

(1963) 11 GUJ CK 0001
In the Gujarat High Court
Case No : Sales Tax Reference No. 5 of 1962

State of Gujarat

APPELLANT

Vs

Ramanlal Sankalchand and Co.

RESPONDENT

Date of Decision : 08-11-1963

Acts Referred:

Bombay Sales Tax Act, 1953 — Section 26(3)
Constitution of India, 1950 — Article 245
Sales of Goods Act, 1930 — Section 26

Citation : AIR 1965 Guj 60 : (1965) 16 STC 329

Hon'ble Judges : J.M. Shelat, C.J.; P.N. Bhagwati, J

Bench : Division Bench

Advocate : J.M. Thakore, A.G. and A.D. Desai, Asst. Govt. Pleader instructed by M.M. Thakore and M.G. Doshit, partners of Bhaishankar Kanga and Girdharlal, for the Appellant; K.H. Kaji, for the Respondent

Judgement

Bhagwati, J.

(1) This Reference raises a question of vires of Section 26(3) of the Bombay Sales Tax Act, 1953. The section has been challenged as beyond the legislative competence of the State Legislature on the ground that it purports to tax a transaction which is not a sale, by treating it as a sale. In order to appreciate how the question arises, it is necessary to state briefly the facts giving rise to the Reference. The opponents were until 27th November 1956, a partnership firm, and the firm carried on business as a dealer in mill stores. The firm was registered as a dealer under the Act and held Registration Certificate No.10-C-198. Quarterly returns of turnover of its sales were filed by the firm from time to time as required by the Act and the Rules framed under the Act. On the death of one of the partners, the firm was dissolved on 27th November 1956, but the surviving partners continued to submit quarterly returns in the name of the firm until 31st March 1957, since certain goods indented by the firms before dissolution were received in March 1957 after dissolution. The goods of the firm which remained after paying off the debts and liabilities of the firm and taking

accounts between the parties, were distributed in specie amongst the surviving partners and the representatives of the deceased partner and this fact was recorded in a Deed of Dissolution dated 27th July 1957. The Sales Tax Officer, Licence Circle, Ahmedabad, by an order dated 23rd April 1958, assessed the firm to sales tax for the period 1st April 1956 to 31st March 1957 and in such assessment included the goods of the firm valued at Rs.94,861/- which were distributed in specie amongst the partners on dissolution of the firm. This he did u/s 26(3) of the Act on the ground that the goods were allotted to the partners and were, therefore, liable to be taxed as if they were sold to the partners. Against the decision of the Sales Tax Officer, the firm preferred an appeal to the Assistant Collector of Sales Tax followed, but the appeal failed. A Revision Application to the Additional Collector of Sales Tax followed, but that was also rejected. the firm thereupon carried the matter in revision before the Tribunal. Two contentions were urged before the Tribunal in support of the Revision Application of which one turned on the interpretation of Section 26(3) and the other related to the vires of the Section. The Tribunal accepted the first contention and held that the allotment of the goods of the firm to the partners on dissolution was undoubtedly treated by the fiction of law created by the Section as a sale, but the fiction merely clothed the allotment with the characteristics of a sale simplicities and did not extend to make it a sale in the course of business. The Tribunal observed that only sales effected by a dealer in the course of business were liable to be included in the turnover of sales chargeable to tax and since the allotment of the goods of the firm amongst the partners though fictionally regarded as a sale was not a sale in the course of business, it was not includible in the turnover of sales and the machinery of assessment set out in Section 14 was, therefore, inapplicable to the assessment to tax on such allotment treated as a sale u/s 26(3). In this view of matter, the Tribunal did not think it necessary to consider the second contention which attacked the vires of Section 26(3). The Tribunal in the result allowed the Revision Application and set aside the assessment in so far as it assessed to tax the goods of the firm apportioned amongst the partners on dissolution. The State thereupon applied to the Tribunal for a reference u/s 34 and since questions of law admittedly arose out of its order, the Tribunal referred the following questions of law for the opinion of the Court:

"1. Whether the goods allotted to any partner of a firm on the dissolution thereof are goods sold to such partner by the firm and can be included in the turnover of sales of the firm?

2. Whether the provisions of Section 14 of the Bombay Sales Tax Act 1953, are applicable to the assessment of the tax liable to be paid u/s 26 (3) of the Act?"

It may be pointed out that though the State did in the first instance ask for a Reference of the first question, at the hearing of the Reference Applications the State did not press it and confined its application only to second question. The firm, however, insisted that the first question should also be referred since it

arose out of the order of the Tribunal and the Tribunal accordingly referred both the questions to this Court.

(2) We will first take up for consideration the second question which arose directly out of the contention which found favour with the Tribunal, for it can be disposed of in a few words. As a matter of fact Mr.K.H.Kaji, learned advocate appearing on behalf of the firm, found it difficult to sustain the order of the Tribunal on that ground and he fairly conceded that it was not possible to argue that the allotment of goods amongst the partners on the dissolution of a firm was under the fiction created by Section 26(3) a sale simpliciter and not a sale in the course of business and was, therefore, not liable to be included in the turnover of sales and the machinery of assessment set out in Section 14 was consequently not applicable to the assessment of tax on such allotment u/s 26(3). The argument was obviously unsustainable because it ignored the basic principle which requires that when a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. Vide *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, . As observed by Lord Asquith of Bishopstone in *East End Dwelling Co. Ltd v. Finsbury Borough Council*, 1952 AC 109:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it ... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imaginations to boggle when it comes to the inevitable corollaries of that state of affairs".

The argument on which the Tribunal decided against the State seeks to do that which Lord Asquith of Bishopstone said that you should not do when a legal fiction is created. If section 26(3) creates a legal fiction requiring allotment of goods to a partner on dissolution of a firm to be treated as a sale to such partner for the purpose of taxation, full effect must be given that legal fiction and it must be carried to its logical conclusion and just as any actual sale effected by the firm would have been a sale in the course of business, so also the fictional sale must be regarded a sale must be regarded a sale in the course of business for the purpose of taxation. The distinction which the Tribunal made between a simpliciter and a sale in course of business was entirely unwarranted and in making such distinction the Tribunal failed to give full effect to the legal fiction created in Section 26(3). If Section 26(3) was a valid piece of legislation, it had clearly the effect of converting allotment of goods of the firm amongst the partners on dissolution into sale for all purpose of taxation and such allotment was liable to be included in the taxable turnover of the firm.

(3) That takes us to the first question which was the question really debated before us. This question raised the point of vires of Section 26(3) in the following manner. The controversy between the parties was whether the goods allotted to a partner of a firm on dissolution could be said to be goods sold to such partner by the firm and were liable to be included in the turnover of sales of the firm. The States insisted that such allotment constituted a sale of goods by the firm to the partner and were, therefore, includible in the turnover of sales of the firm and relied on Sec.26 (3) in support of this proposition. Now prima facie, having regard to Section 26 (3) it would appear that the question must be answered in favour of the State but, said Mr.K.H.Kaji, Section 26(3) was beyond the legislative competence of the State Legislature and was ultra vires and the State was, therefore, not entitled to rely on it for the purpose of upholding the validity of the assessment. He contended that the power of the Legislature to tax sales on goods was derived from Entry 54 in List II of the Seventh Schedule to the Constitution which at the time when Section 26(3) was enacted, was in the following terms, namely, "Taxes on the sale or purchase of goods other than newspapers" and the expression "sale of goods" in this Entry had the same meaning as sale of goods in the Indian Sale of Goods Act and the State Legislature was consequently not entitled to make any law levying tax on transactions which were not of the nature of sale of goods within the meaning of the Indian Sale of Goods Act. the argument was that the allotment of goods of the firm on dissolution amongst the partners was not a sale within the meaning of the Indian Sale of Goods Act and the State Legislature had, therefore, by enacting Section 26(3) purported to tax a transaction which was not a sale by fictionally treating it as a sale. This, contended Mr.K.H.Kaji, was not constitutionally permissible to the State Legislature and Section 26(3) was, therefore, ultra vires and could not be relied upon by the State for the purpose of taxing such allotment.

(4) The learned Advocate General agreed that the power of the State Legislature to legislate with respect of tax on sale of goods was to be found in Entry 54 and that the validity of Section 26(3) would, therefore, have to be tested by reference to the true import of that Entry but he contended that the Section was within the legislative power of the State Legislature as contained in that Entry. He sought to support the validity of Section 26(3) first upon the ground that the matter of that Section was within the subject "Taxes on the sale or purchase of goods other than newspapers" expressly mentioned in Entry 54 since the allotment of goods to partners on dissolution of a firm amounted to sale of goods within the meaning of that expression as used in that Entry and secondly upon the ground that Section 26(3) constituted an exercise of legislative power on a matter ancillary or subsidiary to the primary and main power connoted by the expression "Taxes on the sale or purchase of goods other than newspapers" and contained a provision necessarily incidental to effective legislation on the subject.

(5) These contentions raised a question as to the true scope and ambit of the legislative power of the State Legislature under Entry 54. Now in order to arrive

at a proper determination of this question it is necessary to bear in mind the well settled rule of interpretation that in construing words in a constitutional enactment conferring legislative power, the most liberal construction must be put upon the words so that the same may have effect in their widest amplitude. While considering the scope of the various entries in the Legislative Lists, the widest possible amplitude must be given to the words used and as stated by AIR 1941 16 (Federal Court) "each general word should be held to extent to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it." When legislative power is conferred on a Legislature to legislate with regard to a particular topic of legislation, the Legislature must necessarily also have power to legislate on all matters which are ancillary or subsidiary to the main subject for otherwise it may not be possible to have effective legislation on the subject. Vide *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, and *The State of Rajasthan Vs. G. Chawla and Dr. Pohumal*, . The proposition is, therefore, now well established and beyond controversy that the Legislature has power to legislate not only on a subject matter which falls directly within the subject of the legislative entry but also on a subject matter which may be ancillary or subsidiary to such subject, for otherwise much of the legislation would be rendered ineffective on the ground that provisions which are necessarily incidental to effective legislation on the subject expressly within the power of the Legislature cannot be made by the Legislature on the ground that they fall outside the legislative entry. It is for this reasons that the Supreme Court said in *Chaturbhai M. Patel Vs. Union of India (UOI) and Others*, that---

"It is within the competence of the Central Government Legislature to provide for the matters which may otherwise fall within the competence of the provincial legislature if they are necessarily incidental to effective legislation by the Central Legislature on a subject of legislation expressly within its power".

In every case, therefore, where a provision in an enactment is challenged as beyond the legislative competence of the Legislature, the first question that must be considered is whether the provision falls within the express words of the entry conferring power on the Legislature which enacted the legislation. If it falls directly within the subject of legislation, *cadit questio*. But even if it does not so fall, its validity can yet be sustained on the ground that it reflects an exercise of legislative power on ancillary or subsidiary matter which can fairly and reasonably be regarded as comprehended within the subject of legislation and contains a provision necessarily incidental to effective legislation on the subject of legislation. The question which we have, therefore, to consider for the purpose of deciding the validity of Section 26(3) is a two-fold one. Firstly, does the subject matter of Section 26(3) fall within the subject of legislation set out in Entry 54? And secondly, if it does not can it be said that Section 26(3) constitutes legislation on an ancillary or subsidiary matter necessarily incidental to effective legislation on the subject of legislative contained in the Entry.

(6) Turning to the first question it is clear that the answer to it must depend on the true meaning to be given to the expression "sale of Goods" in Entry 54. Now what is the true connotation of this expression as used in this Entry is no longer a question open to controversy. It is settled by the decision of the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, . The question which arose in that case was in regard to the vires of certain provisions of the Madras General Sales Tax Act, 1939 as amended by the Madras Sales Tax (Amendment) Act, 1947, which sought to tax the supply of materials involved in execution of a works contract treating it as a sale of goods by the contractor. The vires was challenged on the ground that the provisions were beyond the legislative power of the State Legislature under Entry 48 in List II of Schedule VII to the Government of India Act 1935, being the Constitution in force at the date when the provisions were enacted. The Supreme Court was, therefore, called upon to determine the scope and ambit of this Entry which was in the same terms as Entry 54 with which we are concerned in the present case. The Supreme Court held that the expression "sale of goods" in this Entry had the same meaning as it had under the Indian Sale of Goods Act and that the State Legislature was, therefore, entitled to legislate with respect to levy of tax only in respect of those transaction which constituted sale of goods within the meaning of the Indian Sale of Goods Act and was not entitled in exercise of its legislative power under that Entry to levy tax on transaction which did not constitute such sales. The Supreme Court then examined the question as to what constituted sale of goods within the meaning of the Indian Sale of Goods Act and said that in order to constitute such sale it was necessary that three elements should exist in a transaction: first, there should be an agreement between the parties for the purpose of transferring title to goods; secondly, property must actually pass in the goods under the agreement; and thirdly, there must be money consideration for the transfer of property in the goods. If any one of these elements is absent, the transaction would not be a sale within the meaning of the Indian Sale of Goods Act. After formulating these characteristics of sale as defined in the Indian Sale of Goods Act the Supreme Court proceeded to consider whether these characteristics were present in a works contract in so far as the supply of materials under it was concerned and whether it could be said that there was a sale of the materials which went to make up the work. The Supreme Court found that two characteristics of sale were being absent in a works Contract. The first characteristic which did not exist in a works contract was that there was no agreement to sell the materials as such and the second characteristic absent in such a contract was that the property in the materials did not pass as movables. In this view of the matter the Supreme Court held that there was no sale of materials involved in the execution of a works contract. It was, however, made clear that if the works contract was not one indivisible works contract but there were two agreements, one for the supply of materials and the other for the work, the State would be entitled to separate the agreement to sell from the agreement to do work and to impose a tax on the sale of materials effected under the former agreement.

(7) Subsequent to the decision in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, two decisions were given by the Supreme Court in which the principle enunciated in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, was affirmed by the Supreme Court and applied in different situations arising in those cases. The first decision to which we must refer is the decision in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*. The question which arose in that case was whether supply of sugar made by the petitioners to the State of Madras under directions given to them by the Sugar Controller in exercise of the powers conferred upon him under the Sugar and Sugar Products Control Order, 1946, was taxable as a sale under the Bihar Sales Tax, 1947. The argument urged on behalf of the petitioners was that the dispatches of sugar made by the petitioners to the State of Madras were not the result of any contract of sale and there was, therefore, no sale on which tax could be charged under the provisions of the Bihar Sales Tax Act, 1947. This argument was accepted by Shah J., who delivered the majority judgment. The learned judge emphasized the consensual element in a sale and following *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, took the view that in order to constitute a sale of goods must be transferred from the seller to the buyer under a contract of sale. The learned Judge held that under the Sugar and Sugar Products Control Order, 1946, the petitioners were not left any volition but were bound on pain of forfeiture and imprisonment to carry out the directions of the Sugar Controller and to despatch sugar to the State of Madras as directed by him and there was, therefore, no contract of sale under which could be said that was transfer of property in the goods from the petitioners to the State of Madras and concluded that since there was no contract of sale under which property in the goods passed from the petitioners to the State of Madras did not amount to sale and was, therefore, not taxable by the State Legislature in exercise of its power under Entry 48 in List II to the Seventh Schedule to the Government of India Act, 1935. It would thus be seen that this division merely applied the principles laid down in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, to the consensual aspect of sale which one of the essential elements of sale laid down in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*.

(8) The other decision of the Supreme Court which was cited before us was the decision in *Bhopal Sugar Industries Ltd., Madhya Pradesh and Another Vs. D.B. Dube, Sales Tax Officer, Bhopal Region, Bhopal and Another*. In this case the extended definition of "retail sale" in Section 2(1) of the Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act, 1958 (Act 4 of 1958) included "consumption by a retail dealer himself or on his behalf of motor spirit or lubricants sold to him for retail sale and the question arose whether this extended definition was beyond the competence of the State Legislature in that it brought within the ambit of taxation a transaction which was not sale within the meaning of the Indian Sale of Goods Act. the decisions in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and *New India Sugar Mills*

Ltd. Vs. Commissioner of Sales Tax, Bihar, were based on Entry 48 in List II of Seventh Schedule to the Government of India Act, 1935, where as the legislative entry under which the impugned legislation was made Entry 54 in Lists II of the Seventh Schedule to the Constitution, but the Supreme Court held that did not make any difference in principle and" as the scheme of division of legislative power under the Constitution has remained unaltered, the principle of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., applies in adjudging the validity of the provisions of Madhya Pradesh Act 4 of 1958". The Supreme Court thus applied the same principle in the interpretation of Entry 54 in List II of the Seventh Schedule of the Constitution and held that since consumption by an owner of goods in which he deals is not a sale within the meaning of the Indian Sales Goods Act, is also not "sale of Goods" within the meaning of Entry 54 in List II of Seventh Schedule to the Constitution and the extended definition of retail sale which included consumption by a retail dealer himself of motor spirit or lubricant sold to him for retail sale was, therefore, beyond the legislative competence of the State Legislature.

(9) It will be seen in all these cases the Supreme Court examined whether the transaction which was sought to be taxed by the State Legislature was a sale within the meaning of Indian Sale of Goods Act and wherever it found that the transaction was not such sale, it struck down the legislation in so far as it purported to tax such transaction on the ground that the legislative power for levying tax on sale of goods was restricted to enacting legislation for levying tax only on transactions which conformed to the definition of sale of goods with in the meaning of the Indian Sale of Goods Act and the State :Legislature was not entitled to tax any transactions which were not sale of goods strict sensu. We must, therefore, address ourselves to the question whether the transaction in question in the present case, namely, the allotment of goods of the firm amongst the partners on dissolution could be said to be sale of goods within the meaning of the Indian Sale of Goods Act and in order to determine this question must ask ourselves whether this transaction possessed the three elements essential to sale of goods under the Indian Sale of Goods Act.

(10) Before we examine the question, it would be convenient to dispose of an argument advanced by Mr.K.H.Kaji in support of his contention that allotment of a firm amongst partners on dissolution did not constitute sale of goods within the meaning of the Indian Sale of Gods Act. the arrangement was that if such allotment constituted sale of goods, it was not necessary to enact Section 26 (3) for in that event such allotment would always fall within the scope and ambit of the charging Section by reason of the definition of sale. But the Legislaature considered it necessary to enact Section 26(3) and to treat such allotment fictionally as a sale because otherwise it would not be a sale. This argument does not appeal to us. It is not infrequent that the Legislature enacts provisions ex majore cantela with a view to rendering certain that which might otherwise be uncertain and the Legislature may achieve this by using the word "deemed". The word: deemed" is used a great deal in modern legislation and as observed by

Lord Radcliffe, in *St.Aubyn v. Attorney General* (1951) 2 All E R 473 .498. "sometimes it is used to put beyond counta particular construction that otherwise be uncertain". This word is apt to include the obvious and uncertain and the impossible. no inference cam, therefore, be raised from the use of a deeming provision that but for the deeming provision, the subject matter of it would not fall within the main provision. Moreover it must also be remembered that legislation founded on a mistaken or erroneous assumption has not the effect of that making that law which the Legislature has erroneously assumed to be so. This argument cannot, therefore, avail Mr.K.H.Kaji and we must proceed to consider whether, in fact, irrespective of Section 26(3), allotment of the goods of the firm amongst the partners on dissolution constituted sale of goods within meaning of the Indian Sale of Goods Act and for that purpose it must ascertained whether such allotment possessed the three essentials elements of sale of goods to which we have already referred.

(11) Now so far as the first elements of sale of goods agree concerned, namely, that there must be an agreement between the parties for the purpose of transferring property in the goods and that property in the goods must actually pass as a result of agreement, we have no doubt that these elements existed in the present transaction. But it is not necessary to discuss this aspect of the question since in our opinion, the third element namely, that there must be money consideration for the transfer of property in the goods, was absent and therefore even if the first two elements existed, the transferring could not be a transaction of sale of goods within the meaning of the Indian Sale of Goods Act. it was in respect of this third element that the learned Advocate General failed in his attempt to make out that the allotment of goods of the firm amongst the partners on dissolution constituted sale of goods within the meaning of the Indian Sale of Goods Act. we do not set how the residue of the property of the firm after of payments of debts and liabilities and settlement of accounts is divided amongst the partners in specie any money consideration can be said to have been promised or paid by any partner to the firm or for the matter of that to the other partners as consideration for the goods allotted to him. Consideration undoubtedly there would be, for the partner to whom any particular goods are allotted on distribution would be giving up his interest the goods allotted to the other partners in consideration of the other partners giving up their respective interests in the goods allotted to such partner. But such consideration can by no stretch of imagination be called a money consideration. The learned Advocate General said in the course of the argument that such consideration would be a consideration capable of being valued in terms of money. But that is not determination of the question. Even in barter or exchange, the consideration passing from the oneparty to another for the transfer of the property is a valuable consideration and in many cases it would be capable of being valued in terms of money. But on that account it would not become a sale. The essential characteristic of a sale is that there must be money consideration ffrom the transfer and it is this characteristic which is lacking in the

present case. We are, therefore, of the opinion that the allotment of goods of the firm amongst the partners did not constitute sale of goods within meaning of the Indian Sale of Goods Act and that Section 26(3) in so far it purported to bring such allotment to tax by fictionally treating it as a sale did not fall expressly within the subject of legislation contained in Entry 54 in List II of the Seventh Schedule to the Constitution.

(12) We must then proceed to consider whether Section 26 (3) can be regarded as a legislative provision on a matter ancillary or subsidiary to the subject of legislation set out in Entry 54 and whether it could be said be necessarily incidental to effective legislation on that subject. Now what is incidental or ancillary in a given case must depend upon the main legislation and the circumstances of the particular case. It is in the last analysis lay down any hard and fast rule on the basis of which it can be said that a particular provision is necessarily incidental to effective legislation or not. But one thing is certain that the question of incidentally must, as observed by Griffith C. J., in *Australian Steamship Ltd. V. Malcolm* (1914) 19 C.L.R. 298, be determined *ab extra*, irrespective of Parliamentary assumptions on the matter. The object of a particular provisions and the effect which it produces often assist in the determination of the question whether such provision can be regarded as an exercise of ancillary or subsidiary power of legislation it may also be remembered that the legislation must not under the guise of making an ancillary or subsidiary provision for the purpose of effectuating the main legislation carry out an object beyond the powers of the legislature enacting it and encroach upon a field not properly belonging to it. the provision must be regarded in its true nature and character and it must be ascertained having regard to the object or purpose of the provision also the effect produced by it as to whether it is really and truly a provision relating to an ancillary or subsidiary matter or whether under the guise of making a provision on an ancillary or subsidiary matter what it really seeks to do is to trespass into other field. It is in the light of these principles that we must now consider as to whether the provision enacted in Section 26 (3) is a provision enacted by the Legislature on a matter ancillary or subsidiary to tax on sales and purchase of goods and whether it was necessarily incidental to effective legislation on that subject.

(13) In order to determine this question it is necessary to examine briefly the scheme of the Bombay Sales Tax Act, 1953. The Bombay Sales Tax Act, 1953 came into force on 25th March 1953. It imposed two kinds of taxes, namely general sales tax and special tax on sales of goods. It also imposed purchase tax but that was only on certain kinds of purchase and that too in respect of all goods but only in respect of certain goods which might be notified by the State Government. Section 9 required every dealer liable to pay general sales tax to obtain registration under the Act, the scheme being that general sales tax should be chargeable only on a registered dealer and that an unregistered dealer should not be chargeable to general sales tax. the definition of a dealer in Section 2(6) included a firm by reason of the application of Section 3(35) of the Bombay

General Clauses Act and this definition coupled with the other provisions of the Act clearly showed - and this was not disputed by the learned Advocate General - that the firm was recognized as an assessable entity distinct from its partners for the purpose of taxation under the Act. section 26 (3) sought to tax allotment of goods amongst partners or members in the event of dissolution or partition of a firm in the following words:

"26. (3) (I) When a firm liable to pay the tax is dissolved, or

(ii) where an undivided Hindu family liable to pay tax is partitioned, such firm or family, as the case may be, shall be liable to pay the tax on the goods allotted to any partner or member thereof as if the goods had been sold to such partner or member unless he holds a certificate of registration or a licence, as the case may be, or obtains it within the prescribed period".

This was the position as it obtained under the Act prior to its amendment. Sweeping amendments were, however, made in the Act with effect from 1st April 1954. The amendments altered the structure of the various taxes imposed by the Act and instead of taxing the sale at multiple points as was the position under the amended Act, the amended Act taxed the sales only at two points. Section 10 imposed purchase of goods specified in Column 1 of Schedule B at the rates, if any, specified against such goods in Column 4 of that Schedule provided such purchase were made from an unregistered dealer. section 8 imposed sales tax on sale of goods specified in Columns 1 of Schedule B at the rates, if any, specified against them in Column 2 of that Schedule but declared that goods on the purchase of which the dealer has paid or is liable to pay purchase tax shall not be liable to included turnover of goods for the purpose of charge of sales tax. Section 10A provided that notwithstanding anything contained in Section 8 or 10 a registered dealer who is liable to pay purchase tax on purchase u/s 10 shall be entitled to elect to pay either purchase tax on purchase of such goods or sales tax, if any on sale of such goods when they are sold without being processed or altered in any manner so that he would liable to pay only one of the two taxes. A third tax called general sales tax was also imposed by section 9 on sales of certain kinds of goods but that tax was to be paid in any event irrespective of the liability to pay purchase tax on purchase of such goods. Though the structure of the taxes was thus altered, Section 26(3) remained the same with only this inconsequential difference that the words "or a licence, as the case may" which occurred in that section were dropped. This was broadly the scheme of taxation embodied in the act as amended from 1st April 1954.

(14) Relying on the provisions of the amended Act, the learned Advocate General contended that having regard to those provision it was clear that Section 26(3) was a necessary provision for the purpose of making effective the main legislation which imposed tax on sale or purchase of goods. The argument was built up by taking the following steps. He contended that under the amended Act apart from the general sales tax, the primary tax levied on a dealer was the purchase tax. If a dealer purchased goods from an unregistered dealer, he was

liable to pay purchase tax u/s 10 and in that event he would not be liable to pay sales tax u/s 8 when sold the goods. But by section 10A he was given an option. He could by making an election postpone payment of tax and pay it in the shape of sales tax when he sold the goods. This was the benefit conferred on a dealer by the Act. but if the dealer happened to be a firm, the dealer could abuse this benefit by dissolving the firm and distributing the goods of the firm in specie amongst the partners. In such a case the dealer would escape both the sales tax and the purchase tax. It was in order to prevent this escapement of tax that the Legislature enacted Section 26(3). Section 26(3) was intended to ensure the proper and effective work of the Act by preventing escapement of tax which might result in the case of registered firm which has opted in favour of paying sales tax if such firm distributes its goods in specie amongst the partners. Of course, if the partner to whom the goods are allotted is registered, there would be no difficulty, for when such partner sells the goods, sales tax would be recovered by the State. Equally there would be no difficulty if such partner obtains registration within a prescribed period for then the sale of the goods when made by him would be taxable. But if such partners is not registered and does not obtain registration within the prescribed period and sells the goods, sales tax would not be chargeable and in such a case the State would lose the tax which would in any event have been payable as purchase tax but for the election. The election provided in Section 10A would, therefore enable the firm to escape tax by distributing the goods amongst the partners in specie on distribution and this loophole was necessary to be plugged and was so plugged by the Legislature by section 26(3). Section 26(3) was, therefore, necessary for making the main legislation effective and was clearly within the ancillary or incidental power of the State Legislature.

(15) The argument though attractive is, in our opinion, defective in at least two respects. In the first instance it is based on the provisions of the amended Act. The provisions which must be considered for the purpose of deciding whether Ss.26 (3) can be justified as an exercise of ancillary or subsidiary power are not the provisions of the amended Act but the provisions of the Act as unamended in Section 26(3) formed part of the Act as originally enacted and it is at that date that we must see whether the enactment of Sec.26 (3) was within the legislative competence of the state legislature. If it was, the validity of the section must be declared to be invalid, for if the Section was beyond the legislative competence of the State Legislature at the date when it was enacted, no subsequent amendment of the Act can resuscitate it.

(16) But even if the subsequent amendments made in the Act can be taken into account, the argument urged on behalf of the State must yet fail. If we look at Section 10A the legislative intent and policy does not appear to be one that of the two taxes to be paid in any event. Section 10A gives an option to the dealer between the two taxes. If he opts in favour of paying purchase tax there is no more questions about it for in that event he would always pay the purchase tax irrespective of the fact as to what he does with the goods. If on the other hand

he opts in favour of paying sales tax he would not be liable to pay the purchase tax but would be liable to pay only the sales tax, if any,. On the sale of the goods when they are sold. The use of the words "if any" shows that the legislature contemplated that no sales tax become payable by the dealer and the dealer as a result of the election escape tax altogether. Suppose the goods such that on the purchase, tax is payable but not on the sale. If such the case the dealer would not be liable to pay purchase tax by reason of the election and he would equally not be liable to pay sales tax because no sales tax would be chargeable. The same consequence would also ensue when the sale effected by the dealer is a sale in the course of inter-state trade or commerce or a sale outside the State of Bombay. These are cases where the goods are sold but let us take a case where the goods may be destroyed or consumed by the dealer. In such a case also the dealer would not pay purchase tax because of the election and would also not pay sales tax because there is no sale. A dealer may gift the goods purchased by him and there also the dealer would not be liable either for payment of purchase tax or the payment of sales tax. The language of Section 10A which gives the election clearly shows that the legislature did not intend that in any event one of the two taxes should be paid. It clearly contemplated a possibility that where option was exercised in favour of paying sales tax, neither tax may be payable. There was thus, having regard to the legislative policy and intent, no loophole in the Act which required to be plugged and Section 26(3) could not be said to have been enacted in exercise of an ancillary or subsidiary power of legislation with a view to effectuating the main legislation. The object of Section 26(3) was to tax transaction which was not a sale by fictionally treating it as a sale and the attempt was clearly beyond the legislative competence of the State Legislature.

(17) But as we pointed out above the provisions which we have to consider for the purpose of determining the validity of Section 26(3) are the provisions of the Act as amended and it is in the light of those provisions that we have to see whether on the date when Section 26(3) was enacted it was a measure which could be justified by resort to the doctrine of ancillary or subsidiary powers. On this part of the case the learned Advocate General contended that even under the unamended Act, if a firm which was registered under the Act was allowed to distribute the goods in specie amongst the partners on dissolution without attracting the charge of tax, the consequence would be that there would be escapement of tax. If the firm sold the goods in the course of its business, it would be liable to pay sales tax on the sale of the goods, but if the registered firm distributed the goods in specie amongst the partners and any partner was not registered under the Act and did not obtain registration within a particular period and sold the goods, tax at that point would be avoided and the state would lose the tax. Section 26 (3) was, therefore, intended to plug this loophole which enabled tax at least one point to be avoided and the enactment of the section consequently an exercise of ancillary or subsidiary power intended to ensure the proper and effective working of the legislation. This argument is too unsound and cannot be accepted. The ancillary or subsidiary power of

legislation can be exercised by the State Legislature only in aid of the main topic of legislation, namely, tax on sale or purchase of goods. All necessary for the levy and collection of tax what are really and truly sales or purchases of goods and for ensuring that such tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental powers and if any provision is necessary for the purpose of taxing what are really and truly sales or purchases of goods and making evasion of tax on such sales or purchases impossible, the state Legislature can certainly enact such provision. But the State Legislature cannot under the guise of exercise of ancillary or incidental power of legislation tax transactions which are not sales by fictionally treating them as sales. The ambit of incidental or ancillary power cannot go to the extent of permitting the State Legislature to provide that though any particular transactions are not sales or purchases of goods, they shall be taxed as if they were sales or purchase of goods. It is difficult to see how taxing of transactions which are not sales or purchases of goods can be said to be ancillary or incidental to levy or collection of tax on transactions which are really sales or purchases of goods. What in effect the legislature did by Section 26(3) was to tell the dealer that if you had sold the goods, I could have taxed them. But you did not sell them and therefore even though you have not sold them, I shall treat them as sold so that I can tax them. That is something which is not permissible to the State Legislature. Tax becomes exigible only on sale or purchase of goods and if there is no sale or purchase, tax is not chargeable and in such a case it is not right to say that there is any escapement of tax. If the event which attracts taxability does not happen, it is difficult to see how it can be said that there is any avoidance of tax for the purpose of remedying which the State Legislature can intervene. If the State Legislature can say that by allotment of goods amongst partners the firm is avoiding tax and the state Legislature is, therefore, entitled to tax such allotment, the state Legislature should equally be entitled to say that if a dealer instead of selling the goods purchased by him gifts them or consumes them and thereby tax which would have been payable if the goods had been sold is avoided, it can tax such gift or consumption as if it were a sale. Clearly such a thing cannot be done and as a matter of fact the attempt of Madhya Pradesh Legislature to tax consumption of goods by a dealer was declared to be ultra vires by the Supreme Court in *Bhopal Sugar Industries Ltd., Madhya Pradesh and Another Vs. D.B. Dube, Sales Tax Officer, Bhopal Region, Bhopal and Another*, On the same principle we do not see how the attempt of the State Legislature in the present case can be sustained. The Act as it stood quite effective in so far as it taxed sales of goods and if a dealer did not sell goods, he was obviously not liable to pay tax and it could not be urged that since by not selling, a dealer would be avoiding payment of tax, the State Legislature can treat him as having sold the goods and tax him on that footing. We are, therefore, of the opinion that in enacting Section 26(3) what the legislature did was to enact an ancillary or subsidiary provision intended to ensure the proper and effective functioning of the main legislation but to directly and expressly bring to tax a transaction which was not a sale within the meaning of the Indian Sale of Goods Act by fictionally

treating it as such sale. This was constitutionally impermissible to the State Legislature.

(18) Before we part with this point we must refer to three decisions cited by the learned Advocate General in his support of his contention that Section 26(3) was an ancillary or subsidiary provision necessarily incidental to effective legislation on the subject of tax and purchase of goods. One was the decision of the Indian Aluminium Co. Ltd. Vs. The State of Madras, and the other two were decisions of the Supreme Court in The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, Burmah Construction Co. Vs. The State of Orissa and Others, . It is not necessary to refer to these decisions in detail for they affirmed the same principle which we have discussed above, namely, that the power to legislate on a particular topic of legislation necessarily carries with it the power to legislate on all matters which are ancillary or subsidiary to the main subject and merely applied that principle to the different situations arising in those cases. The principle of course is clear and cannot, as we have pointed out above, be disputed but the question is what result does the application of the principle give in the present case. There our answer is that Sec.26 (3) does not for reasons which we have given, represent an exercise of ancillary or incidental power under the relevant legislative entry and must, therefore, struck down.

(19) In this view of the matter we must declare Section 26 (3) as ultra vires the State Legislature in so far as it purported to tax allotment of goods of a firm amongst partners on dissolution. Our answer to question No.1 will, therefore, be in the negative and question No.2 will not arise. The applicant will pay to the opponents the cost of the Reference fixed at Rs. 450/-

(20) Answer accordingly.