A 20TH CENTURY FINANCE CORPORATION LTD. AND ANR.

v.

STATE OF MAHARASHTRA

MAY 9, 2000

B [S.P. BHARUCHA, B.N. KIRPAL, V.N. KHARE, SYED SHAH MOHAMMED QUADRI AND D.P. MOHAPATRA, JJ.]

Sales Tax

C *Maharashtra Sales Tax on the Transfer of the Right to Use Any Goods for Any purpose Act, 1985 (18 of 1985)—S.2(10) Explain., Ss.3 and 8-A:*

Constitutionality of Expln. to S.2(10)—Read down to the effect that it would not be applicable if the deemed sale is: (i) an outside; (ii) a sale in course of import or export; (iii) an inter—State sale.

D

Transfer of right to use any goods for any purpose—Taxable event and situs of—In absence of a legal fiction created by the appropriate legislature contemplating otherwise, situs of such sale, held, would be the place where the property in goods passes and not the place of location of the goods where they are put to use—Where the goods are in existence and right to use them is transferred under a written contract, the taxable event would be the execution of the contract and situs of the sale would be the place where the contract is executed—Where the goods are not in existence or there is an oral or implied transfer of the right to use them, the taxable event would be the delivery of goods.

E

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Contract Act, 1878—Ss. 148,149—Bailment—Transfer of right to use goods—Nature of—Held, not in the nature of bailment—It is a deemed sale under the legal fiction engrafted in Art. 366(29-(A)(d).

U.P. Trade tax Act, 1948(15 to 1948)—Ss.2(h)(iv) & Expln. I(ii) and S.3F—Consitutionality—Expln. I(ii), held is in excess of legislative power of the State Legislature—However, instead of striking it down, it is read down.

G

Rajasthan Sales Tax Act, 1954—Ss.2(38)(4) and Expln. II(b)—Constitutionality—Expln. II(b), Held, is in excess of legislative power—provision read down.

H

A.P. General Sales Tax Act, 1957—Ss. 5—E(a)&(b) and 38 and S.2(n) Explns. II(a)&(IV)—Constitutionality—S. 5—E(b), held, is in excess of legislative power of the State of under Entry 54 of List II of Sch. VII of the Constitution—provision read down.

Haryana General Sales Tax Act, 1973—S.2(I)(iv) Note 4—Constitutionality—upheld.

Karnataka Sales Tax Act, 1957—S.2(t)(iv) & Expln. 3(d) and S.5—C—Constitutionality—Expln. 3(d) to S.2(t), held, is beyond the State Legislature's power under Entry 54 of List II of Sch.VII to the Constitution—Provision read down.

T.N. General Sales Tax Act, 1959, S.2(n)(iv) & Expln. 3(a) and S.3—A—Constitutionality—Expln. 3(a) to S.2(n), held, is in excess of legislative power under Entry 54 of List II of Sch. VII to the Constitution—Provision read down.

Constitution of India—Arts. 366(29—A)(d), 269 & 286 and Sch.VII List II Entry 54 & List I, Entry 92-A—Power of State Legislatures to levy tax on the transfer of right to use any goods—Held, is subject to Entry 92-A of List I read with Art. 269 and is also subject to restrictions under Art. 286—Central Sales Tax Act, 1956, Ss. 4, 3, 5, 2(g).

The appellants and the petitioner companies having offices in and out of the respondent State carrying on business of leasing diverse equipments, entered into Master Lease Agreements with lessees i.e. the party who desired to take equipment for use on hire. The petitioners agreed to give on lease various 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 placed 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. 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

A 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 from an integral part of the Master Lease Agreement. The appellants/petitioners contended before the High Court that one transaction of transfer of right to use goods is subjected to sales tax by more than one State. On such a transaction, some States levy B tax on them, 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, that some States levy tax when the goods were delivered in their States for use in pursuance of agreements of transfer executed outside their States and States tax such transactions of deemed sales on the premise that agreements C for transfer of right to use have been executed within their States. Therefore, they, 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 State.

The appellants/petitioners contended before the High Court that the D Maharashtra Act, particularly Section 3 read with Section 2(10), purports to levy tax not due 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 upon the transfers effected during movement of goods from one State to another E and, therefore, the Act is *ultra vires* Articles 269(3) and 246 read with Entry 92 A of List I of the Seventh schedule of the Constitution; 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* Article 286(1)(a) and (b) of the Constitution. The High Court dismissed the writ petition and held F 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.

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In appeal to this Court the appellants/petitioners contended that there are two independent limitations upon the taxing power of the State based on situs of the sale, one engrafted in Article 286 and the other where the sale occurs within the State that 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 H trade or commerce, 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; 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 that, therefore, no such tax can be levied merely on location of goods in that State. A B

The Respondent-State of Maharashtra contended that, in the absence of any enactment by the parliament, the transfer of right to use goods is to be determined with reference to law dealing with contract; that 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; and that 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 and that the State legislature was fully competent to enact the Explanation to Section 2(10) of the Act. The other respondent States contended 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; that in view of the decision in the second *Gannon Dunkerley's* case, 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, that therefore, the States legislatures were fully competent to levy sales tax if the goods at the time of their use are located within their States; and that the location of goods where they are put to use would furnish the situs of sale and that if Section 4 of the Central Sales Tax Act is not applicable to the transaction of deemed sale under Art. 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. C D E F

Disposing of the Appeals and Writ Petitions, the Court

HELD: Per (Khare, J. for himself, Bharucha J and Mohapatra, J.) : G

1. The power of State 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 H

A 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, State legislatures are not competent to enact law imposing 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 B 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 C 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. These are the limitations on the powers of State legislatures on levy of sales tax on deemed sales envisaged under sub-clause (d) of clause (29A) of Article 366 of the Constitution. [144-G-H; 145-A-C] D

Builders Association of India and Ors. v. *UOI and Ors.*, [1989](2) SCC 645; *M/s Gannon Dunkerley & Co. and Ors.* v. *State of Rajasthan and Ors.*, [1993]1 SCC 364; *State of Bombay and Anr.* v. *United Motors (India) Ltd. and Ors.*, [1953] SCR 1069; *The Bengal Immunity Company Ltd* v. *The State* E *of Bihar and Ors.*, [1955] SCR 603 and *State of Madras* v. *Gannon Dunkerley & Co., (Madras) Ltd.*, [1959] SCR 379, referred to.

2. The location or delivery of goods within the State cannot be made a basis for levy of tax on sale of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the F State would not be the situs of deemed sale for levy of tax if the transfer of right to use has taken place on another State. The State cannot levy a tax on the basis that one of the event 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 G 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 ended into. [149-G-H; 150-A-B]

Indian Copper Corporation Limited v. *The State of Bihar and Ors.*, H [1961] 2 SCR, 276; *The Bengal Immunity Co. Ltd* v. *The State of Bihar &*

Ors., [1955] SCR 603 and *A.V. Thomas & Co. Ltd.* v. *Deputy Commissioner of Agricultural Income Tax,* [1963] 2 SCR, 608, referred to. A

3. On a plain construction of sub-clause (d) of Clause (29A) of Article 366, 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 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. [150-G-H; 151-A] B C

4. 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. [151-E-F] D E

5. 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 Dunkerley's* case 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 Dunkerley's* 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, 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. [152-B-E] F G H

A 6. The reasoning of the High Court in upholding the Explanation to Section 2(10) of the Act is not correct. 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 reasoning of the High Court is not only erroneous, but runs contrary to the decisions of the Court, wherein, it was categorically held that, in the determination of inter-State character of sale the situs of B 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. [153-A-E]

C *20th Century Finance Corporation Ltd.* v. *State of Maharashtra,* (1989) 75 STC 217, reversed.

ITC Classics Finance & Services v. *Commissioner of Commercial Taxes,* (1995) 97 STC 330, affirmed.

D *Builders Association of India & Ors.* v. *U.O.I. & Ors.,* [1989] 2 SCC 645 and *M/s Gannon Dunkerley & Ors.* v. *State of Rajasthan & Ors.,* [1993] 1 SCC 364, referred to.

7. Since the Explanation to Section 2(10) has not been amended in E conformity with Section 8A of the Act, the Explanation to Section 2(10) of the Maharashtra Act transgresses the limits of legislative power confirmed on the State legislature under Entry 54 of List II and instead of striking it down, Explanation to Section 2(10) of the Act shall be read down to the effect that it would not be applicable to the transactions of transfer of right to use any goods if such deemed sale is (i) and outside sale, (ii) sale in course of the import of F the goods into or export of the goods out of the territory of India and (iii) an inter-state sale. [155-F-G]

8. Explanation (3)(d) to Section 2(f) of the Karnataka Sales Tax Act, 1957 has to be held in excess of legislative power conferred on the State legislature G under Entry 54 of List II of the Seventh Schedule of the Constitution following the reasoning given while discussing the Maharashtra Act. It is, therefore, directed 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 H of India and (iii) an inter-State sale. [157-E-F]

9. Explanation 3(a) to Section 2(n) of the Tamil Nadu General Sales Tax Act, 1959 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 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) and inter-state sale. [158-G-H; 159-A]

10. Note (4) of Section 2(e) of the Haryana General Sales Tax Act, 1973 widens the ambit of definition of 'sale' by including outside sale, inter-State sale and import into the territory of India. Note (4) to Section 2(e) of the Act shall be read down to the 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. [159-G]

11. Clause (ii) of Explanation I of Section 2(h) of the U.P. Trade Tax Act, 1948 is in excess of legislative power under Entry 54, List II of Seventh Schedule and, therefore, clause (ii) of Explanation I of Section 2(h) of the Act shall be read down to the 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. [161-G-H; 162-A]

12. By virtue of Explanation II(b) of Section 2(38)(4) of the Rajasthan Sales Tax Act, 1994 the definition of 'sale' is enlarged and it include sales outside the State or sales which are inter-State sales have been made chargeable if 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 Explanation II(b) of Section 2(38)(4) shall be read down to the effect that it would not be applicable to the transaction of the transfer of right house 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. [162-H; 163-A-B]

13. Clause (b) of section 5-E of the A.P. General Sales Tax Act, 1957 is in excess of legislative power of the State under Entry 54 of List II of Seventh Schedule. It is, therefore, directed that clause (b) of Section 5-E of the Act

A shall be read down to the 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. [165-C-D]

B HELD: Per Quadri, J. himself and Kirpal, J. (Dissenting)

1. A combined reading of the first and second limb of Clause (29A) of Article 366, suggests that mere execution of a document de hors passing the domain of the goods does not result in transfer of right to use any goods and will not constitute a 'deemed sale' within the meaning of clause (29A). The C 'deemed sale' envisaged in sub-clause (d) involves not only a verbal or written transfer of right to use any goods but also an overt act but which the transferor places the goods at the disposal of the transferee to make their use possible. On this construction, it is explicit that the transfer of right to use any goods involves both passing of a right in as well as domain of the goods in which right to use is transferred. [169-B-D]

D *The New Shorter Oxford English Dictionary: 1993 Edn. Vol.2 Pg.3367; Corpus Juris secundum: Vol.87 Pg.892 and Black's Law Dictionary: Vi Eng. Pg.1497,* referred to.

2. A sale of any goods is complete when the property in the goods passes E to the purchaser pursuant to a contract of sale of those goods. So, also, a deemed sale of goods under sub-clause (d), will be complete when the control of the goods in which the right to use is transferred, passes to the transferee under the contract to transfer. Such a transfer of right to use any goods may be effected either by the execution of a written contract between the parties indicating the mode by which giving the control or domain of the goods to the F heir is contemplated or by oral contract coupled with delivery of the goods to the hirer. There can be no oral contract with regard to unascertained goods because there can be no delivery of such goods. Where a written contract exists whether in regard to ascertained goods or unascertained goods, the intention of the parties as evidenced by the terms of the contract to 'transfer G of right to use the goods' is determinative of the fact as to when, how and where the right to use the goods is transferred. It is a well-settled principle of interpretation of contracts that the contract must be construed as a whole. When and where such a deemed sale, under sub-clause (d), takes place is a question of fact which has to be decided on the facts and circumstances of each case, including the terms and conditions of the contract evidencing the H transaction. [171-C-E]

Rashtriya Ispat Nigam Ltd. v. *Commercial Tax officer, Company Circle, Visakhapatnam,* 77 STC 182 (1990); I.T.C. Classic Finance and Services v. *Commissioner of Commercial Taxes,* 97 STC 330 (1995); *20th Century Finance Corporation Ltd.* v. *State of Maharashtra,* 75 STC 217 (1989); *Upasana Finance Ltd.* v. *State of Tamil Nadu and Anr.,* 113 STC 403 (1999) and *Krushna Chandra Behera and Anr.* v. *State of Orissa and Ors.,* 83 STC 325 (1991), referred to.

Introduction to the Law of Property by Mr. F.H. Lawson; 1958 Edn. 117; The Halsbury's Laws of England describes 'Hire of Chattels; IV Edn. Vol.2 para 1551 and Bailment by Palmer; 1979 Edn. Page 88, referred to.

3. A transfer under sub-clause (d) will not be complete on execution of the master lease. It will be completed when the supplier delivers the equipment to the appellants or hand it over to a carrier or a bailee or as per the instructions to the hirer, which is deemed unconditional appropriation of goods to the contract of sale and then only the transfer under clause (d) will take effect. After execution of the master lease when the control of the equipment passes to the hirer that the transfer of right to use the goods will be complete. And it is at that stage that the liability of the appellants to pay sales tax will arise. The consequence of acceptance of the contention that on execution of the master lease, the transfer under sub-clause (d) is complete, will be to give the revenue the legitimacy to tax the consideration mentioned in the master lease even before the appellants acquire a right to receive the same. This will be not only an unintended consequence of enacting sub-clause (d) of clause (29A) but also an improper and unjust action having approval of the court.

[172-E-H; 173-A]

4. Till the equipment is handed over to the carrier to be delivered to the hirer, the sale of the equipment itself, ordered by the appellants, will not be complete much less can it be said that the deemed sale in favour of the hirer will be complete on execution of the master lease in respect of non-existent/ unspecified goods. That is why it has been held that on execution of the master lease, there can be no transfer of right to use the unascertained goods giving rise to the liability to pay sales tax on the deemed sale under sub-clause (d).

[173-G-H; 174-A]

Halsbury's Laws of England-Vol. 41-para 708-709, referred to.

5. The contention that for determining the question as to whether a 'sale' is inside one State and outside all other States or whether it is in the course of inter-State trade or commerce, recourse cannot be had to the provisions

A of Sections 3 and 4 of the Central Sales Tax Act, is untenable. The taxable event in regard to the sale of goods is passing of the property in the goods or appropriation of goods. In regard to each of the deemed sales the taxable event are specified in sub-clause (a) to (f) of clause (29A) of Article 366 of the Constitution. For purposes of levy of a tax on transactions referred to in sub-clause (a) and (b) the taxable event is transfer of property in goods, in sub-clause B (c) it is delivery of goods in sub-clause (d) it is transfer of right to use any goods, whereas in sub-clause (e) and (f), supply of goods is postulated as taxable event. It is made clear that no tax can be levied under a legislation enacted by virtue of power conferred in Entry 54 List II of the Seventh Schedule of the Constitution on the agreement for sale; necessarily therefore the taxable event C has to be on the completion of deemed sale. [175-G-H; 176-A-C]

A.V. Thomas & Co. Ltd. v. *Deputy Commissioner of Agricultural Income Tax,* [1963] 2 SCR 608, referred to.

6. In the case of a deemed sale of goods , whether specified or unspecified, under sub-clause (d), where more States than one are involved, D the taxable event will arise where the transfer is complete; if the contract is oral at the place of the delivery of the goods in which the right to use is transferred but if the contract is in writing, subject to the terms and conditions of the contract evidencing the intention of the parties, where giving the control/domain of the goods is postulated. In other words, the transfer will be E complete where the contract is executed and the control/domain of the goods which are the subject matter of the contract, is given to the hirer. [176-C-E]

Halsbury's Laws of England: Vol. 41-Para 711, referred to.

7. It is evident that the taxable event in respect of the deemed sale under F sub-clause (d) is treated not at the place where the transfer of the right to use the goods is complete but is fixed by a deeming provision contained in the impugned Explanation in the State of Maharashtra. It is also apparent that this deeming provision runs counter to the import of sub-clause (d) of clause (29A); it has no nexus to the taxable event, that is, to the transfer of right to use any goods. Indeed, it appears that in the guise of fixing the situs of the G sale by the legislation, which is held permissible by the decisions of the Constitution Benches of this Court, the very taxable event has been altered from 'the transfer of the right to use the goods' to the situs of the goods in the State of Maharashtra at the time of their use. [179-C-F]

Tata Iron & Steel Co. Ltd. v. *The State of Bihar,* [1958] SCR 1355 and H *Gannon Dunkerley & Co. and Ors.* v. *State of Rajasthan,* [1993] 1 SCC 364.

referred to. A

8. A definition of 'sale' with reference to the situs of goods has to conform to the requirements of Articles 286 and 269 of the Constitution as also to the provisions of Sections 3 to 5 of the Central Sales Tax Act. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import or export into a sale inside the State. The question B whether a sale is an outside sale or an inside sale with reference to a State or whether it is a sale in the course of import or export, will have to be determined on the facts of each case in accordance with the principles contained in Sections 3 to 5 of the Central Sales Tax Act and a State Legislature while enacting the sales tax legislation for the State cannot make C a departure from those principles. A legislation of a State which purports to fix situs of sale in that State cannot tax a deemed sale which is completed in another State and it cannot create a taxable event de hors the ingredients of deemed sale under clause (29A) of Article 366. [180-D-G]

9. The impugned Explanation to Section 2(10) of the Maharashtra Act D cannot be sustained, being violative of Article 286(1)(a), Articles 269(1)(g) and 269(3) read with Sections 3 and 4 of the Central Sales tax Act. The same result follows in the case of the impugned legislation of the Haryana Act Note (4) of Section 2(e), Andhra Pradesh Act clause (b) of Section 5E of the Act, the U.P. Act clause (ii) of Explanation I to Section 2(h) and in the Rajasthan E Act, the definition of sale contained in Section 2(38)-Explanation II. Though they are differently worded, they convey the same meaning as contained in the Explanation to Section 2(10) of the Maharashtra Act, and for the same reason, they are also illegal and unconstitutional. The impugned provisions of the Tamil Nadu Act and Karnataka Act also cannot be sustained. They are declared illegal and unconstitutional. [181-F-G] F

10. The transaction in question, namely, entering into master lease between the hirer and the respondent and placing the order for purchase of an equipment desired to be taken on lease by the hirer as an order for purchase of an equipment at the instance of the hirer is an attempt to save sales tax G either on sale of the equipment or on the deemed sale. The Revenue can have no grudge against a person who so arranges his affairs as to minimise his tax liability under the provisions of a taxing statute. Indeed, it is expected of the Revenue to ensure that correct tax as ordained by the Statute is paid by every assessable person - no more no less. But that does not mean the tax evasion should be equated with tax planning. The tax evasion has to be dealt H

with promptly under the provisions of the relevant taxing statute. The clubbing of two transactions-the master lease and the purchase of the equipment pursuant thereto purporting to be at the instance of the hirer with instructions to the manufacturer/supplier to deliver the same to the hirer, to wit, as if the transaction under sub-clause (d) is also an inter-State transaction whereas the sale alone will be an inter-State transaction-cannot but be an attempt to evade the tax leviable on transaction under sub-clause (d) of clause (29A) of Article 366 of the Constitution. [183-E-H; 184-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4500 of 1989.

From the Judgment and Order dated 12.9.89 of the Bombay High Court in W.P. No. 2632 of 1986

WITH

Writ Petition (C) No. 671 of 1990, W.P. (C) 641 of 1992 C. A. No 3438/1990 C. A. No. 3436/1990, C. A. No. 3437 of 1990, C. A. No. 3435 of 1990, C. A. No. 3347/1990, T. C. No. 91/1991, W.P. (C) No. 638 of 1992, W.P. (C) No.640 of 1992, W.P. (C) No. 642/1992, W.P. (C) No. 964/1992, W. P. (C) No. 965/1992 and C. A. Nos. 6218-23/1995.

C.S. Vaidyanathan, Additional Solicitor General, K. Parasaran, R. F. Nariman, Harish N. Salve, Sunil Dogra, R.B. Mehrotra, S.K. Dholakia, B. Sen, A.K. Ganguli, Adarsh Goel, Dr. V.Gauri Shankar, K.J. John, P. Venugopal, P. Sudhir, V. Balachandran, Parag P. Tripathi, Ms. Swati Singh, Ms. Neelima Tripathi, S. Aravindh, Senthil Jagadeesan, Ms. Monica Sharma, A.K. Goel Additional Advocate General for U.P. Kavin Gulati, R.B. Misra, C. Sidharth, R.C. Verma, Krishnamurthi Swami, G. Umapathy, Pradeep P.Tiwari, A. Raghunath, S. Srinivasan, Ms. Nina Gupta, Ms. Arpita Roy Choudhary, Ms. Tania Bery, Sanjay Katyal, Sanjay Chaudhary, Vineet Kumar, Yashank Adhyaru, P.K. Jain, Mrs. Urmila Sirur, Mrs. B. Sunita Rao, D.P. Mukherjee, Mrs. Kamini Jaiswal, G.B. Sathe, Ashish Dholakia Dilip Sen, J.R. Das, D. Krishnan, V. Krishnamurthy, A. Mariarputham, T. Harish Kumar, V. Rama Subramaniam, D. Goburdhan, Ms. Pinky Anand, Ms. Geeta Luthra, M. Veerappa, Kh. Nobin Singh, Manish Mohan, Neeraj Kr. Jain, Ms. Amita Gupta, Mahabir Singh, A.S. Bhasme, K.R. Nambiar, Ranjan Mukherjee, Sumita Mukherjee, K. Ram Kumar, Ms. Santinarayan, Y. Subba Rao, B. Sridhar for G. Prabhakar, Sushil Jain, Pradeep Agrawal, Prakash Shrivastava, A. Mishra, Ms. Anjali Doshi, Dilip Tandon, Ms. Neera Gupta, M. Shivram, R.C. Verma, P. Parmeswaran and S.N. Terdol and Shureshtha Bagga for the appearing parties.

The Judgments of the Court were delivered by A

V.N. KHARE, J. (1) Despite the decisions of this Court in *Builders' Association of India and others* v. *Union of India and others,* [1989] 2 SCC 645 and *M/s. Gannon Dunkerley & Co. and others* v. *State of Rajasthan and Ors.*, [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.

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(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

F G H

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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 Maharasthra 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 Dunkerley's* 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

A 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.

B **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 C 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:

D 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.

E (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.

F (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"

G (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 H 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* v. *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.* v. *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.
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> 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* v. *The United Motors (India) Ltd.,* [1953] SCR 1069 in so far as it decides to the contrary cannot be accepted as well founded on

A 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-
B 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
C 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
D 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".

E 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
F 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."

G (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
H further, clauses (2) and (3) of Article 286 were substituted by two new clauses.

Amended Article 286 read as under:- A

"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 - B

(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 C 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 D 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 E 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 F 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 G *Gannon Dunkerley & Co.* v. *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 H

A 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* v. *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'.

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(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:-

D

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

E

(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;

F

(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;

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(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

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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. A

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." B

(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". C

(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: D

"(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..... E

(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: F

"(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; G

(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 H

A 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 B 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 C 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 D 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 Dunkerley's* 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 E 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 F 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 G 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 H restrictions, States legislatures are not competent to enact law imposing 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. Ltd's* 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-clauses (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

A 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* v. *The State of Bihar and others,* [1961] 2 SCR, 276, the question arose as to where would be the *situs* B of sale in case 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 :

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"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 D 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 E 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 F 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* v. *The Commercial Tax Officer:*

"By sale here (Art.286(1)(a) is meant completed transaction by which G 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."

H 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 much 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.* v. *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

A 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:

> B "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 C 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 D 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 E 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 F 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 Immunity's* case (supra) only to resolve the controversy before us. The illustration given is as under:

> G "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 Cannaught 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 H contract is that the goods contracted to be sold will be actually

delivered from the seller's godown to the buyer's 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 buyer's retail shop. As a direct result of this sale the seller's godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyer's 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

A 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.

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(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

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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:

A "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."

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(30) The aforesaid contention advanced has no merit and reliance on the second Gannnon 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 Dunkerley's 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 Dunkerley's 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.

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(31) It was then argued that if Section 4 of the Central Sales Tax is not applicable to the transaction of deemed sale under Article 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.

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(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

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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

A 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
B 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.

C (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.

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(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.

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(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.

F (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.

G (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
H 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. A

(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. B C D E F G

(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 H

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) xxx

(ii) xxx

(iii) xxx;

(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) xxx

(i) xxx

(ii) xxx

(b) xxx

(c) xxx

(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

A in the course of business for cash, deferred payment or other valuable consideration and includes -

(i) xxxx

(ii) xxxx

B (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.

C 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 D are within the State-"

(i) xxxxx

(ii) xxxxx

E (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 F 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 G 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) H 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(l) 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

A 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 -

B

(i) xxx

(ii) xxx

(iii) xxx

C (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:

D "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 E 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-

F (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

G 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 H 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 widen 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

A 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:

B "*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 instalments;"

C

(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 -

D (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

E

(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:

F "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

G 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

H 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) xxx
>
> (ii) xxx
>
> (b) xxx
>
> *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 (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

C (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."

D *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'

E (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:

F "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

G (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

H 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. A B

(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. C D

(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.* v. *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* v. *Commissioner of Commercial Taxes,* (1995) 97 STC, 330 (under appeal). E

(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. F G

SYED SHAH MOHAMMED QUADRI, J. We have had the advantage of reading the judgment prepared by our learned brother Khare, J. and we H

A regret not to be persuaded to agree with the interpretation of sub-clause (d) of clause (29A) of Article 366 of the Constitution of India.

The facts in Civil Appeal No. 4500 of 1989 and the history of the legislation leading to the passing of the Constitution (Forty-Sixth Amendment) Act, 1982, by which clause (29A) was inserted in Article 366 of the Constitution, B have been exhaustively dealt with by our learned brother; he has also referred to the respective contentions of the learned counsel in extenso, so we do not consider it necessary to repeat the same here.

The questions that arise for consideration in this batch of cases are:

C (1) What are the limitations on the power of the State Legislature to levy tax on the transaction embodied in sub-clause (d) of clause (29A) of Article 366 of the Constitution?;

(2) What is the real import of sub-clause (d) of clause (29A) of Article 366 and where does the taxable event on the transfer of D right to use goods arise?;

(3) Whether the impugned legislations of the States are unconstitutional being in violation of clauses (1) to (3) of Article 286 and clauses (1) and (3) of Article 269 of the Constitution; and

E (4) Whether the orders impugned in the appeals the provisions challenged in writ petitions and transfer petitions are sustainable.

On the first question, after tracing the history of the sales tax legislation both under the Government of India Act, 1935 as well as under the Constitution of India and dealing with the events leading to the insertion of clause (29A) F in Article 366 of the Constitution and after noticing the law laid down in the decisions of the Constitution Benches of this Court in *Builders' Association of India & Ors.* v. *Union of India & Ors.*, [1989] 2 SCC 645 and *M/s Gannon Dunkerley & Co. & Ors.* v. *State of Rajasthan & Ors.*, [1993] 1 SCC 364, our learned brother reiterated the limitations imposed by clause (1), (2) and sub-G clause (a) of Clause (3) of Article 286 and clauses (1) and (3) of Article 269 of the Constitution as well as Sections 3, 4, 5, 14 and 15 of the Central Sales Tax Act and observed that in addition to these limitations, the States would be bound by any law that might be enacted by the Parliament under sub-clause (b) of clause (3) of Article 286 of the Constitution. We are in respectful agreement with the reasoning and conclusion mentioned in para 19 and the H principles laid down in clauses (a) and (d) of para 35 of his judgment.

The germane question is question No. 2 while question Nos.3 and 4 are consequential. A

There is cleavage of opinion among the High Courts on question No. 2 The following reasons impelled us to record this note of discord on the interpretation of sub-clause (d) of Clause (29A) of Article 366 of the Constitution. B

The legislative competence of a State to tax sales or purchases of goods, is derived from Entry 54 of List II of the Seventh Schedule of the Constitution. Before the Constitution (Forty-Sixth Amendment) Act, 1982, the term 'sale' on the expression 'sale or purchase of goods' was not defined in the Constitution. The term 'sale' was understood in the same meaning as in C the Sales of Goods Act. Many transactions which resembled 'sale' but did not satisfy the requirements of that term resulted in such transactions escaping sale tax liability. This court in many cases did not approve the State Legislations which extended the meaning of 'sale'. The Parliament, therefore, inserted Clause (29A) defining the expression 'tax on the sale or purchase of goods' D in expansive terms, in Article 366 of the Constitution, which has to be read in Entry 54 of List II of the Seventh Schedule to the Constitution.

To find out the ambit of sub-clause (d) relating to transaction of 'the transfer of right to use any goods', which along with the transactions specified in sub-clauses (a) to (c) and (f) of clause (29A) of Article 366 of the E Constitution, is treated as a 'deemed sale', it is necessary to quote Clause 29-A here:-

"(29A). '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 F 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 G of payment by instalments;

(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 H

A 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 B 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 C whom such transfer, delivery or supply is made;

A careful reading of Clause 29A shows that it is an inclusive definition and has two limbs. The first limb says that tax on the sale or purchase of goods includes a tax on transactions specified in sub-clauses (a) to (f) thereof. The second limb provides that such transfer, delivery or supply of D any goods referred to in the first limb *shall be deemed to be a sale of those goods* by the person making the transfer, delivery or supply and the purchase of *those goods* by the person to whom such transfer, delivery or supply is made.

E A perusal of sub-clause (d) shows that the tax, envisaged therein, is on the transfer of the right to use any goods for any purpose; the period of use may or may not be specified; the consideration whereof may be cash, deferred payment or any other valuable consideration (need not necessarily be cash consideration). As the tax is on the transfer of right to use any goods, we shall ascertain the meaning of the word 'transfer'.

F In '*The New Shorter Oxford English Dictionary*'*, its meaning is given, *inter alia,* as follows: '(Law)-conveyance of property, especially of stock of shares, from one person to another.' In Black's Law Dictionary#, the word 'transfer' is defined to mean, *inter alia*, "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting G with property or with an interest in property....". In *Corpus Juris Secundum***, it is defined to mean, "common use of the word 'transfer' is, to denote the passing of title in property or an interest therein from one person to another

*1993 Edition, Volume 2, Page 3367.

#Sixth Edition, Page 1497.

H ** Volume 87, page 892.

and in that sense the term means that *the owner of the property delivers it to another* with the intent of passing the rights which he had in it to the latter." A

(emphasis supplied)

Our endeavour here is to discern what transfer, in the context of clause (d) means. Is it simply signing of a document that brings about a transfer of right to use any goods or is it also necessary to give control of the goods to complete the transfer with the intent of passing the right to use the goods to the hirer? A combined reading of the first and the second limb of Clause (29A) suggests that mere execution of a document de hors passing the domain of the goods does not result in transfer of right to use any goods and will not constitute a 'deemed sale' within the meaning of clause (29A). A 'deemed sale' envisaged in sub-clause (d) involves not only a verbal or written transfer of right to use any goods but also an overt act by which the transferor places the goods at the disposal of the transferee to make their use possible. On this construction, it is explicit that the transfer of right to use any goods involves both passing of a right in as well as domain of the goods in which right to use is transferred. B C D

It is a common ground that the transaction mentioned in sub-clause (d) which is treated as a 'deemed sale', is in effect leasing/hiring of the goods, which implies use of the goods by the hirer. E

It will be useful to note the following passage in 'Introduction to the Law of property' by *Mr. F.H. Lawson**, "In Roman law hire was nothing more than contract. In English law, however, it is much more. Here again we must distinguish between chattels and land. When a chattel is handed over by way of hire a bailment takes place, and thereby the hirer is put in possession of the thing. For land the corresponding transaction is a lease, and here too there is transfer of possession. So far the two are very similar, though whereas the lessor always retains what is misleadingly called 'possession', a bailor who bails goods for a fixed term loses possession...." F

The Halsubury's Laws of England describes 'Hire of chattels'# thus: "Hire is a class of bailment. It is a contract by which the hirer obtains a right to use the chattel hired in return for the payment to the owner of the price of the hiring. The proprietary interest in the chattel is not changed, but remains G

*1958 Edition, Page 117.

#Fourth Edition, Volume 2, Paragraph 1551. H

A in the owner, although upon delivery the hirer becomes legally possessed of the chattel hired, so that if it is lent for a time certain, even the true owner is debarred during that time from resuming possession against the hirer's will and, should he do so, becomes liable in damages for the wrongful seizure."

We can with advantage refer to *'Bailment by palmer'**. The learned B author refers to the classification of bailment made by Holt C.J. in *Coggs* v. *Bernard* into six categories of which the third is relevant on the facts in the case of the appellant. Here the equipment, on being received from the manufacturer/supplier, is left with the hirer for being used for hire. The material extract of that book reads thus:

C

> "And there are six sorts of bailments..... The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called locator and the borrower conductor."

Be that as it may, what is the contractual nature of the transaction D specified in sub-clause (d) of Clause 29A? Whether it is a specie of bailment or not? - These questions should not detain us because we are concerned here not with the contractual nature of the transaction but with the substance and content of sub-clause (d). Suffice it to mention that the Parliament itself has not named the transaction and for purposes of the present discussion E relating to tax on the transaction of the nature in sub-clause (d) of clause (29A), brought into the fold of deemed sale, it is not necessary to give a *nomen juris* to it. It may, however, be mentioned that various High Courts in India treated the transaction in sub-clause (d) as bailment; among them are the High Court of *Andhra Pradesh in Rashtriya Ispat Nigam Ltd.* v. *Commercial Tax Officer, Company Circle, Visakhapatnam,* 77 STC 182 (1990) and *I.T.C. Classic Finance and Services* v. *Commissioner of Commercial Taxes 97 STC,* F 330 (1995), the High Court at Bombay In 20th *Century Finance Corporation Ltd.* v. *State of Maharashtra,* 75 STC 217 (1989); the High court of *Punjab and Haryana in Upasana Finance Ltd.* v. *State of Tamil Nadu and Anr.*, 113 STC 403 (1999) and the High Court of Orissa in *Krushna Chandra Behera* G *and Anr.* v. *State of Orissa and Ors.*, 83 STC 325 (1991).

Reverting to sub-clause (d) of clause (29A), a perusal of the Statement of Objects and Reasons appended to The Constitution (Forty-Sixth Amendment) Act, 1982, shows that the Parliament has taken note of the fact that the main right in regard to films relates to its exploitation and after

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*Edition 1979, page 88.

exploitation for a certain period of time, in most cases, the film ceases to have any value, so instead of resorting to the outright sale of a film, only a lease or transfer of the right to exploit the film is made. The device by way of lease of films has been resulting in avoidance of sales tax so to curb that device, sub-clause (d) is inserted in clause (29A). Even so, sub-clause (d) is of wider import than a mere leasing of films. It applies to all kinds of leasing/hiring of goods, for examples, leases of plants, machinery, computers, cars, planes, furniture etc.

A sale of any goods is complete when the property in the goods passes to the purchaser pursuant to a contract of sale of those goods. So also, a deemed sale of goods under sub-clause (d), as has been pointed out above, will be complete when the control of the goods in which the right to use is transferred passes to the transferee under the contract of transfer. Such a transfer of right to use any goods may be effected either by the execution of a written contract between the parties indicating the mode by which giving the control or domain of the goods to the hirer is contemplated or by an oral contract coupled with delivery of the goods to the hirer. There can be no oral contract with regard to unascertained goods because there can be no delivery of such goods. Where a written contract exists whether in regard to ascertained goods, the intention of the parties as evidenced by the terms of the contract, to 'transfer of right to use the goods' is determinative of the fact as to when, how and where the right to use the goods is transferred. It is a well-settled principle of interpretation of contracts that the contract must be construed as a whole. When and where such a deemed sale, under sub-clause (d), takes place is a question of fact which has to be decided on the facts and circumstance of each case, including the terms and conditions of the contract evidencing the transaction.

It may also be pointed out that though the ingredients of a sale of the goods as defined in the Sales of Goods Act and a deemed sale of goods as defined in clause (29A) of Article 366 are different there can be no difference in the incidence of tax and they cannot be treated differently for the purpose of levy of sales tax.

We shall now examine the contention that the transfer of right to use the goods is complete on executing the master lease only and nothing more need be done. In the factual matrix, in the case of the appellants, there is a master lease which is entered into between the appellants and the hirer for leasing of an equipment,. The equipment, on that date, is not in existence. After

A execution of the master lease, the appellants will place an order for purchase of an equipment with the manufacturer purporting to be at the instance of the hirer with instruction that the same be delivered at his place. On the aforementioned premise, can the transfer of the right to use the equipment be complete on execution of the master lease and the appellants' liability under sub-clause (d) to pay sales tax would commence immediately even though the B equipment in regard to which 'the right to use' has been transferred to the hirer is not in existence? But then it is conceded that transfer in sub-clause (d) will not be effectual where the goods are not in existence. Now, the next stage, after placing the order for purchase of an equipment, let us take, an equipment has been manufactured and is thus brought into existence but remains C unspecified; will then the transfer be complete at that stage and the appellant, tax liability will start immediately on its manufacture. In our opinion, no. At that stage even the sale of the equipment in favour of the appellants will not be complete as the property in the equipment will not pass to the appellants. The manufacturer will have to specify as equipment and either deliver or appropriate it to the contract of sale by the appellants, which will complete the D sale of equipment in their favour. Thereafter, the transfer of the right to use the goods can become effective and the liability of the appellants to pay sales tax will arise. Let us take a case where the equipment is with the supplier as unspecified goods; will the transfer to use the goods be complete on execution of the master lease in respect of any unascertained equipment? Can in such a E case the appellants be called upon by the revenue to pay sales tax on the execution of the master lease? We shall answer this question in the negative because, in our view, a transfer under sub-clause (d) will not be complete on execution of the master lease. It will be complete when the supplier delivers the equipment to the appellants or hands it over to a carrier or a bailee or as per the instruction in this case to the hirer, which is deemed unconditional F appropriation of goods to the contract of sale and then only the transfer under clause (d) will take effect. In other words, in this case after execution of the master lease when the control of the equipment passes to the hirer that the transfer of right to use the goods will be complete. And it is at that stage that the liability of the appellants to pay sale tax will arise.

G

There is yet another aspect, which though not decisive is of considerable practical significance and that is before the hirer is given the control/domain of the equipment, his liability to pay consideration under the contract may not arise. But the consequence of acceptance of the contention that on execution of the master lease, the transfer under sub-clause (d) is complete, will be to H give the revenue the legitimacy to tax the consideration mentioned in the master

lease even before the appellants acquire a right to receive the same. This will be not only an unintended consequence of enacting sub-clause (d) of clause (29A) but also an improper and unjust action having approval of the court.

We may clarify here that in the aforementioned examples, we have assumed that the lessor, the manufacturer/supplier, and the hirer are within the same State, albeit they may be in different districts (places).

It may be apt to notice here the principles with regard to unascertained goods in the case of sale of goods, which are*:

> "(i) The rule relating to unascertained goods is fundamental to the contract of sale inasmuch as a contract to sell unascertained goods is not a complete sale but a promise to sell.
>
> (ii) Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. In particular, where the individuality of the goods depends upon their being separated, weighed, measured, tested or counted, or upon some other act or thing being done in relation to them for their ascertainment, the goods are not ascertained until such act or thing is done. Goods are unascertained, notwithstanding that they are to be taken from a specific larger bulk, if the identity of the portion so to be taken is unascertained. The ascertainment of the goods does not of itself necessarily pass the property. It does so only if the parties have agreed that the property in the goods should pass when ascertained."

In our view the same principles will apply in the case of a deemed sale embodied in sub-clause (d).

If these principles are borne in mind, it cannot but be held, in the instant case, that till the equipment is handed over to the carrier to be delivered to the hirer, the sale of the equipment itself, ordered by the appellants, will not be complete much less can it be said that the deemed sale in favour of the hirer will be complete on execution of the master lease in respect of non-existent/ unspecified goods. That is why we have held above that on execution of the master lease, there can be no transfer of right to use the unascertained goods giving rise to the liability to pay sales tax on the deemed sale under sub-

*Halsbury's Laws of England - Vol. 41 - paras 708-709.

A clause(d).

This takes us to the question of fixing the place of taxable event in regard to the transaction mentioned in sub-clause (d) of clause (29A).

B It will be apposite to note here the mandate contained in Article 286(1) prohibiting the States from imposing or authorising the imposition of 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 the export of the goods out of the territory of India. Clause (2) of Article 286 enables the Parliament to enact law and formulate principles for determining when a C sale or purchase of goods takes place in any of the ways aforementioned. Clause (3) of Article 269 of the Constitution also authorises the Parliament to formulate principles, by enacting law, for determining when a sale or purchase or consignment of goods takes place in the course of inter-State trade or commerce by law. Before the formulation of the principles by the Parliament, the question of sale 'inside one State' and 'outside other State' came up for D consideration of this Court in *A.V. Thomas & Co. Ltd.* v. *Deputy Commissioner of Agricultural Income Tax*, [1963] 2 SCR 608. The question which arose for consideration of a Constitution Bench of this Court was whether the State of Travancore, Cochin can levy sales tax on the transactions in question. They involved the sales of tea in lots by auction which was conducted at Fort Cochin E in the erstwhile Madras State. The bid amount was paid at Fort Cochin and the delivery note was taken from there. The tea lots were at Willingdon Island in the then Travancore Cochin State. Pursuant to the delivery notes, the tea lots were sent from Willingdon Island (Travancore Cochin) for consumption to other States and other countries. On the ground that the goods were within the State of Travancore Cochin, sales tax was sought to be levied by that state F on those transaction of sale. This Court opined that the property in the goods passed when the contract was accepted on the fall of the hammer at Fort Cochin (Madras) and held:

> "On the facts of this case it was found by the Sales Tax Appellate G Tribunal that in regard to the sales of tea in 'full lots' the property passed at Fort Cochin and this view has not been challenged in this Court. Therefore, the majority decision in *Indian Copper Corporation Ltd.* v. *State of Bihar*, [1961] 2 SCR 276; the only State which would have the power to levy a tax on such sales would be the State of Madras and so far as Travancore Cochin was concerned, the sale H would be an outside sale.

> In the present case, therefore, the sale was an "outside sale" and cannot be said to be "inside sale"qua Tranvancore Cochin because the title passed at Fort Cochin which is in the State of Madras. Apart from that the money was paid there and the delivery order was also received there even though the actual physical delivery of goods was made at a Willingdon Island in the State of Travancore Cochin."

A

B

At that time Explanation to Article 286(1) was in force, so it was observed that the fiction created by Explanation 286(1)(a) was inapplicable because there was no delivery as a direct result of sale for the purpose of consumption in any particular State.

By virtue of the said constitutional provisions, the Parliament enacted the Central Sales Act, 1956. Section 3 of the Act contains the principles to determine when a sale or purchase of goods takes place in the course of inter-State trade or commerce. Section 4 embodies the principles to determine when a sale or purchase of goods is said to take place outside the State and Section 5 contains the principles when a sale or purchase of goods is said to take place in the course of import or export.

C

D

It may be pointed out here that after the insertion of clause (29A) in Article 366 of the Constitution, the definition of 'sale' in section 2(g) of the Central Sales Tax Act is not amended to conform the definition of the expression 'tax on the sale or purchase of the goods'. In *Gannon Dunkerley's* case (supra), a Constitution Bench of this Court while dealing with the case of works contract falling under sub-clause (b) of clause (29A) took the view:

E

> "It is, however, made clear that the absence of any amendment in the definition of sale contained in Section 2(g) of the Central Sales Tax Act, 1956 so as to include Transfer of property in goods involved in execution of a works contract does not in any way affect the applicability of such Sections 3, 4 and 5 and Sections 14 and 15 of the Sales Tax Act to such transfer."

F

We have no valid reason to think that the same position will not obtain in a case falling under sub-clause (d). Therefore, the contention that for determining the question as to whether a 'sale' is inside one State and outside all other States or whether it is in the course of inter-State trade or commerce, recourse cannot be had to the provisions of Sections 3 and 4 of the Central Sales Tax Act, is untenable.

G

The taxable event in regard to the sale of goods is passing of the property

H

in the goods or appropriation of the goods. In regard to each of the deemed sales the taxable events are specified in sub-clauses (a) to (f) of clause (29A) of Article 366 of the Constitution. For purposes of levy of a tax on transactions referred to in sub-clauses (a) and (b) the taxable event is transfer of property in goods, in sub-clause (c) it is delivery of goods, in sub-clause (d) it is transfer of right to use any goods, whereas in sub-clauses (e) and (f), supply of goods is postulated as taxable event. It must, however, be made clear that no tax can be levied under a legislation enacted by virtue of the power conferred in Entry 54 List II of the Seventh Schedule of the Constitution on the agreement for sale, therefore, necessarily the taxable event has to be on the completion of a deemed sale. We have also discussed above as to when and where a deemed sale will be complete in regard to specified goods as also in regard to unspecified goods. However, some aspects which remained untouched may be dealt with here,. In the case of a deemed sale of goods, whether specified or unspecified, under sub-clause (d), where more States than one are involved, the taxable event will arise where the transfer is complete; if the contract is oral at the place of the delivery of the goods in which the right to use is transferred but if the contract is in writing, subject to the terms and conditions of the contract evidencing the intention of the parties, where giving the control/domain of the goods is postulated. In other words, the transfer will be complete where the contract is executed and the control/domain of the goods which are the subject matter of the contract, is given to the hirer. Let us take an example - the hirer is in Delhi, the lessor is in Mumbai and the goods are in West Bengal, the contract of the transfer of right to use any goods is entered into in Mumbai. On the execution of contract on the lessor's direction, the goods moved from West Bengal to Delhi to be delivered to the hirer. As the deemed sale occasions movement of the goods from, West Bengal to Delhi the deemed sale in sub-clause (d) will be an inter-state sale in respect of each of the said State and the transaction cannot be taxed under any of the *States Acts*. Let us take another example where by the contract the transfer of right to use car 'x' is executed in Delhi, the car 'x' is in-Gurgaon (Haryana) the hirer is headed over the key of the car 'x' in Delhi; as both the execution of the contract as well as the act of passing of the control/domain of the car take place in Delhi, the transfer is complete in Delhi, so the deemed sale is within Delhi State and outside all other States; the taxable event will, therefore, be in Delhi no matter where the *situs* of the car 'x' is at the time of transfer and no matter where the car 'x' will be used in or out of India. If the hirer takes the car 'x' to Bombay, Tamil Nadu or any part of India, no State in which it is used will be entitled to levy tax for in none of the States the taxable event under sub-clause (d) arises. Regarding non-existent and unspecified goods, the following example will

clarify the position. In the example referred to above - the contract of the right to transfer an unspecified equipment (which is not in existence. or which may be with the supplier) is entered into in Gujarat. The lessor places the order to the manufacturer/supplier who is in West Bengal. On the principle discussed above, the sale of the equipment itself will be complete only on delivery of the equipment to the lessor or on his instruction to the hirer at Delhi. The taxable event cannot therefore, be at any earlier stage and at a place other than Delhi.

Here it will be apt to refer to-the following principle in Halsbury's Laws of England*:

> "An appropriation takes place where the goods are situated. at the time of the appropriation, not where the contract of sale is made, or where one party assents to an appropriation by the other. An authority given by one party to the other to appropriate the goods is an implied assent by the party giving the authority to a subsequent appropriation by the other, provided the appropriation is made in accordance with the contract."
>
> This principal deals with the sale of goods but there is no legal impediment or difficulty in applying the same to a deemed sale as well.

It may be noted that levy of tax under sub-clause (d) is on transfer of right to use any goods. The tax is not on the actual use of the goods; the hirer may use the goods during the period specified in the contract in exercise of the right acquired thereunder or he may not use them at all. The taxable event does not depend on the actual use. For purposes of sub-clause (d), actual exercise of the right to use the goods is not its ingredient and is irrelevant.

It will be convenient to deal with question Nos. 3 and 4 together as they are inter-connected. The impugned provisions of the Sales Tax Acts of seven states which are the subject matter of some of the cases, are in *pari materia* being on the subject of levy of impost on the transaction specified under sub-clause (d) of clause (29A). After the insertion of clause (29A) in Article 366 of the Constitution, many States, including the following States, amended their Sales Tax Acts by bringing the definition of the term 'sale'; in line with clause (29A) and also purported to fix the *situs* of the deemed sale in their respective States so as to tax the transaction of deemed sale when more than one State is involved. The impugned provisions of the Maharashtra Act, Haryana Act, Andhra Pradesh Act, Uttar Pradesh Act and Rajasthan Act are not in *hara verba*, but they attempted to achieve the same result by differently

*Halsbury's Laws of England - Vol. 41 - paras 711.

worded legislations which are set out in the statement hereunder:

Maharashtra Act	Haryana Act	A.P. Act	U.P. Act	Rajasthan Act
Section 2(10) Explanation For the purposes of this clause, the transfer of the right to use any such goods shall be deemeed 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 2(e) - 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.	*Amended Section 5.E*—(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 license for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realised or realisable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licensee, pay a tax at the rate of five paise in every rupee of the aggregate of such amount realised or realisable 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 whether 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.	*Section(h)— Clause (ii) of Explanation I.* in a case falling under sub-clause (iv) if the lessee within the course of his 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.	*Section 2 (38) Expl-anation II.* In a case falling under sub-clause (4), if the goods are used by the lessee within the State, whether or not for a spe-cified 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 de-livered to the lessee outside the State.

Since the subject matter of the appeal under consideration is the impugned provisions of the Maharashtra Act which are similar to the provisions of the Acts of other States, noted in the statement, we shall examine the Explanation to Section 2(10) of the Maharashtra Act. The impugned Explanation says that for purposes of sub-clause (d) the transfer of the right to use any 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 goods is made and whether the assent of the party is prior or subsequent to such transfer. From the above provision, it is evident that the taxable event in respect of the deemed sale under sub-clause (d) is treated not at the place where the transfer of the right to use the goods is complete but is fixed by a deeming provision contained in the impugned Explanation in the State of Maharashtra. From the above, it is also apparent that this deeming provision runs counter to the import of sub-clause (d) of clause (29A), discussed above; it has no nexus to the taxable event, that is to the transfer of right to use any goods. Indeed, it appears to us that in the guise of fixing the *situs* of the sale by the legislation, which is held permissible by the decisions of the Constitutions Benches of this Court in *The Tata Iron & Steel Co. Ltd.* v. *The State of Bihar,* [1958] SCR 1355 and in *Gannon Dunkerley's* case (supra), the very taxable event has been altered from 'the transfer of the right to use the goods' to the *situs* of the goods in the State of Maharashtra at the time of their use. In the example referred to above, namely, taking car 'x' on rent by hirer thought the contract of the right to use the car was entered into in Delhi, the control/domain of car was also given in Delhi by handing over key of the car and the delivery of the car was taken from Gurgaon (Haryana), thus the taxable event namely, the transfer was complete in Delhi, but if the hirer uses the car in Bombay, the Maharashtra Act treats such a deemed sale as taxable by that State on the mere use of the car in Maharashtra State which has no nexus to the taxable event under sub-clause (d).

The impugned Explanation is sought to be saved on the following grounds:

(i) the incidence of a deemed sale under sub-clause (d) is delivery of possession and the goods can be delivered only at the place where they are located. We have discussed above the requirement of delivery of possession and held that physical delivery of goods is not required to be effected in sub-clause (d) and that what all is required to complete the transfer in sub-clause (d) is giving control/domain of the

A goods which can be effected at any place and for that *situs* of the goods is not a relevant factor. Here we may point out that there is a distinction between a case of giving control/domain of the goods and effecting the actual delivery of the goods; it is possible that a person has control of the goods but may not be in actual possession thereof.

B (ii) the second ground is that Section 3 and 4 of the Central Sales Act or at any rate the principle involved therein will apply so the *situs* of goods will determine the taxable event. We have already noted above that a Constitution Bench of this Court in *Gannnon Dunkerley's* case (supra) took the view that Sections 3 to 5, 14 and 15 of Central Sales Act will apply to a deemed sale even in the absence of the amendment C of definition of the 'sale' in Section 2(g) of the Central Sales Tax Act and a State law can define a sale with reference to *situs* of a deemed sale. The observations of this Court in *Gannnon Dunkerley's* case appear to support this submission. But definition of 'sale' with reference to the *situs* of goods has to conform to the requirements of D Articles 286 and 269 of the Constitution as also to the provisions of Sections 3 to 5 of the Central Sales Tax Act. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import or export into a sale inside the State. The question whether a sale is an outside sale or an inside sale with reference to a State or whether it is a sale in the course of import or export, will E have to be determined on the facts of each case in accordance with the principles contained in Sections 3 to 5 of the Central Sale Tax Act and a State Legislature while enacting the sales tax legislation for the State cannot make a departure from those principles. A legislation of a State which purports to fix *situs* of sale in that State cannot tax a F deemed sale which is completed in another State and it cannot create a taxable event *de hors* the ingredients of deemed sale under clause (29A) of Article 366. We are of the view, having regard to the above discussion, that regard to the above discussion, that Sections 3 and 4 of the Central Sales Tax Act cannot save the impugned Explanation.

G (iii) The impugned Explanation has to be read subject to Section 8A of the Maharashtra Sales Tax Act. That is no doubt a correct way of reading the said provisions because that section incorporates the mandate contained in Article 286(1) of the Constitution . But this can hardly remove the vice in the impugned Explanation which has already been adverted to in detail.

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For the foregoing reasons, the impugned Explanation cannot be sustained being violative of Article 286(1)(a), Article 269(1) (g) and 269(3) read with Sections 3 and 4 of the Central Sales Tax Act.

The same result follows in the case of the impugned legislation of the Haryana Act Note (4) of Section 2(e), Andhra Pradesh Act clause (b) of Section 5E of the Act, the U.P. Act clause (ii) of Explanation 1 to Section 2(h) and in the Rajasthan Act, the definition of sale contained in Section 2(38)—Explanation II given in the statement above. Though they are differently worded, they convey the same meaning as contained in the Explanation to Section 2(10) of the Maharashtra Act, discussed above, and for the same reason, they are also illegal and uncostitutional.

The impugned provisions of the Tamil Nadu Act is contained in clause (a) of Explanation (3) which reads thus:

> "*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.

This provision, unlike the impugned provisions of the Acts of the other States, discussed above, merely fixes the *situs* of the sale but such fixation of *situs* has no-relation to taxable event having regard to the nature of transaction contained in sub-clause (d). Reverting back to the example of a hirer taking a car on rent; if the car happens to be in Tamil Nadu even though the transaction was completed in Delhi and domain of the car by handing over the key or by doing some other overt act like delivery note was also complete in Delhi, the *situs* of the car having regard to the nature of the deemed sale, in sub-clause (d), will be immaterial and the transaction cannot be made taxable under the Tamil Nadu Act. To the same effect is the impugned provision of the Karnataka Act contained in clause (d) of Explanation (3). Therefore, we hold that the impugned provisions of the Tamil Nadu Act and Karnataka Act also cannot be sustained. They are declared illegal and unconstitutional for the above mentioned reasons.

Inasmuch as the provisions of the Acts noted above are severable and do not affect the other provisions of the Act and if they are retained, they may cause confusion both in the minds of various authorities under the said Acts as well as the common citizens, in our view, it would be appropriate to

A strike down the said provisions. Accordingly, those impugned provisions of the said Acts are struck down.

One aspect, however, remains to be considered and that arises in C.A. No. 6218-6223 of 1995 from the judgment of the Andhra Pradesh High Court reported in *I.T.C. Classic Finance and Services* v. *Commissioner of Commercial* B *Taxes*, (1995) 97 STC 330. The facts in that case are identical with the facts in *20th Century Finance Corporation Ltd. and Anr.* v. State *of Maharashtra* case, except for the fact that in cases before the High Court of Andhra Pradesh assessment of tax for the years 1989-90 to 1994-95 was in fact made under the provisions of the Andhra Pradesh General Sales Tax Act. The crucial question C before the High Court was when on the basis of master lease, the contract to take the equipment on lease, entered into between the respondent and the hirer, the respondent placed an order with the supplier at Calcutta with instructions to deliver it to the hirer at Hyderabad, was the movement of the equipment from Calcutta to Hyderabad pursuant to the sale of the equipment or deemed sale under-clause (d). The Division Bench of the Andhra Pradesh High Court D proceeded on the footing, following, among others, the judgment of the Bombay High Court in the *20th Century Finance Corporation* (supra) as well as the earlier judgments of the Andhra Pradesh High Court, that the transaction referred to in sub-clause (d) is a specie of bailment and on the interpretation of the contract of the master lease, it held that the transfer of right to use the E equipment (deemed sale) was complete on execution of the master lease and that the deemed sale occasioned the movements of the goods from Calcutta to Hyderabad and it being an inter-state transaction was not liable to be taxed within the State of Andhra Pradesh. Here two points arise: (i) when and where the transfer of right to use the equipment was complete; and (ii) was it an inter-state transaction?

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In the light of the above discussion, as the equipment involved was unspecified goods and indeed an order for purchase of an unspecified equipment was made by the respondent after the lease, the respondent did not become owner of the equipment till the same was despatched to the hirer G so the transaction under sub-clause (d) could be complete only after the completion of the sale of the equipment which happened only when the equipment was actually delivered to the hirer in Hyderabad (Andhra Pradesh). Therefore, the transaction of deemed sale under sub-clause (d) cannot be said to be complete on the execution of the contract of master lease. If that be so, the question of the deemed sale being an inter-state sale would not arise. On H this aspect, the Andhra Pradesh High Court has referred to the view of the

Bombay High Court in *20th Century Finance Corporation* and differed form the same. But the Andhra Pradesh High Court failed to take note of the fact that though the deemed sale is subject to the same limitations as the sale, in view of the provisions of Article 286 of the Constitution and the provisions of Sections 3 and 4 of the Central Sales tax Act, and the State is denuded of the power to tax an inter-State transaction, yet in this case there has been no inter-state deemed sale. The fact that the master lease agreement refers to hiring of the equipment and the fact that at the instance of the hirer the appellant placed the order for purchase are immaterial. There is always a difference between purchasing any goods for the reason that hirer wanted to hire it and the hirer himself ordering purchase of the goods. In the instance case, the purchase of the equipment was by the respondent, the fact that the hirer wanted to hire the equipment might have prompted the respondent to place an order for its purchase but that fact is irrelevant in arriving at the conclusion whether the lease in respect of non-existent unspecified equipment would be complete on the execution of the master lease. On this aspect, we have held that before an unspecified equipment reaches the hirer, the sale of the equipment by the respondent itself would not be complete. The deemed sale under sub-clause (d) is only a consequential transaction which follows the completion of the sale in favour of the respondent and cannot precede it.

The transaction in question, namely, entering into master lease between the hirer and the respondent and placing the order for purchase of an equipment desire to be taken on lease by the hirer as an order for purchase of an equipment at the instance of the hirer is an attempt to save sales tax either on sale of the equipment or on the deemed sale. The Revenue can have no grudge against a person who so arranges his affairs as to minimise his tax liability under the provisions of a taxing statute. Indeed, it is expected of the Revenue to ensure that correct tax as ordained by the State is paid by every assessable person-no more no less. But that does not mean the tax evasion should be equated with tax planning. The tax evasion has to be dealt with promptly under the provisions of the relevant taxing statute. It appears to us that clubbing of the two transactions-the master lease and the purchase of the equipment pursuant thereto purporting to be at the instance of the hirer with instructions to the manufacturer/supplier to deliver the same to the hirer, to wit, as if the transaction under sub-clause (d) is also an inter-state transaction whereas the sale alone will be an inter-state transaction - cannot but be an attempt to evade the tax leviable on transaction under sub-clause (d) of clause (29A) of Article 366 of the Constitution.

A The civil appeals, writ petitions and transferred case are disposed of accordingly as indicated above:

Before parting, we wish to record our thanks to Mr. C.S. Vaidyanathan, the learned Additional Solicitor-General who so readily assissted the Court as amicus curiae.

B

V.M. Appeals/Petitions/Transferred Cases disposed of.