in this regard may be made to a decision of the Apex Court in the case of Bhopal Sugar Industries v. Sales Tax Officer, Bhopal (1997) 40 STC 42. The question for consideration before the Apex Court was whether the agreement entered into between Bhopal Sugar Industries with Caltex India Ltd. was a contract for sale or simple contract of agency. The Apex Court held as under:

It is well settled that while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word "agent" or "agency" and the words "buyer" and "seller" are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that that status would be conferred. Thus the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows that the parties clearly intend to treat a buyer as a buyer and not as an agent.

The Apex Court in the aforesaid decision further relied upon its earlier decision in the case of Sri Tirumala Venkateswara Timber and Bamboo Firm v. Commercial Taxes Officer (1968) 21 STC 312 and further held that the true relationship of the parties in such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship.

29. Learned Standing Counsel put heavy reliance on the decision of the Kerala High Court in Rohini Panicker v. State (1997) 104 STC 498 and a decision of the Calcutta High Court in the case of C.S.E.C. Ltd. v. C.T.O. (1995) 99 STC 446. The case of Rohini Panicker (supra) related to lending of video cassettes on payment of charges. The Kerala High Court held that since the principal of the video library are given the video cassettes for a certain period, i.e. for one day/two days on payment of charges and possession of the cassettes is handed over to the principal with a right to use the same for a limited period, there is transfer of right to use, which attracts the charging section.

The ratio of that case, in my opinion, is not applicable in the instant case because as noticed above at no point of time the Petitioners handed over possession or custody and control of heavy machineries to the Respondent-DVC; rather the Petitioner-company executed the work by deploying its own machineries. The decision of the Calcutta High Court in the case of CSEC (supra) is also not applicable in the facts and circumstances of the present case for the simple reason that there is nothing on the record to show that the machineries were

leased out by the Petitioner-company to the Respondent-DVC on payment of rent.

30. Having regard to the facts and circumstances of the case and the discussions made above, I am of the definite view that the heavy moving machineries were never transferred by the Petitioner-company to the Respondent-DVC under the agreement in question for the purpose of transferring the right to use the said machineries; rather the machineries always remained in the custody and possession of the Petitioner-company and the Petitioner-company was free to deploy as many machineries as it liked to do the work for the purpose of removal of minimum monthly quantity of overburden. It is further clear that the Petitioners never parted with the custody/control and possession of the machineries in favour of the Respondent-DVC at any point of time during execution of the works contract and, therefore, the provision of Section 2(t)(iv) or any of the clauses of Section 2(t) of the Act are not attracted. I am, therefore, unable to maintain the order of the Commissioner by which demand has been raised against the Petitioner-company for payment of sales tax on the value of the work.

31. For the reasons, aforesaid, this writ petition is allowed and the impugned order passed by the Respondent-commercial taxes authority as contained in Annexures 8 and 9 to the writ petition are quashed. It is declared that the Petitioners are not liable to pay sales tax for the works executed by them under the contract in question with Respondent No. 4-DVC for removal of overburden, namely, earth, loose debris and stones at Bermo Mines. However, there shall be no order as to costs.

S.K. Chattopadhyaya, J.

32. I agree.