

PETITIONER:
20TH CENTURY FINANCE CORPN. LTD. & ANR.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 09/05/2000

BENCH:
S.P.Bharucha, V.N.Khare. D.P.Mohapatro

JUDGMENT:

V.N.KHARE, J.

(1) Despite the decisions of this Court in Builders Association of India and others vs. Union of India and others (1989) 2 SCC 645 and M/s. Gannon Dunkerley & Co. and others vs. State of Rajasthan and others (1993) 1 SCC 364, the controversy as regards the power of the State legislature to levy sales tax under clause (29A)(d) of Article 366 of the Constitution in the context of the question where is the taxable event on the transfer of right to use any goods remained unresolved. In this group of cases, we are concerned with the power of States legislatures to levy sales tax on the transfer of right to use any goods envisaged under clause (29A)(d) of Article 366 of the Constitution on the premise that goods put to use are located within their States. Several States by their legislations have levied tax on the transactions of transfer of right to use goods on the location of goods at the time of their use within their States irrespective of the place where the agreement for such transfer of the right to use such goods is made. The questions therefore, that arise for consideration in these cases are, whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that - (a) the contract of transfer of right to use has been executed outside the State; (b) sale has taken place in the course of an inter-State trade; and (c) sales are in the course of export or import into the territory of India. The appellants case is that, the State legislature cannot so frame its law as to convert an outside sale or a sale in the course of import or a sale in the course of an inter-State trade or commerce into a sale inside the State. (2) The appellants in civil appeals and the petitioners in the writ petitions filed under Article 32 of the Constitution and transferred petition, and respondent in Civil Appeal Nos. 6218- 23/95 are the companies incorporated under the Companies Act, and some have their registered offices at places outside the respondent States and others have inside the States. They carry on business of leasing diverse equipments. According to them, they entered into Master Lease Agreements with the lessee i.e. the party who desired

to take equipment for use on hire. The appellants and the petitioners agree to give on lease diverse machinery/equipments listed in the Lease Summary Schedule, subject to terms and conditions stipulated in the Master Lease Agreements. The Lease Summary Schedule only mentions the broad category of equipment proposed to be leased and the correct value thereof. The Master Lease Agreement provides that orders for individual equipment will be placed by the appellants at the instance of lessees and that the equipment to be leased will be dispatched by the manufacturer or supplier concerned to the locations specified in the lease. Thereafter, at the instance of the lessees, the appellants place their purchase orders to the suppliers or manufacturers for supply of individual items or equipments falling within the category and correct value mentioned in the Master Lease Agreement Schedules. The appellants and the petitioners further case is that, they disburse the value of equipment to the suppliers and at the instance of the appellants and the petitioners the suppliers deliver the equipments to the lessees at the specified locations for use. After the equipments are delivered and put to use, the lessee executes supplementary lease schedules acknowledging due receipt of the lease equipments, and such supplementary lease deeds form an integral part of the Master Lease Agreement. Such is the nature of business carried on by the appellants and the petitioners in this group of cases. According to the appellants and the petitioners, one transaction of transfer of right to use goods is subjected to sales tax by more than one States. On such a transaction, some States levy tax on the appellants and the petitioners, merely because the goods were found to be located in their States at the time of execution of contract which has taken place outside the State. Some States levy tax when the goods are delivered in their States for use in pursuance of agreements of transfer executed outside their States and some States tax such transactions of deemed sales on the premise that agreements for transfer of right to use have been executed within their States. The appellants and the petitioners, therefore, have challenged the validity of the legislations by various States whereby one transaction of transfer of right to use goods has been subjected to tax by more than one States.

(3) The petitioners by means of writ petitions under Article 32 and transferred petition have challenged the validity of the provisions relating to imposition of tax on transfer of right to use goods contained in the sales tax laws of States of Maharashtra, Karnataka, Tamil Nadu, Haryana, Uttar Pradesh, Rajasthan and Andhra Pradesh. Civil Appeal Nos. 6218-23/95 are directed against the judgment of the Andhra Pradesh High Court allowing the writ petitions filed by the respondents therein. We will separately deal with the sales tax laws of other States. At present, we propose to consider the controversies involved in these cases with reference to the provisions contained in The Maharashtra Sales Tax on the Transfer of the Right to Use Any Goods for any Purpose Act, 1985 (hereinafter referred to as the Maharashtra Act). The Maharashtra Act purports to levy and collect tax on the transfer of the right to use any goods for any purpose in the State of Maharashtra. Section 2(10) of Maharashtra Act defines sale thus: sale means 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 the word sell with all its grammatical variations and cognate

expressions, shall be construed accordingly. The above sub-section has an Explanation, which runs as under: -

Explanation. - For the purposes of this clause, the transfer of the right to use any such goods shall be deemed to have taken place in the State of Maharashtra if the goods are in the State of Maharashtra at the time of their use irrespective of the place where the agreement for such transfer of the right to use such goods is made, and whether the assent of the party is prior or subsequent to such transfer of the right to use any such goods.

Section 3 of the Maharashtra Act provides for incidence of tax and Section 4 deals with levy of tax. There is no dispute as regards the definition of sale. What is under challenge is the Explanation to sub-section (10) of Section 2 of the Act, which fixes situs of deemed sale within the State of Maharashtra on location of goods at the time of their use. The appellants in Civil Appeals excepting Civil Appeal Nos. 6218-23/95, had challenged the levy of sales tax by State of Maharashtra by means of writ petitions under Article 226 of the Constitution before the Bombay High Court. Before the High Court, it was contended by the appellants that the Maharashtra Act, particularly Section 3 read with Section 2(10), purports to levy tax not only the transfers of right to use goods which takes place within the State of Maharashtra, but also upon the transfer which occasions the movement of leased or to be leased goods from one State to another, and also upon the transfers effected during movement of goods from one State to another and, therefore, the Act is ultra vires Articles 269(3) and 246 read with Entry 92A of List I of the Seventh Schedule of the Constitution. It was also contended that the Act imposes sales tax upon transfers of the right to use goods which takes place outside the State of Maharashtra and also in the course of import of the goods into the territory of India and as such the Act is ultra vires Articles 286(1)(a) and (b) of the Constitution. The High Court was of the view that the transaction of transfer of right to use goods is a species of bailment, as there is no transfer of ownership in such transaction and since such transactions are in the nature of contract of bailment, the transfer is completed only upon the delivery of the goods and, therefore, situs of sale created by the Explanation to Section 2(10) of the Act is valid. Consequently, the writ petitions were dismissed. It is in this way the appellants are in appeal before this Court. Excepting two States the provisions of the Sales Tax Acts of all the other States are on line with that of the Maharashtra Act. Since the grounds of challenge to all the Acts are substantially the same, we, therefore, propose to decide these cases by a common judgment.

(4) S/Shri K.R.Parasaran, R.F.Nariman and Harish N. Salve, learned senior counsel, appearing for the appellants and the petitioners urged, that there are two independent limitations upon the taxing power of the State based on situs of the sale - one is engrafted in Article 286 and the other where the sale occurs within the State, it cannot by virtue of Entry 54 of List II read with Entry 92A of List I levy a tax on a sale which is in the course of inter-State trade or commerce and, therefore, Section 3 and Explanation to Section 2(10) of the Maharashtra Act which seeks to levy tax on mere location of goods at the time of their use within the State, are ultra vires Articles 286 and 269 of

the Constitution. Their further argument is that, taxable event of such transaction of sale would be upon the transfer in law of the right to use goods in question and, therefore, the situs of transaction of sale would, on first principle, be the situs of the contract which has the effect in law of transferring the right to use goods and, therefore, no such tax can be levied merely on location of goods in that State. Shri S.K.Dholakia, learned senior counsel, appearing for the State of Maharashtra contended that, in the absence of any enactment by the Parliament, the nature of contract i.e. the transfer of right to use goods is to be determined with reference to law dealing with contract, namely, the Indian Contract Act, and in that connection referred to Sections 148 and 149 of the Indian Contract Act. According to him, the transfer of the right to use goods being in the nature of a contract of bailment, there must be delivery or possession of goods before it can be said that the right to use is transferred. According to him, until the goods are delivered to the lessee it is only an agreement to give it on bailment and, in fact, the delivery of goods is sine qua non of the transfer of right to use goods. Thus, the State legislature was fully competent to enact the Explanation to Section 2(10) of the Act. In brief, the argument is that the taxable event would be the location of goods - delivery of which is to be effected for use. Shri C.S.Vaidyanathan, learned Additional Solicitor General, appearing for Union of India, Shri A.K.Ganguly, learned senior counsel appearing for the State of Tamil Nadu, Shri K. Ram Kumar, appearing for the State of Andhra Pradesh, Shri Adarsh Goel, appearing for the States of Uttar Pradesh and the State of Haryana, Shri S.K. Jain, appearing for the State of Rajasthan and Shri M.Veerappa for the State of Karnataka argued, that the taxable event of such transaction of deemed sale would be on the location of goods the delivery of which is to be effected for use within the State. They further contended that, in view of the decision in the second Gannon Dunkerleys case (supra), the provisions of Section 4 of the Central Sales Tax Act are applicable to deemed sales envisaged under clause (29A)(d) of Article 366 of the Constitution and, therefore, on the application of Section 4 of the Central Sales Tax Act, States legislatures were fully competent to levy sales tax if the goods at the time of their use are located within their States.

(5) On the argument of learned counsel for the parties, the questions that arise for consideration are (a) what are the limitations on the power of States to levy tax on the transactions of transfer of right to use any goods and (b) where is the situs of taxable event on the transfer of right to use goods under Article 366(29A)(d) of the Constitution. Before we deal with the aforesaid questions, it would be helpful to look into the legislative history of levy of sales tax in this country and the decisional law in order to resolve the controversy before us.

(6) The power of the State legislature to levy sales tax first time found place by virtue of Entry 48 of List II of the Seventh Schedule of the Government of India Act, 1935. The Entry was to the following effect:-

taxes on sale of goods and on advertisement.

In exercise of the aforesaid power, the then Provincial legislatures levied sales tax on the sale and purchase of a number of commodities. Government of India

Act did not make any provision about situs of sale for purposes of levy of sales tax by the then Provincial legislatures with the result, the then Provincial legislatures on the basis of one or more than one elements constituting sale made it as the basis for levy of tax by legislations. Some of the States levied sales tax merely because the goods were located within their provinces at the time of contract. In the province of Bihar, if the goods were produced and manufactured inside the province, it was made a basis for levy of tax, as a result of which one transaction of sale was subjected to levy of sales tax by more than one Provinces resulting in burden on the consumers. These difficulties were well taken care of while framing the Constitution and, as a result of which we find Articles 286, as it existed in the Constitution, when it was enforced. Relevant Article 286 is reproduced below:-

Article 286. Restrictions as to imposition of tax on the sale or purchase of goods (1) No law of a State shall impose, or authorise 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 the import of the goods into, or export of the goods out of, the territory of India.

Explanation. For the purposes of clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except insofar as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the day of March 31, 1951.

(3) No law made by the legislature of a State imposing, or authorizing the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

(7) Entry 54 of List II of Seventh Schedule to the Constitution as it existed on the date of enforcement of the Constitution is extracted below:-

54. Taxes on the sale or purchase of goods other than newspapers

(8) After the commencement of the Constitution, two sets of controversies arose as regards the power of States legislatures to levy sales tax on transactions of sales firstly, with reference to clauses (1) and (2) of Article 286 as it existed prior to the Sixth Amendment of the Constitution and secondly, with reference to the transactions of works contract. The Explanation to definition of sale in the Bombay Sales Tax Act, 1952 gave rise to first controversy. The said Explanation provided that sale of any goods which have actually been delivered in the State of Bombay as a direct result of such sale for the purposes of consumption in the said State, shall be deemed for the purpose of the Act to have taken place in the State, irrespective of the fact that the property in the goods has, by reason of such sales, passed in another State. The question, therefore, arose as to whether the State legislature of Bombay could levy sales tax on the transactions of sales merely on the basis that goods, as a result of such sales, were located for consumption within its State although sales are exempted under Article 286(2) of the Constitution. The Bombay High Court, on a petition under Article 226 of the Constitution, struck down the aforesaid provision being of the view that the definition of sale in the Bombay Sales Tax Act was repugnant to Article 286 of the Constitution. But, the said decision of Bombay High Court was reversed by the Supreme Court in the case of State of Bombay and another vs. United Motors (India) Ltd. and others (1953) SCR 1069. However, the controversy did not abate and correctness of decision in the case of United Motors (supra), was doubted and, therefore, it was reconsidered in The Bengal Immunity Company Ltd. Vs. The State of Bihar and Ors. (1955) SCR, 603, wherein it was held, as thus:

The operative provisions of the several parts of Art. 286, namely clause (1)(a), clause (1)(b), clause (2) and clause (3) are intended to deal with different topics and, one cannot be projected or read into another and therefore the Explanation in clause (1)(a) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2).

xxx xxx xxx

What is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The situs of a sale or purchase is wholly irrelevant as regards its inter-State character.

Until Parliament by law made in exercise of the powers vested in it by clause(2) of Art. 286 provides otherwise, no State can impose or authorize the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter- State trade or commerce and the majority decision in The State of Bombay vs. The United Motors (India) Ltd.(1953) SCR 1069 in so far as it decides to the contrary cannot be accepted as well founded on principle or authority.

In nutshell, it was held that situs of a sale, as

engrafted in Explanation to Article 286(1), as it existed prior to the Sixth Amendment of the Constitution, cannot be applied to clause (2) of Article 286, which related to inter-State trade or commerce and situs of sale is wholly immaterial as regards its inter-State character.

(9) After the decision in The Bengal Immunity case (supra), certain recommendations were made by Tax Inquiry Commission, proposing certain amendments in the Constitution relating to levy of sales tax. The aforesaid recommendations were accepted and as a result of which the Parliament passed the Constitution (Sixth Amendment) Act, 1956 whereby, in List I of the Seventh Schedule Entry 92-A was added, which runs as under:-

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

Entry 54 in List II was substituted which reads as thus:-

54. Taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92-A of List I.

Sub-clause (g) was added to clause (1) and sub-clause (3) was added to Article 269 of the Constitution, which are extracted below:-

(g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter- State trade or commerce.

(3) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter- State trade or commerce.

(10) By virtue of the aforesaid amendment in Article 269, the Parliament was empowered to levy and collect tax on sale or purchase of goods where such sale or purchase takes place in the course of inter-State trade or commerce, and also to lay down the principles for determining when sale or purchase of goods takes place in the course of inter-State trade or commerce. The Sixth Amendment also omitted Explanation to clause (1)(a) of Article 286 and further, clauses (2) and (3) of Article 286 were substituted by two new clauses. Amended Article 286 read as under:-

286. Restrictions as to imposition of tax on the sale or purchase of goods. (1) No law of a State shall impose, or authorise 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 the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in

any of the ways mentioned in clause (1).

(3) Any law of a State shall, insofar as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy rates and other incidents of the tax as Parliament may by law specify.

(11) After Sixth Amendment in the Constitution, the Parliament passed an Act known as The Central Sales Tax Act, 1956. The objects of the said Act were to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in course of imports into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. After the enactment of the Central Sales Tax Act by the Parliament, the first controversy stood resolved.

(12) Yet another controversy, as regards the power of the State legislature to levy sales tax on transactions of works contract remained unresolved. In *Gannon Dunkerley & Co. vs. State of Madras* (AIR 1954 Madras 1130), the High Court of Madras was of the view that the transaction of work contract was not a contract for sale of goods as defined under the provisions of Sales of Goods Act and, therefore, sales tax is not leviable on the amount received by the contractors from the persons for whom they had constructed building during the relevant assessment year. However, the Kerala High Court, the then High Court of Mysore, the then High Court of Nagpur and the High Court of Rajasthan were of the view that, States legislatures were competent to pick out from the composite transaction of building contract, which included transfer of property in materials, and make the portion attributable to the cost of such materials subject to payment of sales tax. Ultimately, the Supreme Court, in the *State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd*, (1959) SCR 379 held, that in a building contract which is one, entire and indivisible, there is no sale of goods and is not within the competence of the Provincial legislature under Entry 48 of List II in Schedule VII of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as a sale. (13) After the decision of this Court in *Gannon Dunkerley* case (supra), States suffered losses as a result of avoidance of Central Sales Tax Act leviable on inter-State sales of goods. Therefore, the matters were referred to the Law Commission of India. The Law Commission, after considering the matters referred to, made certain recommendations suggesting amendments in the Constitution in order to augment the revenue of the States. In the light of recommendations of the Law Commission, Parliament passed Constitution (Forty-sixth Amendment) Act, whereby a new clause 29-A was inserted in Article 366 of the Constitution, which is extracted below:-

29-A. tax on the sale or purchase of goods includes

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

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

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

(14) Simultaneously, a new Entry 92-B was inserted in List I of Seventh Schedule to the Constitution, which is extracted as under:

92-B. Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

(15) In clause (1) of Article 269, a sub-clause (h) was also added and clause (3) of Article 269 was also amended. The amended provisions of Article 269 is extracted as under:

(h) taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce..

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

(16) By Forty-sixth Amendment, Article 286 of the Constitution was also amended by substituting clause (3) by a new clause which reads as thus:

(3) Any law of a State shall, insofar as it imposes, or authorises the imposition of, -

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce;

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause(b), sub-clause (c) or sub-clause (d) of clause (29-A) of Article 366

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify. (17) After the Forty-sixth amendment, States legislatures became competent to levy sales tax on deemed sales envisaged in clause (29A) of Article 366 of the Constitution although such transactions were not sales within the meaning of sale and most of the States legislatures enacted law to levy sales tax on deemed sale in terms of the provisions of clause (29A) of Article 366 of the Constitution, and sought to assess the contractors on the transactions of works contracts. It is at this stage writ petitions were filed in this Court challenging such levy contending, that the power of States legislatures to levy tax on transfer of property in goods involved in the execution of works contracts referred to in sub-clause (b) of clause (29A) of Article 366, is in excess of power conferred on States legislature under Entry 54 List II. The respondent-States in those writ petitions defended the levy on the ground that sub-clause (b) of Article 366(29A) bestowed on them a power to levy tax on works contract independent of Entry 54 of List II. This Court in the case of Builders Association (supra) held, that the power of the State legislature to levy tax on works contract is subject to the limitation contained in clauses (1), (2) and (3) of Articles 286 and 269. Again, in second Gannon Dunkerleys case (supra), this Court reiterated that levy of sales tax under sub-clause (b) of clause (29A) of Article 366 is subject to the discipline to which any levy under Entry 54 of the State List is made subject to the Constitution, as held in the Builders Association case (supra).

(18) We have traced the history as regards the power of States legislatures to levy sales tax only to find out as to whether the power of States legislatures to levy sales tax under clause (29A) (d) of Article 366 is subject to same limitations, as noticed in the earlier decisions.

(19) Following the decisions referred to above, we are of the view that the power of States legislatures to enact law to levy tax on the transfer of right to use any goods under Entry 54 of List II of Seventh Schedule has two limitations one arising out of the Entry itself; which is subject to Entry 92-A of List I, and the other flowing from the restrictions embodied in Article 286. By virtue of Entry 92-A of List I, Parliament has power to legislate in regard to taxes on sales or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. Article 269

provides for levy and collection of such taxes. Because of these restrictions, States legislatures are not competent to enact law imposing impose tax on the transactions of transfer of right to use any goods which take place in the course of inter-State trade or commerce. Further, by virtue of clause (1) of Art. 286, the State legislature is precluded to make law imposing tax on the transactions of transfer of right to use any goods where such deemed sales take place (a) outside the State and (b) in the course of import of goods into the territory of India. Yet, there are other limitations on the taxing power of the State legislature by virtue of clause (3) of Article 286. Although Parliament has enacted law under clause (3)(a) of Article 286 but no law so far has been enacted by Parliament under clause (3)(b) of Article 286. When such law is enacted by Parliament, the State legislature would be required to exercise its legislative power in conformity with such law. Thus, what we have stated above, are the limitations on the powers of States legislatures on levy of sales tax on deemed sales envisaged under sub-clause (d) of clause (29A) of Article 366 of the Constitution.

(20) While examining the power of States legislatures under Entry 54 of List II in earlier part of this judgment, we have noticed that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce, as held in *Bengal Immunity Co.Ltds* case. Further, the State legislature cannot by law, treat sales outside the State and sales in the course of import as sales within the State by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature, i.e. Parliament to fix the location of sale by creating legal fiction or otherwise.

(21) It may be noted that the transactions contemplated under sub-clause (a) to (f) of clause (29A) of Article 366 are not actual sales within the meaning of sale but are deemed sales by legal fiction created therein. The situs of sale can only be fixed either by the appropriate legislature or by judge made law, and there is no settled principles for determining the situs of sale. There are conflicting views on this question. One of the principles providing situs of sale was engrafted in Explanation to clause (1) (a) of Article 286, as it existed prior to the Constitution (Sixth Amendment) Act, which provided that the situs of sale would be where the goods are delivered for consumption. The second view is, situs of sale would be the place where the contract is concluded. The third view is, that the place where the goods are sold or delivered would be the situs of sale. The fourth view is, that where the essential ingredients, which complete a sale, are found in majority would be the situs of sale. There would be no difficulty in finding out situs of sale where it has been provided by legal fiction by the appropriate legislature. In the present case, we do not find Parliament has, by creating any fiction, fixed the location of sale in case of the transfer of right to use goods. We, therefore, have to look into the decisional law.

(22) In *Indian Copper Corporation Limited vs. The State of Bihar and others*, 1961 (2) SCR,276, the question arose as to where would be the situs of sale incase of a transaction which was not covered by Explanation to clause (1)(a) of Article 286, as it existed prior to Constitution

(Sixth Amendment) Act. In the said case, the sale transaction took place in the State of Bihar and the goods were sent to outside the State, but not for consumption in such State of first destination. The State of Bihar levied sales tax on such transaction. This Court, in the above case, held thus :

If a single State was designed to have the power to tax any particular transaction of sale, the question that next falls to be considered is the determination of that State in regard to which it could be predicated that the sale in question was not outside that State or in other words, the determination of the particular State in regard to which it could be said that the sale was inside that State. The key to the problem is afforded by two indications in the Article itself: (1) the opening words of Article 286(1) which speak of a sale or purchase taking place and (2) the non-obstante clause in the Explanation which refers to the general law relating to sale of goods under which property in the goods has, by reason of such sale or purchase, passed in another State. These two together indicate that it is the passing of property within the State that is intended to be fastened on, for the purpose of determining, whether the sale in question is "inside" or "outside" the State, and therefore, subject to the operation of the "Explanation that State in which property passes would be the only State which would have the power to levy a tax on the sale. As was explained in the recent decision of this Court in *Burmah Shell Oil Storage & Distributing Co., of India, Ltd vs. The Commercial Tax Officer*:

By sale here (Art.286(1)(a)) is meant completed transaction by which property in the goods passes. Before the property in the goods passes, the contract of sale is only executory, and the buyer has only a chose in action. The Constitution thinks in terms of a completed sale by the passing of property and not in terms of an executory contract for the sale of goods.

Notwithstanding that is not an outside sale, the power of the State to tax might be negatived by the operation of the Explanation which by its non-obstante clause shifts the situs of the sale and renders the sale transaction one within the delivery-cum-consumption State, i.e. as the State in which the sale transaction must be deemed to take place. Where the terms of the Explanation are satisfied, the sale transaction will, by a legal fiction created by it, be deemed to take place inside the State of delivery and therefore outside the State in which the property passes. The conclusion reached therefore is that where the property in the goods passes within a State as a direct result of the sale, the sale transaction is not outside the State for the purpose of Art. 286(1)(a), unless the Explanation operates. We need also add that the power of the State to impose the tax might still not be available unless the transaction in question is unaffected by the other bans imposed under sub-clause (1)(b), (2) and (3) of Art. 286. The submission therefore of learned counsel for the appellants, that in respect of non-Explanation sales the State of Bihar has no power to levy a tax by reason of such sales being outside the State within Art. 286(1)(a) must be rejected.

In brief, it was held that, where a sale was not covered by Explanation to clause (1)(a) of Article 286, the State in which property in goods passes would be the only State which would have the power to levy a tax on the sale.

(23) In *A.V.Thomas & Co. Ltd. vs. Deputy Commissioner of Agricultural Income Tax*, 1963 Supp.(2) SCR, 608, the goods (teas) were stored in the godowns at Willingdon Island which was in the State of Travancore Cochin and from there samples of tea were taken to Fort Cochin which at the relevant time was in the State of Madras. There, at Fort Cochin, samples of tea were sold by public auction in lots. Some were purchased in their entirety and others in parts and after the consideration money was paid at Fort Cochin delivery orders were given to the buyers addressed to the godown keepers at Willingdon Island and actual delivery of tea was taken there. These teas were then sent out from Willingdon Island in Travancore Cochin for consumption either in other parts of India or were exported out of India. The question arose as to whether the State of Travancore Cochin could levy sales tax on the location of goods. As there was no delivery of tea as a direct result of sale for purposes of consumption in any particular State, Explanation to clause (1)(a) of Article 286 as it existed prior to Constitution (Sixth Amendment) Act, was not available. Since there was no legal fiction to determine the situs of sale it was held that the sale was "outside" sale and was not inside sale qua State of Travancore Cochin because the property in goods passed when the contract was accepted on the fall of hammer in Fort Cochin which was in the State of Madras. The relevant extract of the judgment is reproduced below:

that the property in the goods passed when the contract was accepted on the fall of the hammer in Fort Cochin. Under Art. 286(I) it was the passing of the property within the State that was intended to be fastened on for the purpose of determining whether the sale was inside or outside the State. Subject to the operation of the explanation that State in which property passed would be the only State which would have the power levy the tax on the sale. But the explanation did not apply in the present case as there was no delivery as a direct result of the sale for consumption in any particular State.

(24) The aforesaid decisions unambiguously laid down that where situs of sale has not been fixed or covered by any legal fiction created by the appropriate legislature, the location of sale would be place where the property in goods passes. The Constitution Bench held, that it was the passing of the property within the State that was intended to be fastened on for the purpose of determining whether the sale was inside or outside the State.

(25) It was then urged on behalf of respondents that, it is the location of goods where they are put to use would furnish the situs of sale. According to them, there would be no completed transfer of right to use goods until the goods are delivered. We have traced the legislative history of sales tax in this country only to show that, excepting where the appropriate legislature by creating legal fiction fixed the situs of sale on location or delivery of goods for consumption like omitted Explanation to Article 286(1)(a), there is no authority to show that mere location or delivery of goods would be the situs of sale. Here, we would like to

cite an appropriate illustration given in the decision in Bengal Immunitys case(supra) only to resolve the controversy before us. The illustration given is as under:

Take, for instance, a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer has also a retail shop at Cannought Circus also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivered from the sellers godown to the buyers retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Gurgaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyers retail shop. As a direct result of this sale the sellers godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyers retail shop at Connaught Circus for consumption in the State of Delhi. On one view of the law, the situs of such a sale would be Gurgaon. We need not decide that it is, because that type of case is not before us and there may be other views to consider, but it is certainly a possible view. It is also possible to hold that this is not inter-State trade or commerce, because there is no movement of goods across a State boundary. Again, we need not decide that because that also may be controversial. But given these two postulates the transaction would fall squarely within the Explanation and yet it would not come within clause (2), for there is no movement of the goods across the border of any State and both the seller and the buyer are in the same place. Surely, the Explanation will, in presenti, govern such cases irrespective of whether Parliament has lifted the ban under clause (2). If these postulates are accepted then by virtue of clause (1)(a) read with the Explanation the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional situs assigned to such a sale or purchase by Explanation, although the contract was made, price was paid and symbolical or constructive delivery of the goods by the handing over of the delivery order took place in Gurgaon in the State of Punjab.

We, therefore, find that the location or delivery of goods within the State cannot be made a basis for levy of tax on sales of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the State would not be the situs of deemed sale for levy of tax if the transfer of right to use has taken place in another State. Therefore, the contention, on behalf of the respondents that there would be no completed transfer of right to use goods till the goods are delivered is to prevail, then the respondents are further required to show that the contract of transfer of right to use goods is also entered into in the said State in which the goods are located or delivered for use. The State cannot levy a tax on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of right to use, but the

same would not be the condition precedent for a contract of transfer of right to use goods. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located, the situs of such sale would be where the property in goods passes, namely, where the contract is entered into.

(26) Next question that arises for consideration is, where is the taxable event on the transfer of the right to use any goods. Article 366(29A)(d) empowers the State legislature to enact law imposing sales tax on the transfer of the right to use goods. The various sub-clauses of clause (29A) of Article 366 permit the imposition of tax thus: sub-clause (a) on transfer of property in goods; sub-clause (b) on transfer of property in goods; sub-clause (c) on delivery of goods; sub-clause (d) on transfer of the right to use goods; sub-clause (e) on supply of goods; and sub-clause (f) on supply of services. The words and such transfer, delivery or supply. In the latter portion of clause (29A), therefore, refer to the words transfer, delivery and supply, as applicable, used in the various sub-clauses. Thus, the transfer of goods will be a deemed sale in the cases of sub-clauses (a) and (b), the delivery of goods will be a deemed sale in case of sub-clause (c), the supply of goods and services respectively will be deemed sales in the cases of sub-clauses (e) and (f) and the transfer of the right to use any goods will be a deemed sale in the case of sub-clause (d). Clause (29A) cannot, in our view, be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. Nor, in our view, can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with the third sort of bailment referred to in Bailment by Palmer, 1979 edition, page 88. The third sort referred to there is when goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

(27) Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract

in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

(28) No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed.

(29) Learned counsel representing the respondents States contended that by virtue of application of Section 4 of the Central Sales Tax Act, States legislatures are competent to enact law imposing tax on the transfer of right to use goods if the goods are located for use within their States and placed reliance on the decision of this Court in second Gannon Dunkerley & Co. (supra). The relevant passage of the said judgment runs as under:

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 sales tax legislation for the State cannot make a departure from those principles.

(30) The aforesaid contention advanced has no merit and reliance on the second Gannon Dunkerly & Co. (supra) is totally misplaced. It may be noted that after Forty-sixth amendment of the Constitution, the definition of sale in the Central Sales Tax Act has not been amended and further this Court in second Gannon Dunkerleys case (supra) was dealing with the question of levy of sales tax on works contract as envisaged in Article 366(29A)(b) and not under Article 366(29A)(d). In second Gannon Dunkerleys case, this Court has construed sub-clause (b) of clause (29A) of Article 366 as conferring power to split the single and indivisible contract into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. Since tax was held as tax on sales of goods and, therefore, it was held that principles contained in Section 4 of the Central Sales Tax Act would apply to transaction of works

contract as envisaged in clause (29A)(b) of Article 366. Moreover, the transactions contemplated under Section 4 of the Central Sales Tax Act involve series of events and for that reason it has no application to the present case.

(31) It was then argued that if Section 4 of the Central Sales Tax is not applicable to the transaction of deemed sale under 366(29A)(d), the same may be applied by analogy for determining the situs of sale of the transfer of the right to use goods. We have already held that situs of sale can only be fixed by the appropriate legislature by creating a legal fiction like omitted explanation to Article 286(1)(a) but situs of sale cannot be fixed by analogy of Section 4 of the Central Sales Tax Act.

(32) Coming to the question that a transaction in question is in the nature of a contract of bailment, it is true that the High Court of Bombay in the judgment under appeal has taken the view that the transactions of the transfer of the right to use goods are in the nature of bailment. If such a view is taken then the State would not have the power to levy sales tax on such transactions. Unless such transaction is held to be a sale or deemed sale in law and it is only then the State legislature would be competent to enact law to levy tax under Entry 54 of List II of Seventh Schedule. The levy of tax is not on use of goods but on the transfer of right to use goods. The High Court proceeded on the footing that the transfer of right to use is different from sale or deemed sale without considering the legal fiction engrafted in clause (29A) of Article 366 of the Constitution. We are, therefore, of the view that the reasoning of the High Court in upholding the Explanation to Section 2(10) of the Act is not tenable in law. This question is also related to another question which falls to be considered, namely, whether the State of Maharashtra can levy tax on the transaction which is an inter-State sale. The Bombay High Court expressed the view that in case of transfer of right to use goods when agreement is made in one State for giving delivery of goods for use by the lessee in another State, the movement precedes a transfer of right to use i.e. the movement is antecedent to the completed transaction and only upon delivery of goods the transfer of right to use is completed as the transfer of right to use goods is not concluded merely by execution of an agreement or document. In view of the fact that the transaction in question is deemed sale and definition of sale in the Central Sales Tax Act is not amended, the said reasoning of the High Court is not only erroneous, but runs contrary to two decisions of this Court -(i) Builders Association of India (supra) and (ii) M/s. Gannon Dunkerley and Co. (supra) wherein, it was categorically held that, in the determination of inter-State character of sale the situs of sale is immaterial. When goods are entrusted to a common carrier for delivery, it amounts to delivery to consignee. If it takes place outside the State, the fact that subsequently goods have reached the State where they are put to use, cannot be ground for determining the tax liability on the ground that the goods are located in that State for use.

(33) During the course of argument an apprehension was expressed that, in case we take the view which have now taken in our judgment, many unscrupulous companies would shift their head offices to neighbouring countries only to avoid sales tax. It is true that in such cases the State

would not be competent to levy tax on the transfer for right to use any goods. Shri K. Parasaran, the learned senior counsel is right when he contends that such apprehension is not justified as the Parliament has ample power under Article 246 of the Constitution to plug such loopholes.

(34) Shri Harish Salve, learned senior counsel raised an additional argument that Section 3 of the Maharashtra Act levied tax on the transfer of right to use goods effected before the date of commencement of the Constitution Forty-sixth Amendment Act, 1982 which inserted clause (29A) in Article 366 of the Constitution and, therefore, it is ultra vires. As the appellants are to succeed on the first ground, we are not disposed to go into the said question.

(35) As a result of the aforesaid discussion our conclusions are these:

(a) The States in exercise of power under Entry 54 of List II read with Article 366 (29A) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) The appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e. where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial.

(36) In the light of what we have stated above, we will examine the provisions of the various Acts which are impugned in the present case.

(37) These civil appeals and writ petitions are pending for a considerable period of time and during pendency of these cases many States have made various amendments in their State Acts but the appeals and writ petitions were not accordingly amended. We have been supplied with photocopies of the provisions of the Acts during hearing of these matters. We are, therefore, noticing the provisions of the Acts as they are contained in the copies supplied to us by learned counsel for the parties.

(38) Maharashtra Act - In earlier part of this judgment we have already reproduced the Explanation to Section 2(10) of the Act. The said Explanation fixes the situs of deemed sale in respect to the transfers of right to use any goods. The said Explanation deems the transfer of right to use any goods to have occurred in the State of Maharashtra if the goods are located within the State at the time of their use, irrespective of the place where agreement of such transfer of the right is made and therefore it widens the scope of the definition of sale so as to include deemed sales (i) which are in the course of inter-State trade and commerce and (ii) sales outside the State of Maharashtra and (iii) sales which occasioned import of goods into India. Section 3 of the Maharashtra Act provides incidence of tax. It lays down that subject to the provisions contained in the Act and rules, tax shall be leviable on the turnover of sales and therefore turnover necessarily has to include outside sale and sale in the course of inter-State trade and commerce and sales which occasioned import of goods. Although Section 8-A of the Act (as referred to in written notes), provides that nothing in this Act would be deemed to impose or authorise imposition of any tax on a sale outside the State or in the course of the import or export or inter-State trade or commerce but the Explanation has not been amended accordingly. There is a provision for exemption of turnover related to goods in respect of which tax has already been paid under the Bombay Sales Tax Act, 1952 but there is no provision that such exemption would be available in case of goods which have suffered sales tax under the other Sales Tax laws. We are, therefore, of the view that since the Explanation has not been amended in conformity with Section 8-A of the Act, the Explanation to Section 2(10) of the Maharashtra Act transgresses the limits of legislative power conferred on the State legislature under Entry 54 of List II and we, thus, instead of striking it down, direct that the Explanation to Section 2(10) of the Act shall be read down to this effect that it would not be applicable to the transactions of 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.

(39) Karnataka Act. The tax on the transfer of right to use any goods is levied under the General Sales Tax Act, namely The Karnataka Sales Tax Act. Section 2(t) of The Karnataka Sales Tax Act, 1957 defines sale as under:

Sale with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration (and includes, -

(i) xxxx (ii) xxxx (iii) xxxx;

(iv) a 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).

The above definition of Section 2(t) has Explanations. The relevant portions of which are being reproduced below:

Explanation 3. (a) The sale on 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 State-,

(a) xxxx (i) xxxx (ii) xxxx (b) xxxx (c) xxxx

(d) Notwithstanding anything contained in the Sales of Goods Act, 1930 (Central Act No. 3 of 1930), for the purpose of this Act, the transfer of the right to use any goods for any purpose (whether or not for a specified period) of shall be deemed to have taken place in the State, if such goods are for use within the State, irrespective of the place where the contract of transfer of the right to use the goods is made.

The provisions of Section 5(3) of the Act provide for a single point tax. Section 5C is a charging section for levy of tax on the transfer of right to use any goods. Section 5C is reproduced as under:

5-C. Levy of tax on the transfer of the right to use any goods. Notwithstanding anything contained in sub-section (1) or sub-section (3) of Section 5, but subject to sub-sections (4), (5) and (6) of the said section, every dealer shall pay for each year a tax under this Act on his taxable turnover in respect of the transfer of the right to use any goods mentioned in column(2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said Schedule).

(40) A perusal of Explanation 3(d) to Section 2(t) shows that the transfer of right to use any goods would be deemed to have taken place in the State of Karnataka if the goods are for use within the State irrespective of the place where the contract of transfer of right to use the goods is executed. The said Explanation 3(d) to Section 2(t) widens the ambit of definition of sale by including sales outside the State of Karnataka and the sales which occasioned import of goods into India, merely on the premise that goods put to use are located within the State of Karnataka irrespective of the place where the contract or transfer has taken place. This Explanation is in excess of legislative power under Entry 54 of List II of the Seventh Schedule. Another important aspect to notice is that the provision of Section 5(3) which provides for single point taxation has been omitted in its application to Section 5C. Therefore, Explanation (3)(d) to Section 2(t) of the Act has to be held in excess of legislative power conferred on the State legislature under Entry 54 of List II of the Seventh Schedule of the Constitution following the reasoning given while discussing the Maharashtra Act. We, accordingly, direct that Explanation 3(d) to Section 2(t) of the Act shall be read down to this effect that it would not be applicable to the transactions of 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.

(41) Tamil Nadu. The Tamil Nadu General Sales Tax Act, 1959 also levies tax on transfer of right to use any goods. Section 2(n) defines sale as under:

sale with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes

(i) xxxx (ii) xxxx (iii) xxxx (iv) a 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.

The above definition has Explanations and the relevant Explanation (3) is extracted below:

Explanation (3) (a) The sale or purchase of goods 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 State-

(i) xxxxx (ii) xxxxx (b) xxxxx

Explanation 3(a) to Section 2(n) of the Act deems sale to have occurred in the State of Tamil Nadu if the goods are located within the State. Although the Explanation is general in character, the petitioners contended that the said Explanation is being applied in the case of transfer of right to use any goods which have taken place outside the State or an inter-State sale. During the course of argument, learned counsel appearing for the State of Tamil Nadu contended that the said Explanation is applicable in cases where the transfer of right to use goods takes place outside the State, and the State is empowered to levy tax on such transaction of deemed sale, if the goods are located within the State. Further, in Section 3(A), the rates of tax has not been specially prescribed. Following what we have stated earlier, we hold that the Explanation 3(a) to Section 2(n) of the Act is in excess of power under Entry 54 of List II of the Seventh Schedule so far as it relates to the transactions of transfer of right to use any goods are concerned. Since the said Explanation is in the general provisions of the Act, we direct that Explanation 3(a) to Section 2(n) of the Act shall be read down to this effect that it would not be applicable to the transactions of transfer of right to use any goods if such transaction of deemed sale is (i) an outside sale; (ii) the sale which occasioned the import of goods into India; and (iii) an inter-State sale.

(42) Haryana. Haryana General Sales Tax Act, 1973 also levies tax on transfer of right to use any goods. After Forty-sixth Amendment, the Act has been amended. Section 2(1) defines sale, which runs as under:

Sale means any transfer of property in goods for cash or deferred payment or other valuable consideration and includes-

(i) xxxx (ii) xxxx (iii) xxxx

(iv) transfer of the right to use any goods (except tents, kanats, chholdari, crockery, utensils, furniture and all other goods dealt with by the tent dealers as also other allied dealers for decoration and lighting purposes) for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

The charging section in relation to tax on transfer of right to use any goods is under the general provisions of the Sales Tax Act. Note 4 of Section 2(e) reads as thus:

Note (4) A sale falling under sub- clause(iv) shall be deemed to have taken place within the State if the goods in respect of which right to use has been transferred are within the State at the time of their use.

Note (4) is substantially akin to explanation impugned in the Maharashtra Act. Note (4) widens the ambit of definition of sale by including outside sale, inter-State sale and import into the territory of India. Following the reasoning given earlier, we direct that Note (4) to Section 2(e) of the Act shall be read down to this effect that it would not be applicable to the transactions of 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.

(43) Uttar Pradesh. Uttar Pradesh Trade Tax Act, 1948 also levies tax on transfer of right to use any goods. Section 2(h) defines sale, which is reproduced below:

Sale with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration and includes

(i) xxxx (ii) xxxx (iii) xxxx

(iv) a 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.

(44) Clause (ii) of Explanation I to Section 2(h) runs as under:

in a case falling under sub-clause (iv), if the goods are used by the lessee within the State during any period, notwithstanding that the agreement for the lease has been entered into outside the State or that the goods have been delivered to the lessee outside the State.

(45) Section 3.F is a charging section which provides tax on transfer of right to use any goods and it is extracted as under:

(1) Notwithstanding anything contained in section 3-A or section 3- AAA or section 3-D but subject to the provisions of sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of-

(a) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment of other valuable consideration; or

(b) xxxx

at such rate not exceeding fifteen percentum as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers.

(2) For the purposes of determining the net turnover referred to in sub-section (1), the following amounts shall be deducted from the total amount received or receivable by a dealer in respect of a

(a) transfer referred to in clause (a) of sub-section (1) whether such transfer was agreed to during that assessment year or earlier, -

(i) the amount representing the value of the goods covered by sections 3, 4 and 5 of the Central Sales Tax Act, 1956;

(ii) the amount representing the value of the goods exempted under section 4;

(iii) xxxx (iv) xxxx (v) xxxx (vi) xxxx (vii) xxxx (viii) xxxx (ix) xxxx (x) xxxx (xi) xxxx (xii) xxxx

The aforesaid provisions show that so far as the inter-State sales are concerned, in substance, are not taxable, but no provision has been made for declared goods. Yet, there is another aspect. By virtue of clause (ii) of Explanation I to Section 2 (h), the ambit of sale has been widened by including outside sale as inside sale on mere location of goods for use within the State irrespective of the fact that the agreement for transfer of right to use has been executed outside the State or whether the sale is outside the State, the tax is chargeable within the State. And, further, on account of a special provision for rates of tax, the other provision such as single point tax as well as exemption etc. is not applicable to the transaction of transfer of right to use any goods. We find that clause (ii) of Explanation I of Section 2(h) is in excess of legislative power under Entry 54, List II of Seventh Schedule and, therefore, we direct that clause (ii) of Explanation I of Section 2 (h) of the Act shall be read down to this effect that it would not be applicable to the transaction of 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.

(46) Rajasthan. The Rajasthan Sales Tax Act, 1994, levies tax on transfer of a right to use any goods. Section 2(23) defines lease which is being reproduced below:

Lease means any agreement or arrangement whereby the

right to use any goods for any purpose is transferred by one person to another whether or not for a specified period for cash, deferred payment or other valuable consideration without the transfer of ownership, and includes a sub-lease but does not include any transfer on hire purchase or any system of payment by installments;

(47) Section 2(38) defines sale which runs as under:
sale - with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes

(1) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;

(2) xxxx (3) xxxx

(4) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

The said sub-sections has Explanations. Explanation II(b) runs as under:

in a case falling under sub-clause (4), if the goods are used by the lessee within the State, whether or not for a specified period, notwithstanding that the agreement for the lease has been made outside the State or that the goods have been moved from outside the State or the goods have been delivered to the lessee outside the State.

(48) The said Explanation is substantially on the pattern of Explanation to Section 2(10) of the Maharashtra Act. By virtue of Explanation II(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 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.

(49) Andhra Pradesh. The Andhra Pradesh General Sales Tax Act, 1957 levies tax on the transfer of right to use any goods. Section 2(n) defines sale, which is being reproduced below:

Sale with all its grammatical variations and cognate expressions means every transfer of the property in goods whether as such goods or in any other form in pursuance of a contract or otherwise by one person to another in the course of trade or business, for cash or for deferred payment, or for any other valuable consideration xxx or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods. The above

sub-section has Explanations. The relevant Explanations are reproduced below:

Explanation II :- (a) Notwithstanding anything contained in the Indian Sale of Goods Act, 1930 (Central Act III of 1930) a sale or purchase of goods shall be deemed, for the purpose 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 State.

(i) xxxx (ii) xxxx (b) xxxx

Explanation IV: - A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a sale.

The amended Section 5E of the A.P. Act runs as under:

Tax on the amount realised 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 the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in 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 or right is made."

Explanation IV to the definition of sale as contained in Section 2(n) of the Act brings within its ambit tax on transfer of right to use any goods. Explanation II of Section 2(n) which is a general provision, provides that irrespective of the place where the contract of sale or purchase might have taken place, if the goods are within the State, it will be included within the definition of 'sale

(50) Clause (b) of Section 5.E deems that any transfer of right of goods entered into by any dealer, is deemed to have taken place in the State if the goods are used within the State irrespective of the place where the agreement has taken place. Relevant provisions of Section 38 is being reproduced below:

Nothing contained in this Act shall be deemed to impose or authorize the imposition of a tax on the sale or purchase of any goods, where such sale or purchase takes place -

(i) outside the State; or

(ii) in the course of the import of the goods into, or export of the goods out of the territory of India; or

(iii) in the course of inter-State trade or Commerce

Explanation : The provisions of chapter II of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), shall apply for the purpose of determining when a sale or purchase takes place in the course of inter- State trade or commerce or outside a State or in the course of import or export.

(51) Although, the aforesaid Section was required to be amended after the ITC Classics case under appeal, it remained unamended and its Explanation provides that the provisions of Chapter II of the Central Sales Tax Act, 1956 shall apply for the purpose of determining when a sale or purchase takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export.

(52) We have already held that since the definition of sale so far as it relates to transaction of transfer of right to use any goods is concerned in Central Sales Tax Act has not been amended, the provisions of Section 4 of the Central Sales Tax Act will not be applicable to such transactions. Thus, we find that clause (b) of Section 5.E is in excess of legislative power of the State under Entry 54 of List II of Seventh Schedule. We, therefore, direct that clause (b) of Section 5.E of the Act shall be read down to this effect that it would not be applicable to the transaction of 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.

(53) Following what we have stated above, we are of the opinion that the decision of the Bombay High Court in 20th Century Finance Corporation Ltd. Vs. State of Maharashtra (1989) 75 STC, 217 (under appeal) is erroneous, whereas, we affirm the decision of the Andhra Pradesh High Court in ITC Classics Finance & Services vs. Commissioner of Commercial Taxes (1995) 97 STC, 330 (under appeal).

(54) For the aforesaid reasons, all the civil appeals, writ petitions and the transferred case, excepting civil appeal Nos. 6218-23/95, deserve to be allowed and civil appeal Nos. 6218- 23/95 deserve to be dismissed. Consequently, we set aside the judgments under appeal excepting in CA Nos.6218-23/95. All the civil appeals excepting C.A. Nos.6218-23/95, writ petitions under Article 32, the transferred case and the writ petitions filed before the High Court are allowed to the extent what we have held in this judgment and directions issued hereinafter. Civil appeal Nos. 6218-23/1995 are dismissed. The relevant assessment orders if impugned in these cases are set aside. We direct the respondents to assess the appellants and the petitioners for the relevant years involved in these cases only in accordance with the principles of law laid down in this judgment. There shall be no order as to costs.