

(2017) 07 KL CK 0035
In the High Court Of Kerala
Case No : 14 of 2014 ()

THE COMMISSIONER OF CENTRAL EXCISE

APPELLANT

Vs

M/S SAI SERVICE STATION LTD

RESPONDENT

Date of Decision : 07-07-2017

Acts Referred:

Transfer of Property Act, 1882, Section 54 - "Sale defined"
Contract Act, 1872, Section 3 -
Communication, acceptance and revocation of proposals.
Moto

Citation : (2017) 07 KL CK 0035

Hon'ble Judges : Antony Dominic, Dama Seshadri Naidu

Bench : DIVISION BENCH

Advocate : JOHN VARGHESE, P.R.SREJITH, K.LATHA

Judgement

1. The question concerns the "sale" of used cars. The Motor Vehicles Act, 1988, does not directly deal with the sale of a motor vehicle, a movable property; but the Sale of Goods Act, 1930, does. The Motor Vehicles Act, though, deals with the procedure post-sale. Here, a motor vehicle dealer is dealing in used cars. Is its transaction a sale in the conventional sense attracting the sales tax, or a service "as an intermediary, agent, or broker" to the true owner attracting service tax. The question is simple, but the answer is not. C.E. Appeal No.14 of 2014:

2. The respondent-Sai Service Station Ltd., ("Sai") is an authorised dealer for the cars made by M/s. Maruti Udyog Limited. Besides selling the new cars, Sai services and repairs the motor vehicles it sells. To this extent its business is conventional. But it also sells or deals in used or pre-owned cars through its "True Value Division" the very expression "sale" being contested. It holds Service Tax Registration Certificate under the categories of the authorised service centre, Input-service distributor, and Business Auxiliary Services provider.

3. Taking a view that the activity undertaken by Sai's True Value Division

"exchange of old cars for new ones" amounts to business auxiliary service and the difference between the sale price for the old cars and the purchased price of the new ones has to be treated as remuneration for the service rendered by Sai, the appellant-Department issued a show cause notice on 10.04.2012 why the Department should not collect from Sai service tax of Rs.53,76,644/- with interest and penalty for the period from 01.10.2006 to 30.09.2011.

4. After hearing Sai, the Commissioner of Central Excise and Customs at Cochin, the adjudicating authority, through his order-in-original, dated 20.09.2013, confirmed the demand. Aggrieved, Sai filed an appeal before the CESTAT, Bangalore, which allowed it through its Order, dt.13.02.2014. So, the Commissioner of Central Excise is before this Court. C.E. Appeal No.15 of 2014:

5. The respondent-Indus Motor Company ("Indus") is an authorised dealer for the cars made by M/s. Maruti Udyog Limited. It carries on similar business as Sai does. With its corporate office at Ernakulam, Indus has more than 40 branches with service facility, four dealerships (showrooms), and 9 used car showrooms in the state of Kerala. Indus holds Service Tax Registration Certificate, too, like Sai.

6. The appellant-Department issued two show-cause notices: one on 12.04.2012 demanding service tax of Rs.98,66,785/- for the period from 01.10.2006 to 31.03.2011, and another on 15.04.2013 for Rs.44,09,962/-, the period being 2011-2012.

7. After hearing Indus, the same adjudicating authority, through his order-in-original, dated 05.09.2013, confirmed the demand. Aggrieved, Indus filed an appeal before the CESTAT, Bangalore, which allowed it through its Order, dt.19.02.2014. So, the Commissioner of Central Excise is before this Court. The Commissioner's Findings:

8. The transaction of sale takes place only between the registered owner and the purchaser, for which Sai or Indus "acts as a mediator/ intermediary by obtaining blank sale letters signed from the RC owner." So the services rendered by Sai or Indus by selling "the vehicles provided by or belonging to their clients/ customers would fall under subordinators clause (i) Section 65 (19) of the Finance Act of 1994 (as amended)." The Appellate Tribunal's Findings:

9. The owner of the vehicle delivers the property and receives the sale price from the dealer. So the transaction is a sale. There is no doubt about the second transaction: the dealer sells it to another person after refurbishing it. In other words, "it becomes totally a transaction of purchase and sale of old vehicles." The dealer refurbishing, repairing the vehicle as its owner is not a service rendered by it to any other person. Common Cause and Identity of Issues:

10. In both Sai and Indus, identical issues have been raised. Though the adjudicating authority has passed distinct orders, the facts and issues discussed, and the legal principles propounded are identical. So we propose a common judgment. Further, throughout, we refer to both the respondents "Sai and Indus"

compendiously as "the dealer." Dealer's Used-Car Business:

11. As to the manner of business, we may note that whenever a prospective purchaser already owning a car approaches the dealer, and if he is willing to exchange his used car with the new one, he needs to pay the difference amount to the dealer. From the used-car owner, the dealer takes in blank

Form-29 and Form-30, the so-called sale letter and transfer letter, prescribed under the Motor Vehicle Rules; it also collects all the old documents, for example, R.C., from the owner. In the records of the Transport Department, the ownership remains unchanged, though.

12. The used vehicle delivered to it, the dealer gives it a facelift, refurbishes and makes it saleable. Eventually, it sells the refurbished used-car to another person and transfers to that new owner the documents the previous owner signed in the blank. The Department's Contentions:

13. Sri P.R. Sreejith, the learned Standing Counsel, has contended that the vehicle ownership remains with the original owner till it is transferred to the prospective buyer; the dealer is only a custodian of the vehicle till it is sold to a prospective buyer. In fact, it only helps the owner of the used vehicle to find a purchaser. He has also contended that the original owner of the used car is responsible for the accidents or damages as the ownership of the vehicle lies with him or her. The owner's authorisation, if any, renders the dealer an intermediary, or broker, or agent in terms of Section 65(19) of the Finance Act of 1994. In short, the dealer renders Business Auxiliary Service.

14. The dealer repairs and refurbishes the vehicle, contends the learned Standing Counsel, with a view to getting more margin, though the price of the used vehicle vis-A-vis its owner remains fixed. He has strenuously contended that unless the used vehicle is sold or transferred in the manner provided under the Motor Vehicles Act, it cannot be said that there is a valid sale.

15. The learned Standing Counsel has further submitted that the dealer, by performing various acts, contravenes, for instance, Sections 68, 69, and 70 of the Finance Act, 1994, read with Rules 4, 6, and 7 of the Service Tax Rules, 1994. It is with intent to evade the service tax.

16. Eventually, the learned Standing Counsel has contended that the Department has recorded the statements of the dealer's officers and a couple of its customers, all of whom have uniformly said that the dealer only renders service. The Dealer's Contentions:

17. Smt. K. Latha, the learned Counsel for Sai and Indus, has submitted that the dealer purchases the used vehicle from its owner, uses its expertise to refurbish the vehicle, makes it more marketable, and eventually sells for a margin. She has submitted that the original owner will have nothing to do with the market fluctuations, for sometimes the dealer may have to sell the used vehicle at a lower price than it has paid to the owner.

18. Motor Vehicles Act does not deal with the sale of a motor vehicle; according to Smt. Latha, the sale is governed by Section 19 of the Sale of Goods of Act. She has also submitted that the dealer buys the used car"pays the sale price and takes possession"repairs or refurbishes, displays it in its showroom, finds a prospective purchaser, and eventually sells it. At no stage, after the initial sale, does the owner of the used vehicle play a

role. The dealer, contends Smt. Latha, bears the market risk and sells the vehicle at its own option. Finally, she has submitted that the dealer reflects the transaction in its account books as sale and pays sales tax. So she supports the Tribunal"s impugned order.

19. Heard Sri P.R. Sreejith, the learned Standing Counsel and Smt. K. Latha, the learned counsel for Sai and Indus, the dealers, besides perusing the record. Issues:

20. Section 19 of the Sale of Goods Act mandates how the title in the movable property"chattel"passes; section 50 of the Motor Vehicles Act deals with how "the ownership of any motor vehicle" registered under the Act gets transferred. The dealer exchanges a new motor vehicle for an old one after collecting the difference amount. It later sells the old vehicle. But it never gets the registration certificate under the MV Act in its name. Then the questions are these: (1) Is the change of name in the registration certificate under the

MV Act mandatory for an effective sale of a motor vehicle"

(2) Does the dealer actually purchase the used vehicle or merely act as an agent or intermediary to the original owner"

Discussion:

21. Both the issues are inter-related, we propose to discuss them together. From the narration in the order-in-common passed by the Commissioner, we gather the following modus operandi adopted by the dealer. The narration seems to have been based on the statements made by the dealer"s officers during the enquiry.

22. The dealer sells Maruti-Suzuki motor vehicles in the State of Kerala. Besides undertaking ancillary services, it also acts as an agent to Maruti Suzuki India Ltd., ("MSIL") for its used carsale division True Value. Most people purchase cars in a straight transaction: they pay money and buy the vehicles of their choice. Some people, however, prefer to exchange their old vehicle and take a new one after paying the balance sale price.

23. To caters to the needs of the second category, the dealer sells the used cars in two categories: Maruti True Value and NonTrue Value vehicles. It collects 25% of the sale price as "Management Fee" for the sale of Maruti True Value Vehicles using (MSIL) logo. It pays that 25% "Management Fee" to MSIL.

24. On striking a deal with the owner, the dealer takes delivery of the used

vehicle and issues a delivery receipt, specifically undertaking the responsibility of the vehicle till it is sold or transferred to a new buyer. But when it takes delivery, the dealer obtains the owner's signatures on blank Form-29 and Form-30 under the Motor Vehicles Act and Rules. It also issues a possession letter to the owner admitting that it has taken possession of the vehicle, RC book, Insurance documents, and other documents, in the original.

25. After taking possession, the dealer repairs and refurbishes the vehicle at its workshop, displays the vehicle at its used-car showroom until it finds a buyer. While selling the refurbished vehicle, the dealer transfers to the buyer the documents signed in blank by the original owner. The dealer also ensures the change of name in the insurance policy if the policy subsists by the date of sale. It also completes all the formalities "for the legal transfer of the ownership" of the vehicle to the new buyer.

26. In its books of account, the dealer reflects the "refurbishment charges": the expenses, that is, the cost of spares, labour, denting and painting work, etc., incurred by the dealer for renovating the used car. Though it refurbishes both the TrueValue and the Non-True-Value cars, the dealer refurbishes the True-Value vehicles as per the MSIL guidelines. It collects the refurbishment charges separately from the buyer, besides the cost of the used cars. In short, the selling price of the used car includes the cost of the used car, the refurbishment charges, the management fee, free service and warranty, besides business margin.

27. So, conceptually we may have to examine what is "sale", what is "service" and what is "title" of chattel. More important, we must examine which enactment applies to the dealer's selling the used vehicles: The Motor Vehicles Act, 1980, or the Sale of Goods Act, 1930. The Motor Vehicles Act, 1988:

28. As we see from the Statement of Objects and Reasons to the Parent Act, The Motor Vehicles Act, 1939, it consolidates and amends the law relating to motor vehicles. This Act encompasses, among other things, changes in the road transport technology, the pattern of passenger and freight movements, development of the road network in the country and, particularly, the improved techniques in the motor vehicles management.

29. A Working Group was constituted in 1984 to review the Motor Vehicles Act, 1939. Besides the Group's recommendations, the Union Government considered the suggestions and recommendations of various other bodies and institutions.

Eventually, all the suggestions were discussed at a specially convened meeting of Transport Ministers of all States and Union Territories. Some of the modifications so suggested related for taking care of the following: (a) the fast increasing number of both commercial vehicles and personal vehicles in the country;(b) the need for encouraging adoption of higher technology in automotive sector; (c) the greater flow of passenger and freight with the least impediments so that islands of isolation are not created leading to regional or local imbalances; (d) concern

for road safety standards and pollution-control measures, standards for transportation of hazardous and explosive materials; and (e) need for effective ways of tracking down traffic offenders.

30. The legislation in its latest manifestation has aimed at taking care of, among other things, the following: (a) modification and amplification of certain definitions of new type of vehicles; (b) simplification of procedure for grant of driving licences; (c) putting restrictions on the alteration of vehicles; (d) certain exemptions for vehicles running on non-polluting fuels; (e) ceilings on individuals or company holdings removed to curb "benami" holdings; (f) States authorised to appoint one or more State Transport Appellate Tribunals; (g) punitive checks on such components as do not conform to the prescribed standards by manufacturers, and also stocking/sale by the traders; (h) increase in the compensation to the victims of hit and run cases; (i) removal of time limit for filing of application by road accident victims for compensation; (j) stringent punishment for certain offences; (k) a new pre-determined formula for payment of compensation to road accident victims based on age/income, which is more liberal and rational.

31. A little extensively though, we have enlisted the parts of SORs related to different periods only to drive home a pertinent point that the Motor Vehicles Act does not aim to control the sale or transferability of a motor vehicle. Rather, the Act aims at regulating a motor vehicle on the road, not off the road"say its sale. Definitions:

32. Section 2 (4) defines "certificate of registration to mean the certificate issued by a competent authority to the effect that a motor vehicle has been duly registered in accordance with the provisions of Chapter IV; a "dealer" includes a person engaged" (a) in building bodies for attachment to chassis; or (b) in the repair of motor vehicles; or (c) in the business of hypothecation, leasing, or hire-purchase of motor vehicle. It is pertinent to note that the activity of selling is conspicuously omitted. As per Section 2 (13), the "goods" includes livestock, and anything else (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage, or personal effects carried in a motor car or in a trailer attached to a motor car, or the personal luggage of passengers travelling in the vehicle.

33. Of much significance is the fact that the very vehicle, undoubtedly "goods" is not included in the definition. It compels us to conclude that this Act does not deal with the motor vehicle per se but treats it only as a means to transport men and of material. A motor cab, as defined under Section 2 (25) is any motor vehicle constructed or adapted to carry not over six passengers excluding the driver for hire or reward; a "motor car", defined Section 2 (26), means any motor vehicle other than a transport vehicle, omnibus, road-roller, tractor, motor cycle or invalid carriage; and Section 2 (28) defines "motor vehicle" or "vehicle" comprehensively keeping in view the use it is put to.

34. Indeed, the Department has laid much emphasis on the expression "owner." As per Section 2 (30), it means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

35. Initially we talked about the scope and ambit of the motor vehicles act: the motor vehicle's use or transportability on roads; in other words, its pliability. The definition of "owner" under the Act, too, connotes the authority of a person who can ply the vehicle. It does not, we reckon, deal with who possess the vehicle as an asset or as goods, for under this Act a motor vehicle is not goods at all.

36. The Act does not prescribe or regulate how a person can own a vehicle; the mercantile element of a vehicle as goods is blissfully absent. Its user, on the other hand, has been emphasized and regulated upon. No owner or person in charge of a motor vehicle, declares Section 5, shall cause or permit any person who does not satisfy Section 3 or Section 4 to drive the vehicle. Section 8 to 28 of the Act deal with driving licence; Sections 29 to 38 with licensing of conductors of the stage carriage.

37. The motor vehicle registration"not its buying, which is distinct and different"is dealt with in Chapter IV of the Act. We believe Section 39 of the Act puts paid to the controversy why a vehicle owner should have it registered. It is, indeed, not as a sign of his owning it but as a sign of using it. So Section 39 mandates thus: "No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner" (emphasis added)

38. As per the above definition, vehicle owning precedes vehicle using. Without registration no person can, say, drive the vehicle in any public or other place. At the risk of repetition, we may add that the Section does not prohibit a person's owning or possessing a vehicle as such. We can get a further clue on the dichotomy between owning and using a motor vehicle from Section 41, which deals with how one should register a motor vehicle. As per sub-section (1), "an application by or on behalf of the owner of a motor vehicle for registration shall be in such form and shall be accompanied by such documents, particulars and information" Again the Act stresses the owner's statutory responsibility to have the vehicle registered"indeed, to use it on "public or any other place."

39. Talismanic is Section 50 of the Act for the Department. This Section deals with transferring ownership. To the extent relevant, it reads: "50. Transfer of ownership-(1) Where the ownership of any motor vehicle registered under this Chapter is transferred,-

(a) the transferor shall-

(i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and

(ii) in the case of a vehicle registered outside the State, within forty-five days of the transfer, forward to the registering authority referred to in sub-clause (i)-

(A) the no objection certificate obtained under Section 48; or

(B) in a case where no such certificate has been obtained-

(I) the receipt obtained under sub-section (2) of Section 48; or

(II) the postal acknowledgement received by the transferor if he has sent an application in this behalf by registered post acknowledgement due to the registering authority referred to in Section 48, together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted;

(b) . . .

(2) Where-

(a)

(b)

(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, . . . the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under Section 177, such amount not exceeding one hundred rupees as may be prescribed under sub-section (5):

Provided that action under Section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount. (4) Where a person has paid the amount under subsection (3), no action shall be taken against him under

Section 177."

(emphasis added)

40. Section 50 corresponds to Section 31 of the Old Act of 1939. This Court, on more than one occasion, has declared that a motor vehicle is a movable property; the transfer of its ownership is governed by the Sale of Goods Act. It

has also held that for transferring ownership, mutation of the name in the certificate of registration is unnecessary, See *Aliyaru Kunju v. Subair Khan*, 1984 KLT 268; *Commissioner of Income Tax v. Nidish Transport Corporation*, 1989 (2) KLT 501; *United India Insurance Co. Ltd. v. Jameela Beevi*, 1991(1) KLT 832; *Narayanan Nair v. Mariakutty*, 1992(1) KLT SN 32, CN 42.

41. In *Vasanth Viswanthan v. V.K. Elayalwar*, AIR 2001 SC 3367

the issue concerns the transfer of motor vehicles, aimed at defeating an impending legislation fixing a ceiling on the transport permits a person could have. The plaintiff denied he had ever physically transferred the vehicles to the defendant; he intended to transfer them after completing all the statutory formalities. To complete the statutory formalities, both the parties had to litigate for long. On the contrary, the defendant contended that the plaintiff transferred the vehicles even before the statutory formalities could be completed. Of many judicial proceedings, one was a suit filed by the defendant for an injunction against the plaintiff. He obtained one.

42. Eventually, the High Court of Madras, on appeal, found that the defendant forcibly took possession of the vehicle under cover of the injunction. On further appeal, the Supreme Court affirmed the High Court's judgment. In that process, it has observed that transferring a vehicle is not effected under Section 31 of the Motor Vehicles Act, 1939, which simply prescribes the procedure for entering the factum of transfer in the registration certificate. This administrative act is posterior to the transfer. The Court holds: 10. [T]he transfer is not effected under Section 31 of the Motor Vehicles Act, 1939, but the same simply prescribes procedure for entering the factum of transfer in the registration certificate, which is an act posterior to the transfer. The transfer of vehicles in question would be governed by the provisions of Section 19 of the Sale of Goods Act according to which property in the vehicle

would pass to Defendant 1 at such time as the parties to the contract intend it to be transferred. Thus the passing of property in the goods would be dependent upon the intention of the parties, as evidenced from the contract.

43. Given the declaration of law in *Vasanth Viswanthan*, no more precedential prop do we need to hammer home the proposition that the sale or the ownership transfer of a motor vehicle is governed by the Sale of Goods Act, but not the Motor Vehicles Act. What Are Forms 29 & 30"

44. Rule 55 of the Central Motor Vehicle Rules provides for the procedural parameters to further statutory stipulation under Section 50 of the Act: transfer of ownership. As per sub-rule (1), if the ownership of a motor vehicle is transferred, the transferor shall report the fact of transfer in Form 29 to the registering authority concerned. So, contrary to the Department's contention, Form 29 is a letter of mere intimation, rather than a letter of ownership-transfer. Form 30, in fact, is the application under sub-rule (2) for transferring motor vehicle ownership for the activities governed by the Motor Vehicle Act. Thus

stands the myth of Forms 29 and 30 busted.

45. Once we conclude that the Motor Vehicles Act does not apply, we may move on to examine the Sale of Goods Act, 1930. The Sale of Goods of Act:

46. As to the nature and scope of the Sale of Goods Act, we may note that Section 3 maintains that the unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods. Section 66 (e), the savings provision, also mandates that this Act does not affect any rule of law not inconsistent with this Act. (a) Definitions:

47. As per Section 2 (2), the lexical provision of the Act, "delivery" means voluntary transfer of possession from one person to another; "document of title goods" includes any

document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. (Section 2(4))

48. Goods, as per Section 2 (7), means every kind of movable property other than actionable claims and money. Mercantile agent, as defined in Section 2 (9), means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for sale, or to buy goods, or to raise money on the security of goods; and "price" means the money consideration for a sale of goods (Section 2 (10)).

(b) Sale and Agreement to sell

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49. Section 4 of the Act distinguishes between "Sale" and "Agreement of Sale": a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. It may be absolute or conditional. If the property in the goods is transferred from the seller to the buyer, the contract is a sale. But if the transfer of the property in the goods is to take place in future or subject to some conditions to be fulfilled, the contract is a mere agreement to sell.

50. If we examine the English Sale of Goods Act, its Section 2 is analogous to Section 4 of the Indian Act. Under the English law, between 1677 and 1954, contracts for the sale of goods worth "10 or more were required to be evidenced in writing. This requirement was never applied to exchanges, though. Neither of the Acts, English and Indian, now seems to compel the parties to have the contract in writing. (c) Exchange:

51. In this case, true, we are dealing with an exchange in part. Professor Michael Furmston in his Sale and Supply of Goods Michael Furmston's Sale & Supply of Goods, 3rd deals with part-exchange. According to him, part-exchange is very

common, particularly about motor cars. This raises the question of the correct classification of, for example, an agreement to exchange a new car for an old one plus a payment of Rs.2 lakh. In practice, this is often solved by the way that the parties write up the contract. In many cases they will price each car so that the natural analysis is that there are two sales with an agreement to pay the balance in cash. This was how the transaction was approached in *Aldridge v Johnson* (1857).

52. Professor Michael Furmston further observes that many "new for old" car trades would be susceptible to this two-contract approach. An alternative approach would be to say that the new car was being sold but that the customer was given the option of tendering the old car in part payment rather than paying the whole price in cash. Customary practices as to part exchange prices would usually make this a more attractive option to the buyer. Sales where the buyer has the option to do or deliver something in partial substitution for the price are by no means

unusual. Such an option does not convert the transaction from a sale to an exchange, *Id*, . (d) Essential Requisites of Sale:

53. A transaction of sale is a composite transaction consisting of an agreement to sell, passing of title, delivery of goods, and payment of price, costs and charges of transportation . Sale includes "an agreement to sell". The Supreme Court in *Hyderabad Engg Industries v. State of A.P.*, (2011) 4 SCC 705, as quoted in Pollock & Mulla's *The Sale of Goods Act*, LexisNexis, 9th Ed.p.59 has explained the difference between "sale" and "agreement to sell": "If the transfer is in presenti, it is called a "sale"; but if the transfer is to take place at a future time and subject to some conditions to be fulfilled subsequently, the contract is called "an agreement to sell". When the time in the agreement to sell lapses or the conditions therein subject to which the property in goods is to be transferred are fulfilled, the "agreement to sell" becomes a "sale"."

54. The Supreme Court in *State of Rajasthan v. Rajasthan Chemists*, (2006) 6 SCC, para 50 (as quoted in Pullock & Mulla, p.60) has held that according to the law, both of England and of India, in order to constitute a sake, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it must be supported by money consideration, that as a result of the transaction, the property must actually pass in the goods. Unless all these elements were present, there would be no sale. Price is an essential element of sale of goods.

55. Emphatic is the observation of the Supreme Court in *Canbank Financial Services Ltd. v. Custodian*, (2004) 8 SCC 355 at page 383 7 , that right, title, and interest in a movable property can pass by delivery of possession and upon paying of the considerations given the provisions of the Sale of Goods Act. "Passing up of a title in favour of the transferee would not be illegal unless it is forbidden by law. For the said purpose, the transaction must attract the wrath of

Section 23 of the Contract Act" and not otherwise. (e) Contract & Intention:

56. The scheme of the Sale of Goods Act does not provide for any mandatory condition that a contract must be in writing. As to how the contract, be it oral or written, must be executed, Section 19 of the Act spells out: 19. Property passes when intended to pass."(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

57. According to Section 20 of the Act, if there is an unconditional contract for the sale of specific goods "in a deliverable state," the property in the goods passes to the buyer when the contract is made. It is immaterial, the provision further holds, whether the time of payment of the price, or the time of delivery of goods, or both, is postponed. In other words, once the intention is clearly ascertainable, the payment of price or the delivery of goods assumes no importance, and sale takes place even absent either.

58. As seen from Section 26 of the Act, once the property in the goods is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

59. If we examine the facts of this case, the Commissioner has quoted the dealer to the following effect: "On striking a deal with the owner, the dealer takes delivery of the used vehicle and issues a delivery receipt, specifically undertaking the responsibility of the vehicle till it is sold or transferred to a new buyer"

60. Since the Department has contended that the dealer has dealt with the used cars as agent, we may examine Section 27 of the Act. It reaffirms the common-law principle that if a third party sells the goods without the authority or consent from the owner, the buyer acquires no better title to the goods than the seller had. On the contrary, if a mercantile agent, as defined in Section 2 (9), sells the goods "in the ordinary course of business", the sale is valid. Is the Dealer a Mercantile Agent"

61. The concept of "mercantile agent" is wider than that of "agency" in the general law of contract. This concept overcomes the limitation imposed by the general law of agency. If a person puts his car into the hands of a motor dealer to sell on his behalf, the owner will normally be bound by the contract which the dealer makes even though the dealer goes outside the owner's authority, for instance, by accepting a lower price than the owner has agreed, *Lloyds and Scottish Finance Ltd. v. Williamson* [1965] 1 All ER 641, as quoted by Fumston .

62. Here, the dealer's officials have affirmed that the original owner of the used vehicle will have nothing to do with the fluctuations in the price for that matter, even with the loss the dealer may sustain while selling the used vehicle after refurbishing. The Commissioner in his order has quoted the dealer's statement: "After refurbishing (if required) these vehicles at their workshop/outside (authorised service station), they display the vehicle at their used-car show rooms and find a buyer and sell the same on reasonable margin. In some cases they may incur loss also."

63. The Department has placed much reliance on Section 65(19) of the Finance Act of 1994. It defines "Business Auxiliary Service." As we shall see, Chapter V of the Finance Act of 1994 deals with the service tax. Section 65 is the lexical provision. Subsection (19) defines business auxiliary service. It reads thus (as quoted in the Commissioner's order): "Business auxiliary service" means any service in relation to-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services, and includes services as a commission agent, but does not include any information technology service.

Explanation- For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems."

64. As rightly noted by the Commissioner, a mercantile agent (a) has the authority to buy and sell goods on behalf of his principal or to consign them for the purpose of sale; (b) does the business by only representing his principal; (c) links the principal and the third parties in so far as the business transactions are concerned; and (d), thus, acts as an intermediary between the buyer and seller. (e) He is entitled to a commission from his principal, as a monetary consideration for his services.

65. Here, apart from getting Form 29 and 30 signed in blank by the original owner, the dealer gets no further authorisation, either expressly or impliedly. We have already examined whether Forms 29 and 30 delegate any agency power to the dealer. Is the Department's Stand Sustainable"

66. The show-cause notice, as later interpreted or justified by the Commissioner in the Order-in-Common ("the order"), reveals the Department's mind. From

para 9 of the order it is evident that the Department has proceeded on a fundamentally flawed premise that "sale of motor vehicle in India is governed by Motor Vehicle Act." To support this contention, the order profusely draws from the Internet, Wikipedia included. The order holds that the vehicle registration is mandatory; indeed, true. But the registration is confined to using the vehicle. Further, the order's holding that registration is essential to prove the ownership (also observed in para 18 of the order) flies in the face of the proposition in Vasantha Viswanthan.

67. As we gather, the order conflates the concepts of sale of immovable property and that of the movable property, as is found in para 19 of the order.

68. A person purchased a motor vehicle but did not immediately have the name changed in the official registers. When the vehicle was with a mechanic, it met with an accident. He wanted the insurance company to indemnify him. In *The Oriental Fire & General Insurance Co. Ltd. v. Vimal Rai*, 1972 ACJ 314 a Division Bench of the Delhi High Court has held that the motor cycle is a movable property or goods within the meaning of the Sale of Goods Act and the provisions of the Sale of Goods Act, not those of the Transfer of Property Act, apply. It has also held that that the certificate of registration is not a document of title but is an important piece of evidence to show the ostensible owner of the vehicle liable to pay taxes and to perform duties and obligations under the Motor Vehicles Act. But the endorsement of transfer on such certificate is not a condition precedent to the validity of the sale, and its absence does not render an otherwise valid sale as illegal or ineffective.

69. In the above factual context, the Delhi High Court has further observed: "[H]owever failure to do so cannot be deemed to militate against the validity and legality of the passing of the title in the vehicle so transferred or to expose the innocent seller who may have done his all to complete the transfer to legal liabilities for acts an omission in respect of the vehicle subsequent to the transfer. Moreover, the certificate of registration is not document of title it is issued other owner of the vehicle, that it the person by whom the vehicle is kept and used and although proviso is made for changes of ownership to be recorded in the book the name appearing in it may be of the legal owner of the vehicle the registration book is evidence of title and its absence at the time of sale should put a purchase on equity."

70. Contributing equally, two persons purchased a motor vehicle, but they registered it only in one name. Later disputes arose between them. The registered owner sought to exclude the other person from making any claim over the vehicle. The Punjab & Haryana High Court in *Munni Ram vs. Fakir Chand*, AIR 2010 P & H 50 has held that though the registration of the vehicle was in the name of only one person, the title of the movable property, given the admitted fact of equal contribution, would vest with both the persons. The entry in the registration certificate is not a condition precedent for the ownership of the movable property. The Court has held (para 17): "Under Section 40 of the MV Act 1988,

every owner of a motor vehicle is to cause the vehicle to be registered. Similarly Section 41 of the MV Act, 1988, deals with the application by or on behalf of the owner of a motor vehicle for registration. Therefore, the word "owner" appearing in Chapter IV in the context will not mean a registered owner as the vehicle is yet to be registered and for which application is required to be made for registration. Section 50 of the MV Act, 1988 is *pari materia* with Section 31 of the MV Act, 1939. A conjoint reading of Sub-sections (3) and (5) of Section 50 of the MV Act, 1988, shows that if the transferor or the transferee fails to report to the Registering Authority the fact of transfer the Registering Authority may require the transferor or the transferee to pay such amount not exceeding one hundred rupees as may be prescribed under Sub-section (5) in lieu of any action that may be taken against him under Section 177. It, thus, transpires that the ownership of a movable property is not dependent upon the entries in the registration certificate. For the delay in seeking mutation of change in the registration certificate, the transferor or the transferee, as the case may be, can be penalized and proceeded against in terms of Section 177 of the MV Act, 1988. Such default is again compoundable on payment of prescribed fee under Subsection (5) of Section 50 of the MV Act, but the ownership of the movable property is not dependent upon the registration certificate."

71. The Punjab & Haryana High Court has also affirmed that If the transferee fails to have the registration certificate in his

name, he may liable for punishment in terms of Section 112 of the MV Act, 1939 or Section 177 of the MV Act, 1988. But "the property in the vehicle will stand transferred in terms of Section 19 of the Goods Act, when it was intended it being movable property."

72. First we must acknowledge that the sale and the registration of the sale are two distinct acts. The sale of a motor vehicle, movable property, takes place under Section 19 of the Sale of Goods of Act. But if the transferee intends to get statutory protection as the owner of the transferred vehicle, he alone must invoke Section 31 of the Act to have the vehicle transferred on to this name.

73. Evidently, to sell an immovable property, we must register the transaction. The deed of sale may be executed one day and registered another day; they need not be contemporaneous. Then, when has the sale taken place"on the day the deed is executed or on the day it is registered" On the day the deed is

executed. The sale relates back.

74. The registration serves a public purpose, letting the world know that the property belongs to a particular person. For immovable property does not bear on its face any tell-tale signs of ownership or, for that matter, possession. The best sign of owning is possessing. With immovable property possession is usually symbolic, and that symbolism has a statutory sanction: section 54 of the Transfer of Property Act.

75. Movable property chattel stands on a different footing. Possessing it amounts to owning it: there is an element of exclusivity. But owning it does not amount to using it. Of a motor vehicle, the sale signifies its possession; the registration, its use. The Legislation has advisedly avoided registration to be a precondition for the sale of movable property. A person can buy and possess a motor vehicle without registration so long as he does not intend to use. If he intends to use it, the registration assumes significance. As we can see, the Motor Vehicles Act regulates the use of a motor vehicle, and the sale, as held in *Vasantha Viswanthan*, predates the use. Not everyone who owns a motor vehicle uses it, possessing vintage or antique cars "wealth in itself" being a case in point. To conclude, we observe that the sale of a motor vehicle is governed by the Sale of Goods Act, and its use by the Motor Vehicles Act.

76. In para 27 of the order, the Commissioner observes that the used-car dealer does not legally purchase the vehicle from its customer. Regrettably, it is more a surmise than an assertion of substance. As we have already discussed, the transaction is in part exchange. The used-car owner gets a new car and pays the balance price. He signs Forms 29 and 39 in blank and leaves the scene for good "literally. He has no concern how the dealer repairs or refurbishes the car, he has no concern how the dealer displays his wares "the car" and he has no concern what price the used-car fetches. The dealer's not getting the vehicle registered in his name or having the transfer of entry in the road transport registers does not sound the death knell of the transaction so long as the dealer does not intend to use the motor vehicle in "public or other place."

77. As Section 19 of the Sale of Goods Act insists on the contracting parties' intention "rather than the price payment or physical delivery of possession" we may note that between the used-vehicle owner and the dealer the intention is writ large in the transaction. Even the elements of price paying and possession delivering stand concluded at the beginning.

78. In para 31 of the order, the Commissioner observes that the dealer takes from the used-vehicle owner a "sale letter/sale deed." Incorrect. What the dealer obtains are Forms Nos. 29 & 39, signed in blank, though. And neither of them is a sale letter or sale deed, nor does the statute compel the dealer, to be the owner, to obtain one.

79. Indeed, it is poetic justice to invoke the legal proposition paraded by the Department in para 46 of the order:

It is now well settled that strong suspicion, strange coincidences and grave doubts cannot take the place of legal proof *State of Kerala v. M.K. Mathew*, (1978) 42 STC 348

80. The order heavily relies on *CIT v. Ganga Property Ltd.*, (1970) 177 ITR 637 (Cal) and *CIT v. Zoroastrian Building Society Ltd.*, (1976) 102 ITR 499 (Bom) to hold that "a registered document is necessary to give effect to the sale." The order supplies double emphasis to this observation. But it fails to note the further

observation in those judgments: "In the case of a sale of immovable property a registered document is necessary to give effect to the sale."

81. In CIT v. B.M. Kharwar, (1969) 72 ITR 603 the Supreme Court has observed that "the taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But the legal effect of a transaction cannot be displaced by probing into the "substance of the transaction"." We therefore hold that the Final Order No.20227/2014 in ST/28543/2013-DB, dated 13.02.2014 and Order No.20272/2014 in ST/28490/2013-DB, dated 19.02.2014 suffer no legal infirmity. As a result, we dismiss both the appeals. No order on costs.