

(2015) 01 BOM CK 0042

In the Bombay High Court

Case No : Writ Petition No. 2818 of 2012 with Notice of Motion [L] No. 214 of 2013

Tata Sons Limited and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 39

Constitution of India, 1950 — Article 226, 326, 366, 366(29A), 366(29A)(d)

Citation : (2015) 80 VST 173

Hon'ble Judges : S.P. Deshmukh, J.; S.C. Dharmadhikari, J.

Bench : Division Bench

Advocate : Aspi Chinoy, Senior Counsel, Astad Randeria, R.K. Satpalkar, Pinkesh Shah i/b. Mulla and Mulla and C.B. and C., for the Appellant; A.A. Kumbhakoni, Special Counsel a/w V.A. Sonpal and S.B. Lolage, Advocates for the Respondent

Judgement

S.C. Dharmadhikari, J.—By this Writ Petition under Article 226 of the Constitution of India, the petitioners are seeking the following reliefs :

(a) this Hon"ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction;

(i) quashing and setting aside the said impugned orders being exhibits C1 to C4, D1 to D4, E hereto and K4-A, K4-B, K4-C, K4-D, K5-A, K-5-B, K-5-C, K-6-A, K-6-B and K6-C."

(ii) quashing and setting aside the said Notices dated July 17, 2012 for recovery of the alleged sales tax dues for the period 1998-2002 being exhibits F1 to F4 hereto;

(iii) quashing and setting aside the said Orders dated August 9, 2012 for levy of interest and penalty in respect of the said alleged sales tax dues for the period 1998-2002 being exhibits G5 to G8 hereto;

(iv) quashing and setting aside the said Assessment Notices dated March 15,

2011 for levy of sales tax for the years 2002-2005 being exhibit H1 to H3 hereto;

(v) quashing and setting aside the said Notice dated 13th August, 2012 issued under Section 39 of the Bombay Sales Tax Act, 1959 by Respondent No. 2 to the Branch Manager, Canara Bank, Fort Market Branch being Exhibit C8 hereto.

(b) this Hon"ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction directing Respondent No. 2 to refund to Petitioner No. 1 an amount of Rs. 2,66,11,200/- being the total amount of part payment of sales tax paid in respect of the Assessment Order dated August 2, 2003 along with interest thereon at a rate which this Hon"ble Court deems fit;

2. At the outset Mr. Kumbhakoni, learned Senior Counsel appearing for the respondents invites our attention to the order passed by this Court on 5th February, 2014 and submits that though the Writ Petition is admitted the issue of its maintainability has been kept open.

3. The petitioners according to the respondents have an alternate and equally efficacious remedy of seeking reference under Section 61(1) of the Bombay Sales Tax Act, 1959. They have not availed of that remedy. Rather they availed of that remedy during the pendency of this Writ Petition, but, their application seeking a reference on certain questions of law for opinion and answer of this Court was dismissed by the Tribunal on 15th January, 2013 holding that it is barred by limitation. Mr. Kumbhakoni has submitted that the objection, therefore, can still be raised.

4. Mr. Kumbhakoni submits that the conduct of the petitioners is such that they should not be allowed to invoke this Court's equitable and discretionary jurisdiction. He relied upon the fact that Second Appeals were dismissed by the Tribunal on 7th June, 2012. The notices for recovery of tax were issued calling upon the petitioners as to why the recovery should not be effected with deferred penalty. Four orders were passed pursuant to this notice on 9th August, 2012 and Rs. 7 Crores was the amount determined thereunder.

5. Mr. Kumbhakoni submits that the statutory period of limitation of ninety days is prescribed under Section 61 for making an application requesting the Tribunal to refer the questions of law for opinion and answer of this Court expired. However, on the very next day, namely, 14th September, 2012 a Writ Petition in this Court has been filed, namely, the present Writ Petition. On 2nd November, 2012, an order is passed in the present Petition wherein a statement is recorded that in view of availability of the alternate remedy the petitioners would invoke it within two weeks from the date of the order. The present Writ Petition was kept pending. Mr. Kumbhakoni, therefore, submits that the petitioners are accepting the fact that the remedy provided under Section 61 is not only alternate but equally efficacious and they deliberately did not invoke it earlier but availed of purportedly the same after the limitation for availing it had expired. This conduct of the petitioners is intentional and deliberate. The Reference Application filed

belatedly could not have been entertained by the Tribunal and it was rightly dismissed on 15th January, 2013. Thereafter the petitioner is pursuing this Writ Petition. Mr. Kumbhakoni submits that the petitioners are a Corporate entity and advised by legally trained and competent minds. They are not illiterate or downtrodden persons who would on account of their financial condition or situation do not have access to competent legal advice or assistance. In such circumstances, he would submit that in the absence of a statement in the Writ Petition that the remedy is not available or if available is not efficacious all the more this Writ Petition should be dismissed. Further, there is no explanation forthcoming as to why the petitioners purported to avail of the remedy during the pendency of the Writ Petition. The petitioners having availed of it and not succeeded therein now should not be allowed to pursue the Writ Petition.

6. Mr. Kumbhakoni has relied upon a judgment of the Kerala High Court in that regard passed in Writ Appeal No. 715 of 2005 decided on 20th October, 2005 in the case of Assistant Commissioner of Central Excise and Ors. Vs. Krishna Poduval and Ors.

7. On the other hand, Mr. Chinoy, learned Senior Counsel appearing for the petitioners submits that the Writ Petition is now admitted. There are extensive pleadings on record on the merits of the Writ Petition. Further, an application under Section 61(1) of the BST Act, 1959 cannot be termed as an efficacious remedy because the application may be filed by the petitioners, however, it is the prerogative of the Tribunal to refer the questions of law for opinion and answer of this Court. It is not as of right that the petitioners can claim that the questions be referred. In these circumstances, when it is for the Tribunal to decide whether any questions of law arise or if they arise they have to be referred for opinion and answer of this Court, then, the Writ Petition should not be dismissed on the ground of availability of an alternate remedy. Further, the rule that this Court would not entertain a Writ Petition in the face of alternate and equally efficacious remedy does not create a bar. That does not amount to a absolute prohibition but it is a rule of prudence. It has been carved out judicially and will not prevent this Court from entertaining a Writ Petition in the face of such remedies being available. In such circumstances, he would submit that there is nothing deliberate or intentional about the act of the petitioners and the questions raised in the Writ Petition are going to the root of the case that we should entertain the Writ Petition.

8. Having heard learned Senior Counsel on this point, we are not impressed by the objections raised by Mr. Kumbhakoni. The order passed on 5th February, 2014 has been perused by us in its entirety. This Court despite such an objection proceeded to grant rule on the Writ Petition and heard parties on the point of interim relief. After hearing them extensively the Court refused the interim relief. Against the order of this Court, the petitioners approached the Hon''ble Supreme Court by filing a Special Leave Petition being Petition for Special Leave (Civil) No. 4701 of 2014. That was placed before the Hon''ble Supreme Court on 14th

February, 2014 and the Hon"ble Supreme Court proceeded to dismiss it but at the same time requested this Court to dispose of the Petition as early as possible. In the light of the same and finding that the availability of an alternate equally efficacious remedy does not mean there is an absolute bar in entertaining a Writ Petition under Article 226 of the Constitution of India that we reject the preliminary objection raised by Mr. Kumbhakoni. We are not entertaining it at this belated stage as the Writ Petition cannot be dismissed on this short point. Having found that there are extensive pleadings of both sides including the written submissions it will not be proper to shut out the petitioners on the availability of the alternate remedy. Even otherwise we do not find that in the given facts and circumstances the remedy resorted to under Section 61(1) of the BST Act, 1959 would be efficacious and complete. Hence the preliminary objection is rejected.

9. Now on the merits of the case.

10. The present Writ Petition has been instituted by the petitioners by relying upon the fact that the first petitioner a Company incorporated under the then Companies Act, 1913 and registered under the Indian Companies Act, 1956 is the principal or holding company in the group of companies mainly referred to as TATA Companies and collectively belonging to House of TATA. TATA Companies are engaged in diverse business activities in varied sectors, namely, steel, automobiles, information technology, chemicals, tea/coffee, telecommunication, exports etc.. The business activities are conducted by the subsidiaries and companies promoted by the petitioner No. 1. These subsidiaries/group companies have already represented to the public at large their affiliation to the House of TATA. Such affiliation has been represented for several decades now by use of the word TATA as part of the name of the companies or by using the word TATA on various products of the companies.

11. In the year 1998 with a view to systematically develop, promote and enhance the brand equity in the word TATA as well as to legally protect the same, the first petitioner entered into an agreement with the TATA companies called the TATA Brand Equity and Business Promotion Agreement. Said agreement provides for various initiatives to be undertaken by the petitioner No. 1 for protecting, enforcing and enhancing the image and goodwill of TATA of the TATA name and its brand equity. This agreement provides detailed guidelines for use of the TATA name and the trade marks in the course of business by the subscribing companies. The petitioners rely upon various clauses of this agreement and submit that such an agreement was executed in order that the companies to the extent possible pool their resources and make a cooperative effort to promote a unified TATA common brand which would meet the standards and brand equity of well known international brands. It was also to ensure that the subscribing companies followed a common and standardized Code of Conduct in all their dealings with other companies and third parties as well as adopt and subscribe to standardized marketing indicia in respect of the products and services of the subscribing companies. Thus, the agreement draws up a scheme known as TATA

Brand Equity and Business Promotion Scheme to achieve these objectives and the obligations in respect thereof have been set out in this agreement. The petitioners, therefore, claim that such an agreement will not attract the law in question and which is styled as Maharashtra Sales Tax on the Transfer of Right to use any Goods for any Purpose Act, 1985 (for short, referred to as "the Act of 1985").

12. The petitioners do not dispute that the agreements with these subscribing companies were examined in the year 2003 by the Sales Tax Officer, Enforcement Branch and he came to the conclusion that the transaction embodied in the same was covered by the Act of 1985. Therefore he issued notices for assessment for the years 1998-99, 1999-00, 2000-01 and 2001-02. Annexures B-1 to B-4 are the copies of these notices. Following the same, he passed four orders of assessment of dated 2nd August, 2003 (Annexures C-1 to C-4). There were four appeals preferred against these orders to the Deputy Commissioner of Sales Tax (Appeals). The part payment of the sales tax levy was made during the course of these appeals. The appeals came to be disposed of by the Appellate Authority by an order dated 22nd February, 2011. He passed four orders copies of which are at Annexure D-1 to D-4.

13. Aggrieved and dissatisfied with these orders, four Second Appeals were filed before the Maharashtra Sales Tax Tribunal being Second Appeal Nos. 232 to 235 of 2011.

14. The petitioners heavily relied upon the grounds in the memo of appeal before the Tribunal. They specifically relied upon the orders passed by the Tribunal in the case of (i) M/s. Smokin" Joe's Pizza Pvt. Ltd. Vs. State of Maharashtra in Appeal No. 25 of 2004 decided on 25th November, 2008; and (ii) M/s. Diageo India Pvt. Ltd. Vs. State of Maharashtra in Second Appeal Nos. 1432 to 1438 of 2006 decided on 12th February, 2009. The Tribunal however passed a common order on 7th June, 2012 and dismissed these four Appeals.

15. In furtherance of these orders four notices for recovery of sales tax came to be issued by the authorities and the copies thereof have been annexed to the Writ Petition. Even on these recovery notices the petitioners were heard and the second respondent passed an order directing recoveries and in terms of the legal provisions. That is how and aggrieved by the same, present Writ Petition has been filed. The Writ Petition was amended so as to incorporate the events subsequent to the institution of the same. We are not as much concerned with these events because it may be that the petitioners have complied with the demand raised as stated therein but we are required to answer the legal questions which have been raised by the petitioners.

16. Mr. Chinoy, learned Senior Counsel appearing for the petitioners submitted that the petitioners' case was fully covered by the orders passed by the Tribunal in the case of M/s. Smokin" Joe (supra) and M/s. Diageo India (supra) and the further orders which are now revealed to the petitioners, namely, in the case of

M/s. Phonographic Performance Ltd. Vs. State of Maharashtra which is compiled by the petitioners in a compilation (passed in VAT Appeal No. 9/2007 decided on 19th June, 2009). There are similar views which have been taken in the cases of M/s. Deluxe Caterers Pvt. Ltd. Vs. State of Maharashtra in Second Appeal Nos. 1589 to 1591 of 2006 decided on 9th February, 2011 and M/s. Melrose Trading Corporation Pvt. Ltd. Vs. The State of Maharashtra in Second Appeal Nos. 503, 504 and 505 of 2007 decided on 30th September, 2011.

17. The essential grievance of Mr. Chinoy is that when the orders passed in the case of M/s. Smokin" Joe (supra) and M/s. Diageo India (supra) apply then, the Tribunal should have applied them and the judgment of the Hon"ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . In the identical circumstances as that of M/s. Smokin" Joe (supra) and M/s. Diageo India (supra) the petitioners should have been granted reliefs. The petitioners heavily relied upon the judgment of the Hon"ble Supreme Court in the case of BSNL (supra) and particularly paragraphs-97 and 98 thereof. If the facts and circumstances were identical, then, the least that was expected from the Tribunal was to consider the submissions of the petitioners seriously and not brushed them aside and equally the orders passed by it from time to time. They have been so brushed aside with one or two line observations that the facts and circumstances of the petitioners" case are not identical but distinguishable. How they could be said to be distinguishable has not been clarified at all.

18. Mr. Chinoy, has submitted that the Hon"ble Supreme Court has considered some what identical issues in the case of BSNL (supra). There is a concurrence in the opinions of the learned Judges constituting the Bench. In a concurring opinion and judgment, His Lordship Hon"ble Mr. Justice Dr. AR Lakshmanan had summarized the legal principles. Mr. Chinoy relied upon paras-97 and 98 of the judgment in the BSNL case (supra).

19. Mr. Chinoy submits that if the agreement in question is perused as well it would be apparent that the same is to ensure that the brand and equity is protected. The House of TATA has certain standing and reputation in the Industry and society. If there is an anxiety to protect it and not allow it to be abused and misused, then, all the more this agreement must be construed as not-transferring any right. The facility and the concession given to use the trade marks and the name will not necessarily mean that there is any transfer and within the meaning of the Act of 1985. In M/s. Smokin" Joe (supra) and M/s. Diageo India (supra) there were identical facts and rights which were purportedly created and transferred in favour of the franchisee were noted by the Tribunal. Despite noting such clauses in the franchise and related agreement, the Tribunal concluded that the deal between parties would not come within the purview of Act of 1985. In the present petitioners" case as well the agreements do not indicate that the attributes set out in para-98(b) of the BSNL case (supra) have been satisfied. In such circumstances, if there is no right created but a mere

permission for facilitating the use which would at best amount to a license, then, the Tribunal should have allowed the petitioners' appeals.

20. Mr. Chinoy has submitted that the Hon'ble Supreme Court in the case of Gammon India Ltd. Vs. Commissioner of Customs, Mumbai, has cautioned the Tribunals in not passing orders contrary to the law laid down by the Hon'ble Supreme Court or by itself. If the decisions of the coordinate Bench have been brought to the notice of the Tribunal in a case it should not proceed to take a view contrary to it creating a judicial uncertainty. There should not be opposite conclusion as it would be destructive to the institutional integrity. Mr. Chinoy has invited our attention to the judgment of the Hon'ble Supreme Court in the case of S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, . Mr. Chinoy has also relied upon the judgment of the Hon'ble Supreme Court in the case of East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, .

21. Thus, Mr. Chinoy submits that having regard to the nature of the Brand Equity and Business Promotion Agreement, the incident thereof is a right to use the trade mark and it is not a agreement for transfer of the trade mark. It is not a composite agreement covered by Article 366(29A) of the Constitution of India. The Tribunal has completely ignored the clauses of the agreement and hence its order is vitiated by an error of law apparent on the face of record.

22. Mr. Chinoy has contended that the Tribunal's order is perverse because the judgment in the case of BSNL was binding on it. There is an apparent inconsistency in the Tribunal's order and conclusions. It is thus a mockery of the rule of law.

23. Even on merits according to Mr. Chinoy if non-exclusive right has been the subject matter of the agreements and there are 113 companies which are allowed the facility in terms of the agreement, then, the case squarely falls within para-98 of the conclusions recorded in the case of BSNL. For all these reasons, the Writ Petition deserves to be dismissed.

24. On the other hand, Mr. Kumbhakoni, learned Senior Counsel appearing for the respondents would submit that the present Writ Petition deserves to be dismissed. The Tribunal's order cannot be said to be perverse or vitiated by any error of law apparent on the face of record. Mr. Kumbhakoni has submitted that the enactment has to be seen for what it is. The Act of 1985 is dealing with the right to use any goods. The words "exclusive" and "unconditional" which are being read into this enactment by the petitioners and their counsel are totally absent therein. Mr. Kumbhakoni submits that the definition of the term "sale" appearing in Section 2(10), the definition of term "goods" appearing in Section 2(5) and the definition of the term "turn over of sale" appearing in Section 2(15) and the provisions contained in Sections 3 and 4 read with the schedule at Sr. No. 7 would denote that the Act of 1985 squarely covers the agreement such as the one involved in the present case. Mr. Chinoy's arguments are founded on the

fact that there has to be a transfer within the meaning of that term as understood by the Transfer of Property Act, 1882. In the present case the act would indicate as to how mere right to use can also be a subject matter of the levy. If right to use this trade mark is transferred under the agreement, then, all the clauses of the agreement read together and harmoniously would indicate that the right covered thereby is transferable. There is no requirement of any exclusivity in terms of the applicable statutory provisions.

25. Mr. Kumbhakoni submits that the right to use can be transferred by a simple agreement or by a composite agreement. It could be incidental as well. If the right to use the trade mark is transferred then the act applies and it is not necessary that the trade mark itself is transferred or assigned. The tax can be levied on such a user and on every transfer of the right in that behalf. There could be multiple transfers of right to use and in such circumstances so also when the Act does not contemplate cessation of user by the transfer or, then, levy cannot be avoided. The Tribunal's essential conclusion is, therefore, unassailable. The Tribunal may not have assigned detailed reasons for distinguishing the orders passed in the case of M/s. Smokin" Joe"s (supra) and M/s. Diageo India (supra) but the foundation on which it has proceeded is sound in law. So long as the tribunal has not ignored the agreement or the stipulations and clauses therein, the provisions of the Act, then, its order cannot be termed as a perverse.

26. Mr. Kumbhakoni has summarized his arguments by a short note as well. In above circumstances and relying upon this note additionally it is submitted by him that the Writ Petition be dismissed.

27. For properly appreciating the rival contentions reference to the Act is necessary. The act is entitled as the Maharashtra Sales Tax on the Transfer of Right to use any Goods for any Purposes Act, 1985. It is an Act to levy and collect the 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 in the State of Maharashtra. The Act originally enacted came to be amended from time to time. It is containing several definitions. The definition section is Section 2 and which opens with the words "In this Act, unless the context otherwise requires". "Goods" means all kinds of moveable property (not being newspapers, or actionable claims or money, or stocks, shares or securities). "Registered dealer" is defined to mean-a dealer registered under section 7 of the Act. The term "Sale" is defined in Section 2(10) to mean the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or any other valuable consideration, and word "sell" with all its grammatical variations and cognate expressions, shall be construed accordingly. "Sale price" is defined in Section 2(11) to mean the amount of valuable consideration received or receivable for the transfer of the right to use any goods for any purpose. The explanation below Section 2(11) would indicate that the term "sale price" shall include the amount received by the

seller by way of deposit (whether refundable or not), which has been received whether by way of a separate agreement or not, in connection with or incidental or ancillary to, the said sale or the distribution of the said goods. The term "Schedule" means the Schedule appended to the Act and Section 2(14) defines the term "tax" to mean a tax payable under this Act. The term "turnover of sale" is defined under Section 2(15) of the Act and which includes advance received by dealer as a part of sale price.

28. Then comes Chapter-II. The title of this Chapter is "Incidence and Levy of Tax". Sections 3 and 4 coming in this Chapter read as under:

"3. Incidence of tax

Subject to the provisions contained in this Act and the rules made thereunder, tax shall be leviable on the turnover of sales in respect of-

(i) the transfer of the right to use any goods agreed to before the appointed day but the right to use is exercised on or after the appointed day;

(ii) the transfer of right to use any goods agreed to prior to the appointed day, and wherein the right to use has been continued after the appointed day, to the extent of the sale price received or receivable in respect of such use on or after the appointed day; and

(iii) the transfer of right to use any goods agreed to on or after the appointed day.

4. Levy of tax

There shall be levied a tax on the turnover of sales in respect of the transfer of the right to use goods specified in the Schedule, at such rate not exceeding fifteen paise in the rupee, as the State Government may, by notification in the Official Gazette, specify from time to time [and different rates may be specified for different goods specified in the Schedule].

29. A bare perusal of these sections would indicate that subject to the provisions contained in the Act and the Rules made thereunder the tax is leviable on the turnover of sales in respect of the transfer of the right to use any goods and agreed to before the appointed day but the right to use is exercised on or after the appointed day or agreed to prior to the appointed day and wherein the right to use has been continued after the appointed day to the extent of sale price received or receivable in respect of such use on or after the appointed day and the transfer of right to use any goods agreed to on or after the appointed day. Levy of tax is on the turnover of sales in respect of the transfer of the right to use goods specified in the Schedule and at such rate as is set out in Section 4.

30. Section 4A provides for set-off drawback etc. Then Section 5 sets out the liability of dealer and by Section 6 Sales Tax is made payable by dealer.

31. Chapter III is entitled as "Registration" and contains Section 7, whereas by Chapter IV certain provisions of the Bombay Sales Tax, 1959 are made

applicable. By Section 8A certain sales are not liable to tax under the Act. Chapter V is entitled as "Miscellaneous and Rules". There is a power give to the State to amend the schedule by inserting any entry in respect of transfer of right to use any goods for any purpose and by Section 10 there are powers conferred in the State to make rules generally to carry out the purpose of this Act and by sub-section (2) the rules may provide for matters set out therein. The schedule and which is referable to Sections 2(12), 4, 6 and 9 to the extent relevant reads as under :

"7. The transfer of the right to use the goods of incorporeal or intangible character, that is to say,-

a) Patents,

b) Trademarks,

c) Import-Licences."

This entry No. 7 has been inserted by a notification dated 18th March, 1988.

32. Thus, the transfer of rights to use goods of incorporeal or intangible character has been inserted by this Government Notification in the Schedule. The tax is, therefore, leviable on the transfer of right to use any such goods.

33. In the present case the agreement that is relied upon is entitled "TATA Brand Equity and Business Promotion Agreement". By clause-1 which contains "interpretation and definition", the term "Marketing Indicia" has been defined to mean certain trading names, logos, advertising slogans and images, colour schemes, styles of labelling, emblems and other manifestations characteristic of the TATA brand to be developed by the Proprietor for use by the Subscribers to this and similar Agreements. The term "Protect/Protection" has been understood by parties to include the creation and development of a mark or a symbol (which may or may not incorporate the word TATA) by the Proprietor in pursuance of this Agreement to project the group image and further includes the registration of such mark either as a trade mark under the Trade and Merchandise Mark Act, 1958 or as a "work" under the Copyright Act, 1957. The expression also includes certain steps with a view to prosecute, defend and enter into legal proceedings. By Clause (2) Obligations and responsibilities of the proprietor are set out and by Clause (3) the "grant" in terms of the agreement is set out. Clause 3.1 reads as under :

"3.1 The Proprietor hereby grants to the Subscriber for the term of this Agreement and subject to its terms a personal but non-exclusive and non-assignable subscription to use the Business Name, the Marketing Indicia and a right to enter into a separate Registered User's/Licence Agreement for the use of the Marks in relation to its products and/or services in the Territory and/or Other Use in relation to the Subscriber's business. The Subscriber would be entitled to use any mark or symbol newly developed by the Proprietor for projecting the Group image, provided always that the Subscriber adheres to the Code and

further that the Subscriber would assist the Proprietor in protecting and enforcing the said mark or symbol;

PROVIDED HOWEVER that where on the date of execution of this Agreement the Subscriber has already been granted a Registered User of the Proprietor's existing Trade Marks and an Agreement to that effect is valid and subsisting such Agreement will continue to remain in force in accordance with the terms of such Registered User's Agreement."

34. By clause (4) use of the business name, marks and marketing indicia is set out and the business name, marks and marketing indicia can be used in terms of the said clauses. By clause (5) control of use of the marks and marketing indicia is dealt with and clauses 5.1 and 5.2 therein read as under :

"5.1 In order to maximise the impact and benefit to both parties of the subject matter of this subscription-

(a) the Subscriber shall supply the Proprietor with detailed Major Campaign schedules which involve the Business Name, Marks or Marketing Indicia as soon as these are known and agreed internally by the Subscriber;

(b) the Proprietor shall supply the Subscriber with information similar to that referred to in sub-clause 5.1(a) in relation to Major Campaign schedules sponsored by the Proprietor relating to the business of the Subscriber in the Territory.

In order not to clash in their respective communications efforts each party shall keep the other informed in good time of any changes to such schedules. If it is found that there is any clash in content or timing of any Major Campaign, the parties shall consult together with a view to revising such content or timing in a manner satisfactory to each. If agreement is not reached within a reasonable time, the Proprietor's decision as to the action to be taken by each party shall be final and the Subscriber shall abide by it but neither party shall be required to pay any compensation or reimbursement of expenses to the other in relation to such decision.

5.2 The Proprietor shall supply to the Subscriber appropriate guidelines and codes relating to matters such as :

Corporate Visual Standards;

International Businesses Visual Standards;

Advertising and Business Promotion Standards;

and such other printed material as may from time to time become available and be considered by the Proprietor to be useful or necessary. If there is a conflict or inconsistency between the manuals and this Agreement the terms of this Agreement shall prevail."

35. Then there are stipulations with regard to quality and standards and to be

found in Clause (6). By Clause (7) there is a proprietor access and by Clause (8) what is provided is that notwithstanding the provisions of Clause 2 and notwithstanding any approval or agreement by the Proprietor pursuant to Clause 3.1 all conditions, warranties, statements, liabilities and guarantees whether statutory or otherwise as or relating to the products and services are the responsibility solely of the Subscriber and the Proprietor shall not be liable for any damage caused by the third party acts.

36. The proprietor shall not be liable for contract, tort or otherwise in respect of any of the acts set out in clause-8.1(b). Then by clause (9) the TATA Code of Conduct is set out and by clause (10) the acknowledgment of rights is recorded. That right of the Proprietor is acknowledged by the Subscribers to the agreement. Then clause (12) is relied upon with its sub-clauses so as to urge that there will be control of the Proprietor on the usage and the grant in terms of the clauses of the agreement.

37. The argument of the respondents and which commends to us is that a person may have various rights in respect of any goods, namely, to sell, to possess, to use, to consume etc., but, from and out of these rights, right to use goods is the subject matter of the act. It is transfer of the right to use goods which is subjected to levy in terms of this Act. The assignment by way of sale or otherwise of any right including a title in any goods is not covered by the Act. Further argument is that the Act applies to transfer of not only tangible but intangible/incorporeal goods. That is how the schedule entry No. 7 and Section 2(12), 4, 6 and 9 have been referred by Mr. Kumbhakoni. Further argument is that the trade mark is goods within the meaning of the said term as defined by the Act and that transfer of right to use a trade mark is covered by the Charging Sections or by chapter-II of the Act. There may not be assignment of the trade mark but there could be transfer of the right to use the trade mark and which is taxable.

38. Mr. Kumbhakoni has highlighted in his oral and written arguments the attributes in case of tangible goods and it is submitted that in case of machinery, physical possession or control of the goods would be necessary to use the goods. However, in case of intangible/incorporeal goods by their very nature there is no possibility of physically possessing or controlling the same. This is to meet the arguments of Mr. Chinoy that in terms of the TATA Brand Equity and Business Promotion Agreement, the petitioners retained control and power of the brand and its equity and there is no exclusive transfer of the same. It is at best a conditional right to use and which cannot equated with a license is what is argued by the petitioners.

39. Mr. Kumbhakoni has countered that in cases of this nature, there could be more than one person who can simultaneously use the intangible/incorporeal goods. In the present case, there need not be any transfer of possession or control and thus that is not the attribute which is required so as to tax the transaction or deal. If there can be multiple transferees and the transferor

continues to use the goods along with the transferee still the levy cannot be escaped.

40. Upon perusal of the entire Act and reading these provisions together and harmoniously, we are in agreement with Mr. Kumbhakoni that the deal or transaction between the petitioners and the subscribers envisage that a transfer of a right to use the goods and which could be said to be the marks as well. Upon a conjoint reading of the provisions of the Act we are of the opinion that in the case of intangible/incorporeal goods the right to use them is capable of being transferred and if transferred it may be subjected to tax. The Act does not give any indication as is rightly urged before us that the right to use the incorporeal/intangible goods should be exclusively transferred in favour of the transferee. The nature of the transfer or the nomenclature assigned to the act of will therefore not necessarily be decisive. Mr. Chinoy does not dispute that the right to use the goods is incapable of being transferred. The goods could be intangible as well.

41. We have referred to the clauses in the agreement between the petitioner No. 1 and the subscribers in detail only to emphasise that it is not the argument of the petitioners that the right to use is not transferred. However, their argument is that it is not exclusive but conditional. Secondly, it is clear from the clauses of the agreement that the proprietor continues to control even the limited right conferred by the above clauses in favour of the subscribers. We are of the opinion that so long as the agreement transfers the right to use intangible goods which are the trade marks in this case, then, there is no question of the petitioners escaping the consequences of the enactment. The enactment and the definitions which we have referred together with the substantive provisions does not envisage exclusive and unconditional transfer of the above right. The Act has been brought in and with a specific object. The definition of the term "goods" means all kinds of property (not being newspapers, or actionable claims or money, or stocks, shares or securities). Therefore in terms of this definition and the schedule entry No. 7, intangible/incorporeal goods and particularly trade marks are brought within the purview of the enactment. Even the definition of the term "dealer" in section 2(4) would indicate that it means any person who whether for commission, remuneration or otherwise transfers right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration and includes State Government or Central Government which so transfers the right to use such goods and also any society, club or association of persons which transfers the right to use such goods to its members. The explanation also makes it clear that the right to use video cassettes if transferred, the person who transfers such right to the exhibitor or user and from whom exhibitor or user derives the right to make such use shall be deemed to be the dealer under this clause. The term "sale" as defined in section 2(10) means the transfer of the right to use any goods for any purpose. In the context which the Tax is demanded this term has been defined and if transfer of right to use any goods for any purpose is granted that comes within

the definition of the term "sale". The term "sale price" also indicates as to how the act has been brought in with a specific object and purpose.

42. The tax is therefore leviable on the turnover of sales in respect of transfer of right to use any goods and in the present case according to assessee after the appointed day. Levy is on the turn over of sales in respect of transfer of the right to use the goods specified in the schedule. The schedule entry itself reflects as to how on 18th March, 1988 by a Government notification of the Finance Department the transfer of right to use the goods of incorporeal or intangible character i.e. to say patents, trademarks and import licenses have been brought in under the Act.

43. Such being the sweep of the Act and the reading of the agreement styled as TATA Brand Equity and Business Promotion Agreement which contains stipulations transferring the right to use the marks, we are in agreement with Mr. Khumbhakoni that the Tribunal committed no error of law apparent on the face of record or acted perversely in dismissing the petitioners' appeals.

44. The argument of Mr. Chinoy is premised on the law laid down in the decision of the Supreme Court in the case of BSNL (*supra*). We would carefully peruse the said decision. In BSNL case (*supra*), the three Judge Bench of the Hon'ble Supreme Court was called upon to decide as to whether services which have been rendered by the BSNL could be brought within the purview of a tax and envisaged by entry No. 54, list II of the Seventh Schedule to the Constitution. The argument was that the nature of the transaction by which mobile phone connections are enjoyed it is a service and the Central Government alone can levy service tax under entry No. 97 of list I or entry No. 92C of list I after 2003. If the nature of the transaction partakes character of both sale and service then the mute question whether both the legislative authorities could levy separate taxes together or only on one of them.

45. The service providers and the States were before the Hon'ble Supreme Court. The service providers contended that there is no sale transaction involved and the attempt of the several States to levy tax on the production of mobile phone facilities by them to subscribers was constitutionally incompetent. It was their case that the transaction in question was merely a service and that the Union Government alone was competent to levy tax thereon. The States contended that the transaction was a deemed sale under Article 366(29A)(d) of the Constitution of India read with charging sections of the various Sales Tax Enactments and, therefore, they are competent to levy the sales tax on the transactions. The High Courts of Allahabad, Andhra Pradesh and Punjab and Haryana held that there was no sale of goods under the State Sales Tax Acts justifying levy of sales tax on rentals charged by service providers to the subscribers. All the three decisions were overruled by the Hon'ble Supreme Court in the case of State of Uttar Pradesh and Another Vs. Union of India (UOI) and Another, . The Kerala High Court took a different view.

46. It is essentially considering this controversy that the Hon''ble Supreme Court concluded that the issues arising for consideration are what are the goods in telecommunication for the purpose of Article 366(29A)(d), was there any transfer of right to use any goods by providing access or telephone communication by the telephone service provider to a subscriber which is the nature of the transaction involved in providing telephone communication. If so it is possible to tax the sale element if the nature of providing of telephone communication is a composite transaction of service and sale. It is essentially dealing with this controversy and in the backdrop of services provided by the telephone service provider that the Hon''ble Supreme Court concluded that Article 366 was amended by inserting a definition of tax on the sale or purchase of goods in clause 29A. That was to get over certain decisions whereby the transactions which were subject to levy of sales tax could be brought in and the avoidance of tax curtailed. The Supreme Court analysed this from para-42 and from para-45 it concluded as to how certain services do not involve a sale for the purposes of entry 54 list II. In para-46 the Supreme Court dealt with a composite contract. It held that the test therefore for composite contracts other than those mentioned in article 366(29A) continues to be-did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is as to what is the substance of the contract. That is how the Hon''ble Supreme Court evolved the dominant nature test.

47. We are afraid that this controversy and dealt with by the Hon''ble Supreme Court is not the subject matter before us. The observations and conclusions of the Hon''ble Supreme Court cannot be seen de hors this essential controversy and arising from the services rendered by the BSNL. The Hon''ble Supreme Court in the light of the constitutional challenge has applied the dominant nature test. That is how it eventually concluded and in favour of BSNL that the goods do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d). The goods in tele-communication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by concerned assessing authorities.

48. There may be a transfer of right to use goods as referred in the answer to the question (A) (see para-92) by giving a telephone connection. That is how the Hon''ble Supreme Court concluded the issue. However, the nature of the transaction involved in providing telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale. Thus, the questions formulated in the majority judgment at para-32 have been answered in para-92. This paragraph read as under :

"92. For the reasons aforesaid, we answer the questions formulated by us earlier in the following manner:

(A) Goods do not include electromagnetic waves or radio frequencies for the

purpose of article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the assessing authorities.

(B) There may be a transfer of right to use, goods as defined in answer to the previous question by giving a telephone connection.

(C) The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) The issue is left unanswered.

(E) The aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service."

49. It is with this conclusion that the His Lordship Justice Dr AR Lakshmanan (as His Lordship then was) agreed. He agreed and concurred with this conclusion but added his few paragraphs. The focus never shifted from the principle issue, namely, imposition of sales tax in the light of Article 326 (29A clause d) on different activities carried on by the telecommunication service provider. In para-96, the case of BSNL was referred. In para-97 the factual aspect, namely, the entire infrastructure/instruments/appliances and exchange being in physical control and possession of the petitioner BSNL at all times and there is neither any physical transfer of such goods nor any transfer of right to use such equipment or apparatuses has been referred and set out. Then comes para-98 which reads as under :

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

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor-this is the necessary concomitant of the plain language of the statute-viz. a "transfer of the right to use", and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

50. Para-98 is relied upon by Mr. Chinoy. However, that cannot be read in isolation and out of context. It must be read in the backdrop of the underlying controversy, namely, relationship between a telephone connection service

provider and its customer. Such a transaction is essentially of service.

51. It is in relation to such a controversy that the observations, findings and conclusions must be confined. We do not see as to how they can be extended and in the facts and circumstances of the present case to the enactment that we are dealing with. Going by the plain and unambiguous language of the Act of 1985 we cannot read into it the element of exclusivity and a transfer contemplated therein to be unconditional. Therefore the tests in para (d) and (e) cannot be read in the Act of 1985.

52. We are in agreement with Mr. Kumbhakoni that the judgment of this Court in the case of Commissioner of Sales Tax Vs. M/s Duke and Sons Pvt. Ltd., cannot said to be no longer good law in the light of the judgment of the Hon"ble Supreme Court in BSNL's case. That was the argument canvassed by Mr. Chinoy and his further submission is that relying upon BSNL (supra), the Tribunal rendered its decisions in favour of the franchisees, namely, M/s. Smokin" Joe (supra) and M/s. Diageo India (supra). In M/s. Duke and Sons Pvt. Ltd. similar controversy fell for consideration and determination of this Court. There, M/s. Dukes was holder of a registered trade mark, namely, Duke"s, Mangola, Pineola, Tango. It manufactured concentrates for manufacturing aerated waters, beverages etc. There were written agreements between the assessee M/s. Dukes and purchasers of the concentrates. The assessee sold the concentrates to the customers for use in manufacturing aerated waters, beverages etc. at their bottling plants. Pertinently such purchasers of the concentrates were permitted to market their beverage by using the trademark of the assessee. The assessee charged royalty for use of the trade mark by the customers. They were styled as Franchise Agreements. One such Franchise Agreement wherein the assessee permitted the customer M/s. Salstar Foods and Beverages Ltd. to use the trade mark of the assessee on the bottles of the beverage manufactured by them in Maharashtra and to market the same under the trade mark of the assessee was subjected to the tax under the Act of 1985. There was some doubt and, therefore, an application under Section 52 of the Bombay Sales Act, 1959 was made by the assessee to the Additional Commissioner of Sales Tax. This was for determination of the question, where it was liable to pay tax on the amount of royalty received by it for transfer of trade mark under the Act of 1985. The Additional Commissioner of Sales Tax (Enforcement Branch) by his order dated 3.3.1989 held that by the agreements in question there was a transfer of right to use the trade mark of the assessee to its customers and amounted to sale under Section 2(10) of the Act of 1985. The assessee was thus held to be liable to pay tax. That order was appealed to the Tribunal. The Tribunal set aside the order of the Additional Commissioner and held that the transaction did not amount to transfer of right to use the trade mark by the assessee to its customers and no tax could be levied on the royalty received on said transfer. The Revenue applied for reference of the ground of law arising from this order of the Tribunal. That is how the question of law framed by this Court at para-1 came up for consideration. After noting the rival contentions, the Division Bench held as

under :

"5. We have considered the rival submissions in the light of the facts of the case. There is no dispute about the fact that trademarks are goods within the meaning of clause (5) of section 2 of the 1985 Act which defines "goods" to mean all kinds of movable property (not being newspapers, or actionable claims or money, or stocks, shares or securities). This position is also well-settled by the decision of the Supreme Court in *Vikas Sales Corporation vs. Commissioner of Commercial Taxes* where it was observed that even incorporeal rights like trademarks, copy rights, patents and rights in personam capable of transfer or transmission are included in the ambit of "goods". In the instant case, the admitted position is that by the agreement in question, the assessee transferred the right to use its trademarks to M/s. Salstar Foods and Beverages Ltd. ("transferee") for consideration. Pursuant thereto, the transferee marketed its products under the trademark of the assessee and for transfer of the right to use the trademark for the purpose of marketing its products under the terms of the agreement, the transferee was liable to pay to the assessee the amount in question by way of royalty. The question that arises for consideration is whether the right to use the trademark without transfer of any right or interest therein would amount to "sale" within the meaning of clause (10) of section 2 of the 1985 Act.

6. The Maharashtra Sales Tax on the transfer of the Right to use any Goods for any purpose Act, 1985 was enacted with a view to levying tax on transfer of right to use any goods for any purpose for cash, deferred payment or any other valuable consideration in the State of Maharashtra. Under section 3 of the Act, tax is leviable on the turnover of sales in respect of transfer of right to use any goods. "Turnover of Sales" has been defined in clause (15) of section 2 to mean aggregate of the amounts of sale price received or receivable during the year by a dealer in respect of the transfer of the right to use any goods. "Sale price" has been defined in clause (11) of section 2 to mean the amount of valuable consideration received or receivable for the transfer of the right to use any goods for any purpose. The transfer of right to use any goods for any purpose is regarded as "sale" under the Act as is evident from the definition of "sale" in clause (10) of section 2 of the Act which defines sale to mean transfer of any right to use any goods for any purpose for cash, deferred payment or any other valuable consideration. From a conjoint reading of the above provisions, it is thus clear that tax is leviable under the Act on the amount received by the assessee for the transfer of the right to use any goods for any purpose. In the instant case, the assessee received a sum of Rs. 1,500/- by way of royalty on the transfer of right to use the trademark of which the assessee is the owner. The right was transferred by an agreement with the transferee by which the transferee was allowed to use the trademarks of the assessee on payment of consideration by way of royalty at the rate specified therein. It was made clear in the agreement that what was transferred to the transferee was only the right to use the trademark in the manner set out therein and not the right or interest of the assessee in the trademark. The assessee's case is that mere user of the

trademark without transfer of any right in the trademark would not amount to transfer of right to use the trademark within the meaning of clause (10) of section 2 of the Act. However, on perusal of the clear provisions of the 1985 Act, we find it difficult to accept the same. This contention, in our opinion, goes counter to the very scheme and object of the 1985 Act. The 1985 Act was enacted for the purpose of levying tax on the transfer of right to use the goods. It is not applicable to transfer of right or title in the goods which may attract the provisions of the Bombay Sales-tax Act. In case of trademark, what is taxable under the 1985 Act is the transfer of right to use the trademark. Admittedly, by agreement between the assessee and M/s. Salstar Foods and Beverages Ltd. there was a transfer of right to use the trademark to M/s. Salstar Foods and Beverages Ltd. The royalty of Rs. 1,500/- was payable in respect of transfer of the right to use the trademark. Such transfer clearly falls within the provisions of the 1985 Act.

7. "Trade Mark" has been defined in section 2(1)(v) of the Trade and Merchandise Marks Act, 1958 to mean a mark used in relation of goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right, either as a proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person. There is a distinction between transfer of right to use a trademark and assignment of a trademark. "Assignment" of trademark is taken to be a sale or transfer of the trademark by the owner or proprietor thereof to a third party inter vivos. By assignment, the original owner or proprietor of trademark is divested of his right, title or interest therein. He is not so divested by transfer of right to use the same. Licence to use a trademark is thus quite distinct and different from assignment. It is not accompanied by transfer of any right or title in the trademark. The transfer of right to use a trademark falls under the purview of the 1985 Act and not the assignment thereof. The manner of transfer of the right to use the goods to the transferee would depend upon the nature of the goods. For transfer of right to use a trademark, permission in writing as required by law may be enough. In case of tangible property, handing over of the property to the transferee may be essential for the use thereof. All that will depend upon the nature of the goods. Take for instance, transfer of right to use machinery. The right to use the machinery cannot be transferred by transferor to the transferee without transfer of control over it. The case before the Andhra Pradesh High Court in Rashtriya Ispat Nigam Ltd. (supra) was a case of transfer of right to use machinery. It was in that context, the above decision came to be rendered. But the position in case of trademark is different. For transferring the right to use the trademark, it is not necessary to handover the trademark to the transferee or give control or possession of trademark to him. It can be done merely by authorising the transferee to use the same in the manner required by the law as has been done in the present case. The right to use the trademark can be transferred simultaneously to any number of persons. The decision of the Andhra Pradesh High court in Rashtriya Ispat Nigam Ltd. (supra) thus has no application

to the transfer of right to use a trademark."

53. In terms of the conclusions reached that there is no dispute that the trade mark is specially included in the schedule of goods to the Act of 1985 and entry No. 7 that the question was answered in favour of the Revenue against the assessee. The amount received by the assessee on the transfer of right to use the sale was held as liable to be taxed under the Act of 1985. Thus, the peculiar provision of the Act of 1985, the insertion in the Schedule of intangible and incorporeal goods including Patents and Trade Marks, that the Division Bench concluded as above. Thus, there can be a transfer of the right to use these goods and it need not be exclusive and unconditional. The Transferor may simultaneously use it and during the period of a agreement to transfer the right to use it.

54. This judgment has been quoted with approval by a Division Bench of the Kerala High Court in Kreem Foods Private Limited Vs. State of Kerala, . There, His Lordship Hon"ble Mr. Justice H.L. Dattu, who was then the Hon"ble Chief Justice of Kerala High Court, spoke for the bench and relied on a decision rendered in Jojo Frozen Foods (P) Ltd. v. State of Kerala (S.T. Rev. No. 12 of 2006) disposed of on June 23, 2008 and reported in Jojo Frozen Foods (P) Ltd. Vs. State of Kerala, and Mechanical Assembly Systems (India) Pvt. Ltd. Vs. State of Kerala, . The Hon"ble the Chief Justice then quoted with approval in para-11 the conclusions of this Court in M/s. Duke and Sons (supra) and concurred with them. That is how the judgment in the case of Jojo Frozen Foods (supra) would also read.

55. Even in the case of Nutrine Confectionery Co. Pvt. Ltd. Vs. State of Andhra Pradesh, , the Andhra Pradesh High Court dealt with a case of manufacture and marketing arrangement and the agreements with other companies to allow use of trade mark and logo for agreed royalty. The agreement also provided for obligation of the petitioner to suggest various business modalities and provide formula and recipe. On the question whether the agreement between the petitioner and the company was in respect of transfer of right to use goods taxable under Section 5(e) of the Andhra Pradesh General Sales Tax Act, 1957, the Bench concluded as under :

"The background of the case and the rival submissions throw up the only question for consideration as to whether the agreement between the petitioner and the assignee-company is in respect of the transfer of the right to use the petitioner's trademark and logo by the assignee.

There is no dispute that "Nutrine" trademark and "bunny" logo are goods within the meaning of Section 2(h) of the GST Act. There is also no dispute that in the event of the transfer of the right to use trademark and logo by the assignee, the petitioner is liable to pay the tax. The petitioner, however, contends that there is no transfer of the right to use the trade-mark and logo and that the agreement contemplates the petitioner allowing the assignee to use the farmer's formulas

and recipes, make available to data about suppliers of raw materials and the latter agreed not to make any alterations or changes in the formulas. Thus, indisputably the agreement between, the petitioner and the assignee is not only for transfer of right to use the trademark and logo but also obligation of the petitioner to suggest various business modalities and provide formulas and recipes. Can it then be said that there is no transfer of right to use the goods as contemplated under section 5E of the GST Act, which we quote hereunder:

"5E. Tax on the amount realized in respect of any right to use goods:-

Notwithstanding anything contained in this Act,-

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of eight paise on every rupee of the aggregate of such amount realized or realizable "by him during the year.

(b) The transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in this State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made:

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than rupees two lakhs."

7. When it is the case of transfer of right to use any goods/section 5E of the GST Act overrides all other provisions of the GST Act. What is taxable is the consideration received by the dealer for "transfer of the right to use any goods for any purpose, whatsoever" to any lessee or licensee for cash, deferred payment or other valuable consideration in the course of the business. The use of the phrase "... for any purpose, whatsoever" is the key to understand and resolve the question raised in these revision cases. If the Legislature had intended that the exclusive transfer of right to use the goods alone is taxable without there being the transfer of technical know how, manufacturing process, etc., the Legislature must have said so. It is conspicuously absent. Even if there is transfer of right to use goods along with the transfer of other services and facilities even if it is for any limited period, the event is taxable. Either in relation to the taxable event or taxable person, the Legislature does not leave any ambiguity or doubt. There can be transfer of right to use goods under an agreement intended for that purpose or there could be such transfer of the right to use the goods under an agreement for different purposes to be acted upon by the parties as agreed different situations.

8. The relevant clauses to which our attention has been invited in the agreement

between the petitioner and the assignee are clauses 2, 4, 5, 7, 9 and 10, which read:

"2. The party of the first part shall allow the party of the second part to use the "Nutrine" trademark and "bunn/logo on the wrappers, pouches, containers, invoices, letter heads and advertisement materials. It is expressly understood that there will be no exclusive entrustment of the logo and trademark to the party of the second part and the party of the first part will use the same for its own operations.

4. The party of the first part hereby agrees to suggest suitable items of confectionery products keeping in view the facilities available with the second party, provide formulas and recipes for such products and periodically suggest measures for cost reduction.

5. The party of the first part will also suggest locations and areas for getting maximum advantage for their products, the method of advertising their products and proper structuring of the prices.

7. The party of the second part shall use the logo and trademark only at the places permitted by the first party.

9. In consideration of the party of the first part permitting usage of logo and trademark and providing various supports and amenities as detailed above, the party of the second part shall pay a sum of Rs. 500 (rupees five hundred only) per tonne of production as royalty.

10. The royalty amount mentioned above shall be calculated on the monthly production and shall be paid to the first party within 15 days from and of the month."

The agreement is without any title to give any indication as to nature of the agreement. But it is settled rule of interpretation of documents that every documents or deed has to be interpreted keeping in view the intention of the parties. It is also well-settled that the intention of the parties to a transaction has to be determined with reference to the language and if there is any difficulty or ambiguity in so doing, it is always open to look to attending circumstances. In the absence of any evidence with regard to the circumstances that lead the parties to enter into the transaction or enter into a deed or document, such circumstances can even be inferred from the agreement itself. Clause 2 itself uses the terminology to the effect that," the party of the first part shall allow the party of the second part to use "Nutrine" trademark and "bunny" logo...".This is very clear and unambiguous and amounts to transfer of the right to use the trademark and logo. Clauses 4 and 5 are only incidental aspects and no transfer is involved therein. Clause 4 is to the effect that, "party of the first part agrees to suggest suitable items of confectionery products keeping in view the facilities available with the second party, provide formulas and recipes for such products and periodically suggest measures for cost reduction". Clause 5 also speaks of

the petitioner making suggestions regarding locations for getting maximum advantage for those products. These are only add on services offered by the petitioner and they do not amount to transfer of trademark nor they are different services. When one understands the brand value of the trademark things would be clear. More often than not the brand value is result of the trademark of the company itself. By allowing the assignee to use trademark and logo, the petitioner only ensuring that brand value of "Nutrine" to get a competitive edge in the market. The facilitating use of technical know-how, recipes and formulas are, indeed related to the brand value and, therefore, the petitioner undertook the obligation of providing these services. This is made clear by reference to clause 9 which says that the consideration of payment of royalty is only for permitting the assignee to use the trademark and logo. Therefore the agreement in question is certainly one evidencing the transaction of transfer of the right to use Nutrine trademark and bunny logo.

10. This court, after giving anxious consideration, is of the opinion that even if the consideration cannot be separated nor is it discernible as to which part of the consideration for which service, it does not make any difference nor the obligation undertaken by the petitioner to provide supporting services dilute clause 2 which speaks of transfer of right to use the trademark and logo. None of the decisions relied on by the counsel would support the petitioner's contention. It is well-settled that the nature of transfer of right to use on the plain language of section 5E of the GST Act is immaterial. The transfer of right to use any goods "for any purpose whatsoever" falls within the ambit of section 5E of the GST Act and merely because the agreement speaks of other aspects in addition to creating a right in the assignee to use the trademark and logo does not make any difference especially when the goods so transferred are incorporeal or intangible in character like copy right, patent, trademark) etc."

56. Pertinently in paras-15 and 16, a reference was made to the judgment of the Hon'ble Supreme Court in the case of BSNL (supra) and the same was distinguished. The Bench concluded that the consideration received as royalty for allowing use of the trade mark and logo is covered by the A.P. enactment. The royalty is realized in respect of transfer of right to use goods and is thus taxable.

57. Thus, far from the judgment of the Division Bench of this Court in M/s. Dukes and Sons (supra) being no longer a good law, that judgment and the ratio therein has been consistently referred and quoted with approval by the Kerala High Court and Andhra Pradesh High Court. This was subsequent to the judgment of the Hon'ble Supreme Court in BSNL (supra). With respect, we concur with all the aforesaid decisions and rulings.

58. We are of the opinion that the Tribunal did not act perversely or committed an error apparent on the face of record in rejecting the petitioner's appeals. May be the Tribunal could have rendered a detailed finding and conclusion. However, upon perusal of the order passed by the Tribunal we find that it referred to the facts. It has also adverted to the contentions of the parties. It also referred to its

own conclusions rendered in the case of M/s. Smokin Joe etc. However, it concludes that the facts and circumstances in the present case are not identical to the cases dealt with by it and of the above franchisees. We do not express any opinion as to whether the Tribunal's conclusions in the case of M/s. Smokin" Joe (supra) and M/s. Diageo India (supra) are accurate or correct. We are informed that separate proceedings in that regard are pending in this Court. However, the Tribunal did not err in holding that the cases which have been dealt with by it including the Supreme Court judgment in the case of BSNL (supra) are on distinct facts.

59. Once such conclusion is reached by us, then, strictly it is not necessary to deal with the judgments on the rule of precedents and propriety of disregarding co-ordinate bench decisions. This rule is reiterated by this Court and equally by the Hon"ble Supreme Court. In fact, this Court has followed several such judgments of the Hon"ble Supreme Court. There cannot be any dispute or quarrel about this principle but its application would depend on the given facts and circumstances. When a coordinate Bench decision can be distinguished and such distinction is founded on facts and circumstances which are peculiar to the other case, that course is equally permissible in law. We do not see how the tribunal can be faulted for not applying and following the rule of consistency or judicial discipline. In our view, reliance therefore placed on the judgments laying down and reiterating the above principle is entirely misplaced.

60. As a result of the above discussion, we do not find any merit in this Petition. Rule is discharged. Petition stands dismissed. There will be no order as to costs. Notice of Motion also stands disposed of.