
(2001) 02 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Special Appeal No"s. 1538 of 1999 and 15 of 2000

Triveni Engineering and Industries Ltd.

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 16-02-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5
Constitution of India, 1950 — Article 269, 286, 286(1), 366, 366(29)
Rajasthan Sales Tax Act, 1954 — Section 5(3)
Rajasthan Sales Tax Act, 1994 — Section 2(38)
Rajasthan Sales Tax Rules, 1995 — Rule 29(2)

Citation : (2001) 3 RLW 1752 : (2001) 4 WLC 65 : (2001) 3 WLN 127

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Appellant; Sanjeev Johari, for the Respondent

Final Decision : Allowed

Judgement

Balia, J.

(1). These two appeals raise a common question about the constitutional validity of Explanation II to Section 2(38) of the Rajasthan Sales Tax Act 1994 (hereinafter called the Act of 1994) on the envil that it is ultra vires the legislative competence of the Stale Legislature to enact a law by providing that "notwithstanding the agreement for works Contract has been wholly on in part entered into outside the State or the goods have been wholly or in part moved outside the State, still it shall be deemed to be sale inside the State if the goods are in the State at the time of their use, application or incorporation in the execution of works contract as it impinges on item 92A of the Union list of Schedule VII and the provisions of Article 286 of the Constitution of India.

(2). We may notice the facts in brief giving rise to these two appeals separately.

(3). Appeal No. 1538/99 arises out of dismissal of writ petition No. 4983/99. The assessee, which is a company covered under the Companies and having its

registered office at Okhla Industrial area, Phase I New Delhi entered into a turn key contract with M/s Sriganganagar Sugar Mills for design, manufacture, supply,-transport, erection and supervision and undertook to construct one cane mud falter and one cane juice clarified and for execution of this contract during the relevant period 1.4.98 to 31.12.98 brought various items directly purchased by its Head Office at Delhi from various places in the country in the course of inter-state trade by transfer to documents and such goods which were purchased by it during the course of execution of said work and were used for execution of the work contract within the State of Rajasthan. According to him no tax liability under RST or CST was attracted on transfer of property in such goods which resulted in movement of goods under the agreement under which works contract was being executed and was sold in the course of inter-state trade or commerce in which the goods have moved from outside State of Rajasthan to within State.

(4). That turnkey contract between the petitioner and M/s. Sriganganagar Sugar Mills was one indivisible contract. Considering the liability to be taxed on the value of goods involved in the execution of works contract the Assessing Officer by relying on Clause A of Explanation. It appended to Section 2(38) of the Act of 1994 held that since the goods were involved in execution of works contract in the State at the time of use or application notwithstanding that the agreement for works contract has been wholly or in part entered into outside the State or the goods have been wholly or in part moved outside the State, it would be deemed to be sale inside the State and on that envil with reference to the aforesaid provision levied the tax under the Rajasthan Sales Tax Act by provisional assessment order dt. 18.8.99 for the assessment period 5.7.97 to 31.3.98.

(5). Aggrieved with that order, the assessee appealed before the Dy. Commissioner (Appeals) along with application for staying demands created by the Assessing Officer, but the Dy. Commissioner (Appeals) on 1.11.99 had stayed merely part of the payment and for rest, the same was rejected.

(6). Aggrieved with that order, the assessee preferred an appeal before the Rajasthan Tax Board, Ajmer which was dismissed vide order dated 29.11.99.

(7). The assessee in his writ petition initially has challenged the order of Rajasthan Tax Board. However no ground about validity of Explanation II Clause (a) of Section 2(38) was raised in the writ petition. The said writ petition carne to be dismissed by the order under appeal dated 14.12.98 by the learned Single Judge keeping in view of the fact that the appeal filed against the provisional assessment order was still pending and the order was only refusal to interfere with the interim order passed by the Dy. Commissioner (Appeals) by which recovery of 50% has been stayed, but for rest, the stay application has been rejected.

(8). The show cause notices were issued on 17.12.99 staying encashment of Bank Guarantee furnished by the appellant during pendency of the appeal. The

assessee moved an application for amending the writ petition to incorporate challenge to constitutional validity of aforesaid provision which was allowed by order dated 14.3.2000.

(9). During pendency of this appeal, final assessment order came to be made by the Assessing Officer in the same terms in which provisional assessment order was made and writ petition was amended to challenge the final assessment order also on the same grounds viz the validity of Explanation 11.

APPEAL NO. 15/2000

(10). This appeal arises out of the writ petition No. 4984/99 filed by same petitioner in respect of assessment year 1998- 99 subsequent to the assessment period 1997-98 in the identical facts and circumstances challenging the order passed by the Rajasthan Tax Board, Ajmer. However in the matter of assessment period 1998-99, it is slated by the learned counsel for the parties that no final assessment order has come into existence as yet. The petition has been dismissed by the learned Single Judge vide order dated 14.12.99.

(11). The learned counsel for the respondents has raised a preliminary objection that since the appeal against the impugned order is still pending before the Dy. Commissioner (Appeals), the writ petition ought not to be entertained as it amounts to pursuing two remedies simultaneously. However, as noticed above, the petitioner challenges constitutional validity of provisions contained in Section 2(38) Explanation II Clause (a) and challenges these orders inter alia on the ground that the levy of tax with the aid of aforesaid provision which is ultra vires cannot be sustained. It is well settled that the authorities which are created under the statute do not have jurisdiction to entertain the plea regarding validity of the statute itself and, therefore, whenever such grounds are raised against the validity of the orders passed by the authorities under particular Act, the availability of alternative or pursuing of alternative remedy cannot be held a ground for examining the issue raised about the constitutional validity of the provision. We, therefore, reject the preliminary objection raised by the learned counsel for the respondents.

(12). It is contended by the learned counsel for the appellant- petitioner that the power of the State Legislature to enact any particular law on any particular subject is governed by the provisions of the Constitution. The authority of the State Legislature to levy and collect tax on sale and purchase of goods is derived from Entry 54 of the List II of VII Schedule which deals with taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92A of List I. Entry 92A of List I of VII Schedule reserves the field of levy of tax on sale and purchase other than news papers where such sale or purchase takes place in the course of inter-state trade and commerce exclusively for Parliament.

(13). Laying down of law in respect of these very transactions led to insertion of Clause 29A in Article 366 of the Constitution.

(14). Clause 29A of Article 366 defines tax on the sale and purchase of goods which includes amongst others "tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract." This amendment lead to Legislations by the State Legislature the law for imposition of tax on transfer of property (whether as goods or in some other form involved in the execution of a works contract. However, power of State Legislature to enact laws under Entry 54 of List II read with Clause 29A of Article 366 remained inhibited by provisions of Entry 92A of List I which reserves the subjects of tax on sale or purchase of goods in the course of inter-state Trade or Commerce for parliament to the exclusion of all other legislatures and Article 286 of the Constitution of India which prohibits the State from making any law for taxes on sale or purchase which takes place outside that State and sale or purchase which takes place in the course of import into or export out of India. The authority of State to legislate for imposition of tax on the sale or purchase where such sale or purchase of goods takes place in the course of inter-stale trade and commerce or where such sale or purchase takes place in the Court of import into or export out of India is excluded by the conjoint reading of Entry 92A of List I of VII Schedule and Article 286(1). Clause 2 of Article 286 further authorises the parliament to make law formulating principles to tax sales taking place in the course of inter-state trade and commerce.

(15). In view of aforesaid, provisions of the Constitution, it is apparent that the State Legislature by deeming provisions cannot extend its authority to impose tax on the sale and purchase which takes place in the course of inter-state Trade or commerce outside that State or in the course of import into or export out of India, with reference to situs of Sales. The principle for determining when sale of goods takes place in the course of inter-state Trade or commerce, when sale can be considered to have taken place outside the State or when any sale or purchase can be said to have taken place outside the territory of India remains exclusive prerogative of the Parliament and cannot be impinged by the State Legislature. The Central Sales Tax Act which has been enacted by the Parliament lays down the principle for determination of the aforesaid question and the State Legislature in our opinion could not by artificially fixing situs of the sale within the State could not arrogate to itself authority to impose tax on the sale or purchase of goods on the basis of deeming provisions extending the field of its applicability to sales which has taken place in the course of inter-state trade or commerce as per law enacted by the Parliament by treating it to be sale within the State of Raj. and imposed tax on that basis. The law is well settled that for the purpose of levy of tax situs of sale is irrelevant. What is relevant is whether the sale has taken place within the State otherwise than in the course of inter-state trade or commerce or outside the State or in the course of import into or export outside territory of India. Any law made by the State Legislature contrary to that must be held to be ultra vires.

(16). In this connection reference may be made to the decision of Hon"ble Supreme Court in the case of Gannon Dunkerley & Co. v. Union of India and Ors.

(1). The Constitution Bench of the Hon"ble Supreme Court in the context of existing provisions under the Rajasthan Sales Tax Act, 1954 explain the principle:

"In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of List II of Schedule VII to the Constitution of India read with Article 366(29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export. The Legislative power of the State Legislature under Entry 54 of the State List is subject to two limitations one flowing from the entry itself which makes the said power "subject to the provisions of Entry 92-A of List I", and the other flowing from the prohibition contained in Article 286. Under Entry 92-A of List I Parliament has the power to make a law in respect of taxes on sale or purchase of goods other than newspaper where such sale or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by Article 269. This shows that the legislative power under Entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-State trade or commerce. Similarly Article 286(1) prohibits the State from making a law imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of import of goods into or export of the goods out of the territory of India. As a result of said provisions, the legislative power conferred under Entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposing of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29-A) of Article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State Legislature to frame the legislative enactment in exercise of the legislative power conferred by Entry 54 in State List in such a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations."

"So far as sales in the course of inter-State trade or commerce are concerned, the position is well-settled that the situs of the sale or purchase is wholly irrelevant as regards its inter-State character. The location of the situs of the sale in sales tax legislation of the State would, therefore, have no bearing on the chargeability of tax on sales in the course of inter-State trade or Commerce since they fall outside the field of Legislative competence of the State Legislatures and

will have to be excluded while assessing the tax liability under the State . Legislation. The same is true of sales which are outside the State and sales in the course of import and export. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import and export into a sale inside the State. The question whether a sale is an outside sale or a sale inside the State or whether it is a sale in the course of import or export will have to be determined in accordance with the principles contained in Sections 4 and 5 of the Central Sales Tax Act and the State Legislature while enacting the sale tax legislation for the State cannot make a departure from those principles."

(17). However, Section 5(3) of the Rajasthan Sales Tax Act, 1954 transgressed the limits of the legislative power conferred on the State Legislature under Entry 54 of the State List in as much as it enabled tax being imposed on deemed sales resulting from transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract which take place in the course of inter-State trade or commerce, or which take place outside the State or which take place in the course of import and export within the meaning of Sections 3, 4 and 5 respectively of the Central Sales Tax Act and it did not take into account the conditions and restrictions imposed by Section 15 of the Central Sales Tax Act in respect of goods declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act. Clause (1) of Rule 29(2) of the Rajasthan Sales Tax Rules also suffered from the same infirmity and consequently Section 5(3) of the Rajasthan Sales Tax Act and Rule 29(2) of the Rajasthan Sales Tax Rules were held to be ultra vires the provisions of the Constitution.

(18). The same view was expressed by the Hon'ble Supreme Court in the case of Builders' Association of India v. State of Karnataka and Ors. (2), while considering the provisions under the Karnataka Sales Tax, 1957. The provision which was before the Hon'ble Supreme Court for consideration was Clause (c) of Explanation (3) to Section 2(1)(t) of the Karnataka Sales Tax Act, 1957 which fixed situs of sale in the case of a works contract. The said explanation reads as under:

"Explanation 3 (a): The sale or purchase of goods other than in the course of inter-State trade or commerce or in the course of import or export shall be deemed, for the purposes of this Act, to have taken place in the State wherever the contract of sale or purchase might have been made, if the goods are within the;

(i) in the case of specific or ascertained goods at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase, by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such

appropriation.

(b) Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of clause (b) shall apply as if there were separate contracts in respect of the goods at each of such places.

(c) Notwithstanding anything contained in the Sale of Goods Act, 1930 (Central Act 3 of 1930), for the purpose of this Act, the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to have taken place in the State, if the goods are within the State at the time of such transfer irrespective of the place where the agreement for works contract is made whether the assent of the other party is prior or subsequent to such transfer".

(19). The Court taking note of expression used in clause (a) of explanation (3) that the sale or purchase of goods other than in the course of Inter-state trade or commerce or in the course of import or export shall be deemed, for the purposes of this Act to have taken place in the State wherever the contract of sale or purchase might have been made held that Clause (c) of explanation (3) to Section 2(I)(t) of the Karnataka Sales Tax Act, 1957 which fixes the situs of sale in the case of a works contract has to be read with the other provisions of the Act, including clauses (a) and (b) of Explanation (3), which expressly exclude a sale in the course of inter-State trade or commerce and a sale in the course of import or export. So read, it cannot be said that in fixing the situs in respect of deemed sales resulting from the transfer of property in goods involved in the execution of a works contract the State Legislature has included a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(20). These provisions were not held to be ultra vires because of expressed exclusion of a sale in the course of inter-State trade or commerce and a sale in the course of import or export of the goods outside the territory of India not to violate the provisions of the Constitution.

(21). We do not find in the impugned provision of Rajasthan enactment any such exclusion from the operation of the Act the sales which have taken place in the course of inter-state trade or commerce or in the course of export or import. On the contrary the provision says in no uncertain terms that notwithstanding that agreement for works contract has been wholly or in part entered into outside the State or that the goods have been wholly or in part moved outside the State. Such sales which are deemed to take place within the State of Rajasthan shall be taxed on the basis of situs of sale only.

(22). The matter again cropped up before the Hon'ble Supreme Court in the case of Steel Authority of India Ltd. v. State of Orissa and Ors. (3). It has arisen in connection with provisions made in Orissa Sales Tax Act, 1947. Section 13AA which provides for deduction of sales tax at source from the payment of works contractor reads as under:

"13-AA. Deduction of tax at source from the payment of works contractor:-

(1) Notwithstanding anything contained in Section 13 or any other law or contract to the contrary, any person responsible for paying any sum to any contractor for carrying out any works contract in pursuance of a contract between the contractors and-

(a) Central Government or any State Government, or

(b) any local authority, or

(c) any authority or corporation established by or under a statute, or

(d) any company incorporated under the Companies Act, 1956 (1 of 1956) including any State or Central Government undertaking, or

(e) any cooperative society or any other association registered under the Societies Registration Act, 1869 (21 of 1860);

shall be at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct an amount towards sales equal to two percentum of such sum in respect of the works contract:

Provided that if the value of the works contract does not exceed rupees one lakh, no such deduction shall be made.

(2) While making deduction as referred to in Sub-section (1), the deduction authority shall grant a certificate to the contractor in the form prescribed and shall send a copy thereof to the Sales Tax Officer within whose jurisdiction the works contract is executed.

(3) The amount deducted from the bills or invoices shall be deposited into the Government Treasury within one week from the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into Treasury shall be adjusted by the Sales Tax Officer towards the sales tax liability of the works contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited.

(5) If any person contravenes the provisions of Sub-section (1) or Sub-section (2) or Sub-section (3) of this section, the Sales Tax Officer shall, after giving him an opportunity of being heard, by an order in writing, impose on such person penalty not exceeding twice the amount required to be deducted and deposited by him into Government treasury."

(23). The aforesaid provision was declared ultra vires by the High Court of Orissa in the case of Brajendra Mishra v. State of Orissa (4), for the reason that Section 13-AA as it existed then, did not provide any mechanism to exclude a transaction from its purview even if ultimately, the transaction was not at all liable to levy of

sales Tax. In other words, even in the case of a pure and simple labour contract or service contract where the question of sale would not arise, the persons responsible for making any payment to a contractor had no option but to deduct 2% of such sum towards sales tax. Though a transaction which might not be a sale at all was made liable for levy of sales tax, yet in respect of that transaction power had been conferred to make deduction of 2% from the amount to be paid. The Court held that in the absence of any discretion with the authority and in the absence of any mechanism by which the contractor could approach any authority and obtain a certificate to the effect that the transaction did not amount to a sale, the deduction of 2% from the amount could not but be held to be grossly discriminatory and confiscatory in nature and, therefore, the same had to be struck down. The Orissa High Court further held that a bare reading of Section 13-AA made it explicitly clear that the amplitude of the incidence of tax had been widened so as to include transactions which were outside the sphere of taxation available to the State Legislature under Entry 54 of List II of the Seventh Schedule to the Constitution. Inasmuch as even in respect of a purely labour contract or service charges, section 13-AA authorised deduction of 2% from the bills of the contractor, it could not but be held to be unconstitutional and void.

(24). Accepting the decision of Orissa High Court Section 13-AA was replaced by new Section 13-AA which read as under:

"13-AA. Deduction of tax at source from the payment of works contractor-(1) Notwithstanding anything contained in Section 13 or any other law or contract to the contrary, any person responsible for paying any sum to any contractor (hereinafter referred to in this section as the "deducting authority") for carrying out any works contract which involves transfer of property in goods in pursuance of a contract between the contractors and-

(a) central Government or any State Government, or

(b) any local authority, or

(c) any authority or corporation established by or under a statute, or

(d) any company incorporated under the Companies Act, 1956 (1 of 1956) including any State or Central Government undertaking, or

(e) any cooperative society or any other association registered under the Societies Registration Act, 1869 (21 of 1869).

shall be at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct an amount towards sales tax equal to two percent of such sum in respect of the works contract if the value of the works contract exceeds rupees one lakh.

(2) While making deduction as referred to in Sub-section (1), the deducting authority shall grant a certificate to the contractor in the form prescribed and

shall send a copy thereof to the Sales Tax Officer within whose jurisdiction the works contract is executed.

(3) The amount deducted from the bills or invoices shall be deposited into the Government Treasury within one week from the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into Treasury shall be adjusted by the Sales Tax Officer towards the sales tax liability of the works contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited.

(5)(a) Where, on an application being made by the contractor in this behalf, the Commissioner is satisfied that any works contract of the nature referred to in Sub-section (1) involves both transfer of property in goods and labour or service, or involves only labour or service and accordingly, justifies deduction of tax on apart of the sum in respect of the works contract or, as the case may be justifies no deduction of tax, he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate, in the manner prescribed:

Provided that nothing in the said certificate shall effect the assessment of the sales tax liability of the contractor under this Act.

(b) Where such a certificate is produced by a contractor before the deducting authority, until such certificate is cancelled by the Commissioner, the deducting authority shall either make no deduction of tax or make the deduction of tax as the case may be, in accordance with the said certificate.

(5) If any person contravenes the provisions of Sub-section (1) or Sub-section (2) or Sub-section (3) or of clause (b) of Sub-section 5, the Sales Tax Officer shall, after giving him an opportunity of being heard, by an order in writing, impose on such person penalty not exceeding twice the amount required to be deducted and deposited by him into Government Treasury."

(25). The Steel Authority of India entered into contracts for supply of equipments from other countries outside India on high seas sales basis u/s 5 of the CST Act. The Steel Authority of India deducted sales tax at source at the rate of 4% in respect of payments to works contractor pertaining to item (d) and (e) above and in respect of some of the items, it did not deduct tax at source for the reason that they were in respect of inter-State sales, outside sales and import sales and, therefore, outside the purview of Orissa Sales Tax Act. The stand taken by the Steel Authority of India was not accepted by the Commercial Taxes Officer and he initiated proceedings for levy of penalty under the aforesaid provision. The said notices were challenged before the Orissa High Court. The Orissa High Court held the provisions of Section 13-AA of the Orissa Sales Tax Act as not ultra vires the Constitution.

(26). In appeal the Hon"ble Supreme Court after making reference to the case of

Bhawanl Cotton Mills Ltd. v. State of Punjab (5), and Gannon Dunkerley and Co. v. State of Rajasthan (supra) has held as under:

"There can be no doubt upon a plain interpretation of section 13-AA that it is enacted for the purposes of deduction at source of the State Sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate u/s 13-AA (5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon an inter-State sale, an outside sale or a sale in the course of import. The owner is required by Section 13,-AA (1) to deposit towards the contractor's liability to State sales tax four per cent of such amount as he credits or pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales, or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13-AA are beyond the powers of State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import."

(27). If we see in the light of aforesaid dicta, we find that the impugned provisions in the present petition suffer from direct vice of violation of Entry 92A of the Union List and Article 286 and is beyond legislative competence of the State to enact law for. Imposition of tax on sale or purchase of goods in the course of interest trade or commerce. Sub-clause 2(a) of Article 286 makes it explicit clear that the power of tax sales taking place in the course of Inter-State trade or commerce is within the exclusive competence of Parliament. Central Sales Tax Act provides notwithstanding situs of sales, where goods move from one State to another as a result of agreement for sale, the transaction is of sale or purchase in the course of inter-state trade or commerce irrespective of the fact where the property in goods passes to the buyer, yet the impugned provision makes it permissible for the State to impose tax on the sale or purchase of goods which have moved from one State to another as a result of works contract in execution of which such goods are to be involved solely on the basis of place of involvement of goods in execution thereof.

(28). The matter again came up before the Hon'ble Supreme Court in connection with clause (b) of Explanation II to Section 2(38) of the Act of 1994 in the case of 20th Century Finance Corp. Ltd. and Anr. v. State of Maharashtra (6).

(29). The Supreme Court nullified the effect of this provision by directing as under:

"The said explanation is substantially on the pattern of explanation 2(1) of the Maharashtra Act. By virtue of Explanation 1(b) of Section 2(38) (4), the definition of "sale" is enlarged and it includes sales outside the State or sales which are inter State sales have been made chargeable if the goods are used within the State. Therefore, the said Explanation is in excess of legislative power under Entry 54 of List II of the Seventh Schedule and, we accordingly, direct that

the Explanation II (b) of Section 2(38) (4) shall be read down to this effect that it would not be applicable to the transaction of the transfer of right to use any goods if such deemed sale is (i) an outside sale, (ii) sale in course of the import of the goods into or export of the goods out of the territory of India and (iii) an inter-State sale."

(30). The aforesaid principle also directly impinges upon the case with which we are concerned. It can be said that the power of State Legislature to enact law to levy tax on transfer of right or tax on transfer of goods by sale or purchase thereof under Entry 54 of List II of VIIth Schedule of the Constitution is inhibited with two limitations firstly the power to tax sales taking place in the course of inter-State trade and commerce is within the exclusive competence of Parliament and that even though a sale does not take place in the course of inter-State trade or commerce, State's power to tax would be subject to restriction and conditions imposed by Parliament if the sale relates to goods declared by parliament to be of special importance in inter-State trade or commerce. Article 269 provides for levy and collection of such tax by Union and because of the restrictions, the State Legislature is not competent to enact law to impose tax on such sale or purchases which takes place in the course of inter-State trade or commerce according to law enacted by Parliament. The second inhibition on the power of State Legislature to enact law relating to sale or purchase tax is by virtue of clause (i) of Article 286 under which State Legislature is precluded from making law to tax on sale or purchase which takes place outside that State and on sale or purchase which takes place in the course of import into or export out of India. Laying down principle for determining the question where sale or purchase takes place outside State or takes place in the course of export out of India or Import from out of India is also within the domain of Parliament. Hence by artificially deeming any sale or purchase within the State by the State Legislature, the State cannot usurp and expand the territory of its taxing authority. That will be violating Article 286 patently.

(31). In this connection reference to principle enunciated in the case of *State of Madras v. Ganan Dunkerley* (7), will be apposite to recall, in the said case, the court said that State Legislature cannot enlarge the definition of sale and bring within the ambit of taxation what is not "sale" according to the established concept of sale in laws of contract particularly as defined in Sale of Goods Act, 1930. It is on this principle certain transactions which the State desired to bring within the ambit of its taxing net, but we held by the Supreme Court to be outside its competence, like transfer of goods involved in execution of works contract, service of food articles and drinks by hotels as part of service etc. This led to amendment in Constitution by inserting Clause (29A) in Article 366. Moreover even where a transaction can be termed "sale" properly under general view of sales or extended meaning given by dint of amendment in the Constitution, it needed legislative action on the part of State Legislatures to impose tax on Sales coming within such extended meaning. Such enactment still have to be subject to provisions of Entry 92A of the Union List and Article 286 of

the Constitution.

(32). In view of aforesaid, we have no hesitation in coming to the conclusion that the impugned provisions of Rajasthan Sales Tax Act, 1994 in so far as they have widened the scope of levy of tax notwithstanding that the agreement for works contract has been wholly or in part entered into outside the State or that the goods have been wholly or in part moved outside the State are ultra vires the Constitution.

(33). Accordingly, the petitions are allowed as aforesaid. The impugned assessment orders for the assessment year 1997-98 and provisional assessment order for the year 1998-99 are quashed and set aside and the Assessing Officer is directed to decide the question of levy of tax de novo without taking into consideration the provisions of Explanation (2) of Section 2(38) of the Act of 1994.

(34). No order as to costs.