

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

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WRIT PETITION Nos. 22960 AND 23034 of 2007; 8122 AND 9016 of 2008; 4763, 8006, 12745, 15121, 16857, 16909, 16945 AND 19516 of 2009; 8 AND 25776 of 2010; 10711, 23689 AND 26994 of 2011; 6834 of 2012; 8 AND 39431 of 2013; 14192 AND 14457 of 2014

W.P.No.22960 of 2007

Between:

M/s.Larsen and Toubro Ltd.

.... Petitioner

Vs.

1. State of Andhra Pradesh rep. by its Principal Secretary (Revenue),
Hyderabad & Ors.

.... Respondent

DATE OF JUDGMENT PRONOUNCED: 14.09.2015.

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

1. Whether Reporters of Local newspapers may
be allowed to see the Judgments?
2. Whether the copies of judgment may be marked
to Law Reports/Journals
3. Whether Their Ladyship/Lordship wish to see the
fair copy of the Judgment?

JUSTICE RAMESH RANGANATHAN

* THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
* THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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+ WRIT PETITION Nos. 22960 AND 23034 of 2007; 8122 AND 9016 of 2008; 4763, 8006, 12745, 15121, 16857, 16909, 16945 AND 19516 of 2009; 8 AND 25776 of 2010; 10711, 23689 AND 26994 of 2011; 6834 of 2012; 8

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% Dated 14-09-2015

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.... Respondents

-
! Counsel for the petitioners: Sri S.R. Ashok, Sri N. Venkataraman,
Sri S. Ravi, Learned Senior Counsel and
Sri S. Dwarakanath, Sri A.K.Jaiswal, Sri
T.Vinod Kumar Tadakamalla, Sri Ch.
Pushyam Kiran, Sri K.Priyadarshan
Reddy.

^ Counsel for respondents: Sri K. Vivek Reddy, Learned Special
Counsel. Sri P. Balaji Varma, and Sri S.
Suribabu, Learned Special Standing
Counsel for Commercial Taxes,

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> HEAD NOTE:

? Citations:

- 1) (2003) 132 STC 272 (AP) (DB)
- 2) (1998) 111 STC 434 = AIR 1999 SC 121 = (1998) 7 SCC 19 (SC)
- 3) (1991) 83 STC 488 (Gujarat High Court) (DB)
- 4) AIR 1997 SC 1875 = (1997) 4 SCC 82
- 5) (1983) 142 ITR 663: (AIR 1983 SC 603
- 6) (2014) 1 SCC 603
- 7) (2011) 4 SCC 337
- 8) AIR 1964 SC 1419
- 9) AIR 1961 SC 1615
- 10) 1953 SCR 1069
- 11) 1954 SCR 1122
- 12) AIR 1955 SC 661
- 13) (1997) 5 SCC 536
- 14) AIR 1952 SC 192
- 15) (1985) 1 SCC 260
- 16) (1999) 1 SCC 472
- 17) (1999) 3 SCC 5
- 18) AIR 1961 SC 609
- 19) (1999) Supp (2) SCC 312
- 20) (1998) 8 SCC 1
- 21) (1998) 8 SCC 272
- 22) (1999) 1 SCC 209
- 23) (2001) 6 SCC 569
- 24) (2012) 11 SCC 651
- 25) (1979) 3 SCC 83

26) AIR 1958 SC 86
27) (2003) 2 SCC 107
28) (2005) 6 SCC 499
29) AIR 1954 SC 207
30) AIR 1955 SC 425
31) AIR 1957 SC 882
32) AIR 1966 SC 1089
33) AIR 1959 SC 422
34) AIR 1965 SC 1321
35) (1984) 2 SCC 436
36) (1988)n 1 SCC 572
37) (1995) 5 SCC 75
38) (2000) 6 SCC 293
39) (2000) 7 SCC 695
40) (2001) 6 SCC 634
41) (2001) 8 SCC 509
42) (2002) 7 SCC 484
43) (2003) 1 SCC 72
44) (1996) 4 SCC 230
45) (1997) 9 SCC 10
46) (2006) 6 SCC 522
47) (2012) 4 SCC 211
48) (2013) 57 VST 357
49) (1974) 1 QB 720
50) (1978) 0 QB 823
51) AIR 1964 SC 477
52) (2004) 7 SCC 166
53) (1970) 2 SCC 355
54) (2001) 121 STC 621 (AP High Court) (DB)
55) Judgment in TRC Nos.75 of 2000 and batch dated 09.07.2003
56) AIR 1962 SC 1893
57) 1992 Supp (1) SCC 443= AIR 1992 SC 711
58) 1992 Supp (1) SCC 443
59) (1990) 3 SCC 481
60) (2001) 122 STC 1
61) (1966) 17 STC 624 (SC)
62) (1970) 26 STC 354 (SC)
63) (1993) 1 SCC 364
64) 1959 SCR 379 = AIR 1958 SC 560
65) (1984) 55 STC 314 (SC)
66) (1972) 29 STC 474 = AIR 1972 SC 1131
67) (2014) 7 SCC 1
68) (1996) 100 STC 417 (P&H HC)
69) (2015) 78 VST 451 (SC)
70) (2013) 65 VST 1 (SC)
71) AIR 1958 SC 909
72) (1966) 18 STC 325 (Madras)(DB)
73) (1998) 7 SCC 707
74) (2000) 117 STC 413 (SC)
75) (2010) 9 SCC 461
76) (2011) 3 SCC 1
77) AIR 1962 SC 83
78) (1989)1 SCC 101
79) AIR 1967 SC 1480
80) (1991)4 SCC 139
81) (2009) 6 SCC 379
82) (2004) 13 SCC 217
83) AIR 2003 Calcutta 96
84) (2005) 11 SCC 314
85) 1995 Supp (2) SCC 303
86) (1974) 1 SCC 342
87) (1974) 1 SCC 78
88) (1997) 10 SCC 73
89) (2008) 7 SCC 85
90) (1998) 1 SCC 278
91) (1976) 4 SCC 320
92) (2006) 12 SCC 233
93) (2005) 12 SCC 1
94) AIR 1966 SC 997

95) AIR 1957 SC 357
96) (2009) 5 SCC 713
97) 1936 AC 1
98) (2004) 10 SCC 1
99) (1988) 170 ITR 278 (Madras HC) (DB)
100) (1996) 222 ITR 831 (Gujarat HC)(DB)
101) (1985) 3 SCC 230
102) AIR 1968 SC 49
103) AIR 1968 SC 200 = (1967) 66 ITR 692) (SC)
104) 30 TC II
105) (1935) 19 TC 490
106) AIR 1961 SC 65 = (1960) 11 STC 655
107) (2009) 2 SCC 326
108) (1968) 21 STC 184 (Madras HC) (DB)
109) AIR 1961 SC 426
110) (2005) 6 SCC 796
111) (1980) 45 STC 52) (Delhi High Court) (DB)
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113) (1869) LR 4 Exch 26
114) (1975) 1 ALL ER 847
115) (1976) 2 ALL ER 721
116) (2002) 1 SCC 367
117) (1955) 1 All ER 753
118) AIR 1999 SC 1225 = (1999) 3 SCC 632
119) AIR 1957 SC 23
120) AIR 1990 SC 897 = (1990) 1 SCC 593
121) AIR 1967 SC 465 = (1967) 1 SCR 489
122) AIR 1959 SC 356 = 1959 Supp (1) SCR 310
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124) (2010) 34 VST 417 (Delhi HC) (DB)
125) (2008) 15 VST 401 (Orissa HC) (DB)
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127) MANU/SC/0225/1977 : (1978) ILLJ 1 SC
128) 1993(2) A.P.L.J. 479 = 1993(3) ALT 391
129) (2006) 5 SCC 167
130) (1976) 2 SCC 521
131) (2003) 7 SCC 197 = 2003 SCC (Cri) 1722
132) (2002) 4 SCC 638
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134) (2007) 5 SCC 428
135) (1959 Supp (2) SCR 375 = AIR 1959 S.C. 814
136) (2002) 5 SCC 203
137) (2000) 6 SCC 12
138) (1976) 2 SCC 44 = (1976) 37 STC 207
139) (1978) 41 STC 140 (Madras HC) (DB)
140) (2006) 144 STC 605 (Karnataka High Court) (DB)
141) AIR 1972 SC 87
142) (1970) 2 SCC 287
143) (1959) 10 STC 297 (SC)
144) (1964) 7 SCR 706 = AIR 1964 SC 1752
145) (2006) 5 SCC 258
146) (2006) 2 SCC 628
147) (2000) 6 SCC 579
148) (2003) 1 SCC 281
149) (1997) 107 STC 196 (SC)
150) 1947 KB 685
151) (1966) AC 451
152) (2006) 148 STC 616) (AP HC) (DB)
153) (2013) 58 VST 483 (Madras) (DB)
154) (1869) Law Reports (III) Appeal Cases 101
155) (1963) 14 STC 788) (Madras HC) (DB)
156) 2010 (4) M.P.L.J. 515 = (2010) 36 VST 356) (MP HC). – (DB)
157) (2014) 68 VST 87)(APHC) (DB)
158) (2005) 7 SCC 58
159) (1977) 4 SCC 286
160) (1988) 71 STC 253 (Orissa HC) (DB)
161) (1999) 8 SCC 667
162) (1940) 8 ITR 522 (PC)
163) (2007) 6 VST 248 (SC)

164)	(2004) 10 SCC 201
165)	(2006) 7 SCC 714
166)	(2006) 12 SCC 583 = 2006 (9) SCALE 652
167)	(2004) 8 SCC 569
168)	(2008) 15 SCC 673
169)	(2004) 6 SCC 281
170)	(2004) 11 SCC 1
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173)	2003 (5) ALT 216 (DB)
174)	(1975) 2 SCC 47
175)	AIR 1971 SC 870 = (1969) 3 SCC 349
176)	(1974) 1 SCC 459
177)	AIR 1966 SC 1216 = (1966) 17 STC 473
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186)	(1989) 2 SCC 645 : AIR 1989 SC 1371 =(1989) 73 STC 370 (SC)
187)	1963 (14) STC 188 = (AIR 1963 SC 548
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190)	(1992) 3 SCC 750
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192)	AIR 1966 SC 1350
193)	AIR 1975 SC 887
194)	AIR 1981 SC 446
195)	[1974] 1 SCR 463
196)	(1974) 34 STC 535 (Pat)
197)	A.I.R. 1952 S.C. 366
198)	A.I.R. 1953 S.C. 333
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200)	[1989] 72 STC 52 (Allahabad HC)
201)	AIR 1994 SC 1456
202)	A.I.R. 1968 Pat. 329 (FB)
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204)	(1994) 6 SCC 57
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206)	1993 (6) SLR 1 = 1993 (3) ALT 471 (FB)
207)	(1980) 3 SCC 358
208)	(2001) 124 STC 17 (Raj HC) (DB)
209)	(1985) 4 SCC 404
210)	(2006) 148 STC 83
211)	(1955) 2 SCR 483
212)	AIR 1988 SC 1775 : (1988) 71 STC 1) (SC)
213)	(1983) 54 S.T.C. 382 (Mad. HC DB)
214)	(1984) 56 STC 77 (M.P. HC) (DB)
215)	(2014) 1 SCC 708
216)	(2008) 17 VST 1 (SC)
217)	(1993) 104 PLR 269
218)	(1981) 2 SCC 460
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220)	(1992) 2 SCC 66
221)	1983 E.L.T. 65 (Ker.)
222)	AIR 1958 SC 341
223)	1981 E.L.T. 153 (Madras HC)
224)	1990 (45) ELT 9
225)	Judgment in W.P.Nos. 4552 and 6258 of 2013, dated 18.12.2014
226)	(1985) 4 SCC 119
227)	AIR 1997 SC 1125

**THE HON’BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON’BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

WRIT PETITION Nos. 22960 AND 23034 of 2007; 8122 AND 9016 of 2008; 4763, 8006, 12745, 15121, 16857, 16909, 16945 AND 19516 of 2009; 8 AND 25776 of 2010; 10711, 23689 AND 26994 of 2011; 6834 of 2012; 8 AND 39431 of 2013; 14192 AND 14457 of 2014

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COMMON ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

M/s. Larsen & Toubro Ltd, Hyderabad filed W.P. Nos.23034 and 22960 of 2007, W.P. No.8122 and 9016 of 2008, W.P. Nos.8006 and 15121 of 2009, W.P. No.8955 of 2010, W.P. Nos.10711 and 23689 of 2011, W.P. No.6834 of 2012, W.P. No.39431 of 2013 and W.P. No.14457 of 2014. Alstom Projects India Ltd filed W.P. Nos.4763 and 12745 of 2009, and W.P. No.26994 of 2011. M/s. Siemens Ltd, Hyderabad filed W.P. Nos.16857, 16909 and 16945 of 2009, W.P. No. 25776 of 2010, W.P. No.8664 of 2013 and W.P. No.14192 of 2014. BGR Energy Systems Ltd, Nellore filed W.P. No.19516 of 2009.

All the petitioners have executed turnkey projects for different customers. They claimed that the goods supplied by them, for being used in the turnkey projects, were subsequent sales exempt from tax under Section 6(2) of the CST Act, import sales under Section 5(2) of the CST Act, and the respondents lacked jurisdiction to subject these transactions to tax under the AP VAT Act treating them as intra-state sales. On their claim being negatived by the assessing/revisional authorities they have invoked the certiorari jurisdiction of this Court. It would suffice to note the contents of the assessment order passed in W.P. No.8006 of 2009 as illustrative of the orders impugned in these Writ Petitions.

The petitioner in W.P. No.8006 of 2009, M/s. Larsen & Toubro Ltd, is a company registered under the Companies Act with its registered office at Mumbai. It has various branches, among others, at Hyderabad also. It is engaged in the execution of Engineering, Procurement and Construction (EPC) Works Contracts on a turnkey basis, and is a registered dealer both under the AP VAT Act and the CST Act. For the tax period 01.04.2005 to 31.03.2006, the petitioner claimed exemption on a turnover of Rs.373,28,65,393 as sales effected in the course of inter-state trade and commerce under Section 6(2) of the CST Act, and sales in the course of import under Section 5(2) of the CST Act. The exemption claimed by the

petitioner related to six contracts awarded in their favour by Konaseema EPS Oakwell Power Ltd (hereinafter referred to as Konaseema) and Vemagiri Power Generation Limited (hereinafter referred to Vemagiri).

In the assessment order dated 12.03.2009, the assessing authority noted that the petitioner (Larson & Toubro) had, during the financial year 2005-06, entered into six supply contracts, two of which were with Konaseema and Vemagiri; placing reliance on certain clauses in the agreement, the petitioner had stated that they were required to deliver the goods as agreed upon mutually, and the contractees had also agreed to provide necessary certificates/forms for claiming tax exemption; the goods involved were subjected to pre-despatch inspection, and testing of the equipment by the contractee i.e. Konaseema; in the light of these terms and conditions, they had arranged the transactions by way of a sale falling under Section 3(b) r/w. Section 6(2) of the CST Act claiming exemption towards sale in transit in the case of Konaseema, and as a sale falling under Section 3 of the CST Act or sale in the course of import in the case of Vemagiri; with regards transit-sales, they had contended that, while the goods were in the course of inter-state movement, the documents of title to the goods were transferred in favour of Konaseema which, in turn, took delivery of the goods; with regards import sales, they claimed to have placed orders on approved dealers outside the country; while the goods were consigned to them, the bills of lading ie, the documents of title to the goods were endorsed in favour of Vemagiri which, in turn, had cleared the goods from customs paying all the duties; they had filed specimen copies of the documents such as copies of the bills issued by the ex-state seller, foreign seller, copies of LR/bill of lading, copies of the bills raised by the petitioner, customs clearance documents etc; and they contended that these transactions were in the nature of inter-state sale transactions, and sales in the course of import, covered by Section 3(b) read with Section 6(2) and Section 5(2) of the CST Act and were exempt from levy of tax.

In the impugned assessment order the assessing authority observed that, in the show-cause notice, he had opined that there were two independent transactions – one between the foreign seller in favour of the contractor, and the second set of transaction between the contractor and the

contractee; the petitioner had refuted this contention contending that the goods had moved from outside the State specifically for the purpose of compliance of the supply contract and, therefore, the movement had an inextricable link with the ultimate sale; the petitioner had opposed the view that there cannot be a sale in transit in a works contract, placing reliance on **Larsen & Toubro Limited v. Commissioner of Commercial Taxes**^[1]; and they had also placed reliance on **MMTC of India Ltd. v. Sales Tax Officer**^[2] in respect of High Sea Sales falling under Section 5(2) of the CST Act.

After extracting Sections 3(b) and 5(2) of the CST Act, the assessing authority held that these provisions refer to a 'sale' which is effected by transfer of documents of title while the goods are under movement from one State to another (Section 3(b)), and while the goods are imported into the territory of India (Section 5(2)); the goods involved in these transactions were subject to inspection by the contractee, which could also be rejected at the contractor's cost; it is only after satisfactory acceptance by the contractee that the material would be delivered duly endorsing the documents of title to the goods; in **State of Gujarat v. Chem-Dyes Corporation**^[3], the Gujarat High Court had held that during the period, i.e at the time of endorsement of documents of title to the goods, what was in-existence was an 'agreement to sell', and Section 3(b) did not apply; in the present case, one of the conditions of the sale is that the goods are subject to inspection by the contractee/purchaser; the impugned transactions were, therefore, required to be treated as intra-state sales; the contract between the petitioner and Konaseema was to build, own and operate a combined cycle electric power plant; the petitioner was required to design, engineer, manufacture, test and supply the material ex-works; however, by a separate agreement, the petitioner was required to engineer, design, procure, and construct the civil and structural works based on the data provided by the owner and erect, install, start up, test and commission the owners equipment issued to contractor, as 'free issue' by the owner as per the written instructions, if any, of various suppliers; thus the intention of the contractee was to build, own and operate a combined cycle electric power plant; this work had been

entrusted to the petitioner which had not only supplied the material required for executing the above work, but had also executed such work; thus, intrinsically, it was a works contract awarded to the petitioner duly splitting it into a supply contract and a labour contract; the intention of both the contractor and contractee was to execute a works contract though it was split into two; these contracts were not entrusted to two separate contractors, but to the petitioner alone; in the case of Vemagiri the agreement, dealing with the contractors obligations, specifically provided that the contractor had the experience, skill and resources to perform the works; thus the intention of both the contractor and the contractee was to execute a work, where the transfer of property takes place not as chattel qua chattel, but on the theory of accretion; in such a case, it is impermissible to split such contracts into a supply and labour contract; the nature of the contract was that of a works contract which the petitioner had conveniently split into two contracts – one of which was as a supply contract wherein they claimed exemption under Section 3(b) and Section 6(2) of the CST Act; the other contract was designed as a labour contract or a works contract as it related only to erection/installation etc., by deploying its labour, and no material was involved therein; the petitioner had claimed exemption on a portion of this also; thus by splitting the works contract, one into a supply contract and the other into a labour contract, the petitioner had claimed exemption on the entire value of the contract running into crores of rupees; tax planning could only be within the framework of law; after the 46th amendment to the Constitution of India, the States had been conferred the power to levy tax on works contract; even thereafter the concept of transfer of property in the goods, involved in the execution of a works contract, by theory of accretion, did not lose its significance; even if a contract is indivisible, and is a composite one, it has to be split up into the value of goods and labour and other services; both goods and labour put together make a works contract; and the value of the goods had to be arrived at for the purpose of levy of tax under the A.P VAT Act.

The assessing authority also examined the question whether there can be a sale in transit, or a sale in the course of import, in a transaction of works contract. He held that, from the nature of the contracts awarded, it could be

seen that the petitioner was required to supply the goods as per the supply contract; they were also required to execute the works themselves; the intention of both the contractor and the contractee was completion of the works involving supply of goods as well as labour; therefore the transaction related to a works contract; in such an event, the transfer of property in goods would take place, on the theory of accretion, when the goods are incorporated into the property of the contractee; this would happen only if the petitioner is the owner of the goods sought to be incorporated in the works; by arranging its affairs, camouflaging such deemed sale as in the nature of sales falling under Sections 3(b), 6(2) and 5(2) of the CST Act, the petitioner does not cease to be the owner of the goods sought to be incorporated in the works; unless the contractor is the owner of the goods, by the time of incorporation in a composite contract, he cannot execute such a contract; the transactions under Sections 3(b), 6(2) and 5(2) of the CST Act do not fit within the concept of a works contract; a works contract is a conglomerate of both goods and labour inseparably; splitting of the value of the goods is only artificial, and is for the purpose of levy of tax; in the present case, the petitioner themselves furnished the value of the goods separately, making it easy for the assessing authority to arrive at the taxable turnover; the intention of the parties is important in deciding the nature of the transaction, but not how the documentation is made; the intention of both the petitioner and the contractee is to execute works at Konaseema and Vemagiri respectively; in order to avoid the brunt of taxation, the petitioner had created tailor made documents in order to claim exemption under Sections 3(b), 6(2) and 5(2) of the CST Act; the sale of goods, involved in a works contract, is concluded only after the said goods are incorporated/merged/fused with the property of the contractee; the petitioner had split the contract into supply of goods, and erection and installation, only to make it tailor made to suit Sections 3(b), 6(2) and 5(2) of the CST Act, and nothing else; the transactions must, therefore, be treated as intra-state deemed sale of goods involved in a works contract; **MMTC of India Ltd.**² was a case of normal sale, in the course of import, where the property was transferred chattel qua chattel; in the present case, the impugned transactions are transactions of works contract where such transfer of property takes place on the theory of

accretion, i.e. after the goods get merged/fused with the property of the contractee; as property in the goods is transferred only after its installation and erection, such a deemed sale is complete only after such installation and the like; the ratio of the decision in **MMTC of India Ltd.**² has no application to the facts of the present case; and the reasoning of the Gujarat High Court, in **Chem-Dyes Corporation**³, is more appropriate than the reasoning given in the judgment of the A.P. High Court in **Larsen & Toubro Limited**¹. The assessing authority preferred to follow the judgment in **Chem-Dyes Corporation**³, and expressed his inability to accept the decision in **Larsen & Toubro Limited**¹ on the ground that it was not logical.

Elaborate submissions were put forth by Sri S.R. Ashok, Sri N. Venkataraman, and Sri S. Ravi, Learned Senior Counsel and Sri S. Dwarakanath, Learned Counsel appearing on behalf of the petitioners. While Sri P. Balaji Varma, and Sri S. Suribabu, Learned Special Standing Counsel for Commercial Taxes, put forth their submissions, a substantial part of the arguments was advanced, on behalf of the revenue, by Sri K. Vivek Reddy, Learned Special Counsel. Written arguments were submitted, on behalf of the petitioners, by Sri A.K. Jaiswal, Sri S. Dwarakanath, Sri T. Vinod Kumar, Sri Ch. Pushyam Kiran and Sri Priyadarshan Reddy. Written submissions were filed, on behalf of the revenue, by Sri K. Vivek Reddy. It is convenient to examine the elaborate submissions, urged by Learned Counsel on either side, under different heads.

(I). DOES EXISTENCE OF A STATUTORY REMEDY OF APPEAL UNDER THE A.P. VAT ACT REQUIRE THIS COURT TO REFRAIN FROM EXERCISING JURISDICTION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA?

It is contended, on behalf of the revenue, that the A.P. VAT Act prescribes an appellate mechanism to challenge the revisional and assessment orders; adjudication of questions of fact, involved in these Writ Petitions, may be appropriately undertaken through the appellate process, and not in a Writ Petition; and the scope of the Writ Petition is limited more so when a Writ of Certiorari is sought. Reliance is placed in this regard on **State of Goa v. Laukoplast (India) Ltd.**^[4]; **Titaghur Paper Mills Co. Ltd. v. State of Orissa**^[5]; **CIT v. Chhabil Dass Agarwal**^[6]; **Nivedita Sharma v.**

Cellular Operators Assn. of India^[7]; Thansingh Nathmal v. Supt. of Taxes^[8]; Carl Still G.M.B.H.v. State of Bihar^[9]; State of Bombay v. United Motors (India) Ltd^[10]; Himmatlal Harilal Mehta v. State of Madhya Pradesh^[11]; Bengal Immunity Co. Ltd. v. State of Bihar^[12]; Mafatlal Industries Ltd. v. Union of India^[13]; Chhabil Dass Agarwal⁶; G. Veerappa Pillai v. Raman & Raman Ltd.^[14]; CCE v. Dunlop India Ltd.^[15]; Ramendra Kishore Biswas v. State of Tripura^[16]; Shivgonda Anna Patil v. State of Maharashtra^[17]; C.A. Abraham v. ITO^[18]; Titaghur Paper Mills Co. Ltd.⁵; Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath and Sons^[19]; Whirlpool Corpn. v. Registrar of Trade Marks^[20]; Tin Plate Co. of India Ltd. v. State of Bihar^[21]; Sheela Devi v. Jaspal Singh^[22]; Punjab National Bank v. O.C. Krishnan^[23]; Union of India v. Guwahati Carbon Ltd.^[24]; Munshi Ram v. Municipal Committee, Chheharta^[25]; and Chhabil Dass Agarwal⁶).

Relying on Chhabil Dass Agarwal⁶; State of U.P. v. Mohd. Nooh^[26]; Titaghur Paper Mills Co. Ltd.⁵; Harbanslal Sahnia v. Indian Oil Corpn. Ltd.^[27]; State of H.P. v. Gujarat Ambuja Cement Ltd.^[28]; Chhabil Dass Agarwal⁶; K.S. Rashid and Son v. Income Tax Investigation Commission^[29]; Sangram Singh v. Election Tribunal^[30]; Union of India v. T.R. Varma^[31]; Mohd. Nooh²⁶; K.S. Venkataraman and Co. (P) Ltd. v. State of Madras^[32]; N.T. Veluswami Thevar v. G. Raja Nainar^[33]; Municipal Council, Khurai v. Kamal Kumar^[34]; Siliguri Municipality v. Amalendu Das^[35]; S.T. Muthusami v. K. Natarajan^[36]; Rajasthan SRTC v. Krishna Kant^[37]; Kerala SEB v. Kurien E. Kalathil^[38]; A. Venkatasubbiah Naidu v. S. Chellappan^[39]; L.L.

Sudhakar Reddy v. State of A.P.^[40]; **Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra**^[41]; **Pratap Singh v. State of Haryana**^[42]; **GKN Driveshafts (India) Ltd. v. ITO**^[43]; and **Gujarat Ambuja Cement**²⁸⁾ it is contended, on behalf of the petitioners, that it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy; the assessing authority has not drawn any factual adverse inference after examining various documents, and the evidence to the transaction; there is no disputable questions of fact; the jurisdictional error, committed by the respondent authorities, is on account of misappreciation of the law and the statutory provisions; the levy is without jurisdiction, without authority of law and in flagrant violation of Article 286, and Sections 3, 4 & 5 of the CST Act; the taxing authorities have assumed jurisdiction to levy tax though none existed; this Court admitted the Writ Petitions way back in the years 2009 and 2011; and it is not open to the State, at this length of time, to raise the dispute of an alternate remedy to non-suit the petitioners.

In **Bharat Heavy Electricals Ltd. v. Union of India**^[44], **Ashok Leyland Ltd. v. Union of India**^[45], **Rapti Commission Agency v. State of U.P.**,^[46] **Zunaid Enterprises v. State of M.P.**,^[47] the Supreme Court and, in **Kalpna Glass Fibre Pvt. Ltd. v. State of Orissa**^[48], the Orissa High Court Division bench held that the question whether a particular sale is an inter-State sale or an intra-State sale, and whether the contract of sale is in respect of specific or ascertained goods, or whether it is in respect of unascertained or future goods, are essentially questions of fact, more appropriately a mixed question of fact and law, and the factual aspects should have been asked to be dealt with by the authorities.

The orders, under challenge in these Writ Petitions, are either assessment or revisional orders passed by the concerned authorities exercising jurisdiction under the AP VAT Act. This Court has been called upon, by Learned Counsel on either side, to mainly examine whether the impugned orders are without jurisdiction. The enquiry, in these Writ Petitions, is confined to an examination of the material placed before the

assessing and the revisional authorities on the parameters applicable to certiorari proceedings. This Court is conscious, and need not be reminded, that the statutory system of appeals is more effective and more convenient than an application for certiorari as an appeal can be disposed of where the issue is a matter of law or fact, whereas an application for certiorari is limited to cases where the issue is a matter of law appearing on the face of the order ie where the decision is liable to be upset as it is made without jurisdiction or in consequence of an error of law.

An application for certiorari has this advantage that it is speedier and cheaper than the other methods. (**Reg v. Hillington, London Borough Council**^[49]; **Gujarat Ambuja Cement Ltd**²⁸; **Hanson v. Church Commissioner**^[50]). A writ of certiorari can be issued for correcting errors of jurisdiction such as in cases where orders are passed without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction or where, in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly. The jurisdiction to issue a writ of certiorari is supervisory and not appellate. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. The adequacy or sufficiency of evidence, and the inference of fact to be drawn therefrom cannot be agitated in certiorari proceedings. (**Syed Yakoob v. K.S. Radhakrishnan**^[51]).

If the tribunal has erroneously refused to admit admissible and material evidence, or has erroneously admitted inadmissible evidence, or if a finding of fact is based on no evidence, it would be an error of law which can be corrected by a writ of certiorari. Where the conclusion of law by the tribunal is based on an obvious mis-interpretation of the relevant statutory provisions, or in ignorance of it or even in disregard of it or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. Whether or not an error is an error of law, and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case, and upon the nature and scope of the legal provisions which is alleged to have been misconstrued or contravened. (**Syed Yakoob**⁵¹).

It must also be borne in mind that the rule of exclusion of the writ jurisdiction, in view of the existence of an alternative remedy, is not a rule of compulsion. (**Harbans Lal Sahnia**²⁷; **Gujarat Ambuja Cement**²⁸). When, on undisputed facts, the taxing authorities are shown to have assumed jurisdiction which they do not possess, a writ petition can be entertained. (**Gujarat Ambuja Cement**²⁸). Some exceptions to the rule of alternative remedy have been recognized i.e. where the statutory authority has not acted in accordance with the provisions of the enactment or in defiance of the fundamental principles of judicial procedure etc. (**Chhabil Dass Agarwal**⁶).

The existence of an alternative remedy is merely a factor to be considered, and would not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. (**S.J.S. Business Enterprises (P) Ltd. v. State of Bihar**^[52]). If the High Court has entertained a petition, despite availability of an alternative remedy, and has heard the parties on merits it would, ordinarily, not be justified in dismissing the Writ Petition on the ground of non-exhaustion of the statutory remedies unless it finds that factual disputes are involved, and it would not be desirable to deal with them in a writ petition. (**L. Hirday Narain v. Income Tax Officer, Bareilly**^[53]; **Gujarat Ambuja Cement Ltd**²⁸). These writ petitions were admitted several years ago, and elaborate submissions were put forth by Learned Counsel on either side not only on the effect of the contractual provisions, but also on the scope of Sections 3(a), 3(b), 4, 5(2), 6(2) and 9 of the CST Act. Despite reminding us of the limited scope of judicial review, Sri K. Vivek Reddy, Learned Special Counsel, has himself addressed us on issues which travel far beyond the findings recorded in the impugned orders.

It is necessary, in this context, to note the contention, urged on behalf of the petitioners, that the judgment in **Larsen & Toubro Limited**¹ squarely applies to the facts of the present batch of cases, the S.L.P. preferred by the revenue against the said judgment was dismissed, a similar view was taken in **State of Andhra Pradesh v. Usha Breco Ltd, Calcutta**^[54] and in **State**

of **Andhra Pradesh v. Dwaraka Prasad Radhe Ramalal**^[55], in the light of the direct binding judgment in **Larsen & Toubro Limited**¹, the finding recorded by the assessing authority that the decision of the Gujarat High Court, in **Chem-Dyes Corporation**³, is more logical and should be followed, is an abuse of the judicial process, and the judgments of the jurisdictional High Court are binding on the lower authority as held by the Supreme Court in **East India Commercial Co. Ltd. v. Collector of Customs**^[56] and **Union of India v. Kamalakshi Finance Corporation Ltd.**^[57].

It was also contended, on behalf of the petitioners, that the assessing and revisional authorities had ignored the orders of the Sales Tax Appellate Tribunal that similar transactions could not be subject to tax under the AP VAT Act, even though the Supreme Court, in **Union of India v. Ramlakshmi Finance Corporation Ltd.**^[58], had held that judicial discipline require that the orders of the Tribunal and higher appellate authorities should be followed unreservedly by the subordinate authorities; several new contentions were urged across the bar by Sri K. Vivek Reddy, Learned Counsel for the revenue, which were not dealt with in the impugned orders; the scope of the Writ Petition has been sought to be enlarged which is impermissible as held in **British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries**^[59]; the assessing/revisional authorities have picked some clauses in some of the contracts, and have applied it to all the contracts which were subjected to assessment, contrary to the law declared in **Siemens Ltd. v. State of Kerala**^[60]; the burden lies upon the Commercial Tax Officer to prove that a turnover is liable to tax (**Hyderabad Deccan Cigarette Factory v. State of A.P.**^[61]); and, as held in **TELCO Ltd. v. Assistant Commissioner of Commercial Taxes**^[62], the assessing authority is bound to examine each individual transaction. The aforesaid objections, put forth on behalf of the petitioners, may well justify the impugned orders being set aside, and the matters being remanded to the concerned authorities to pass orders afresh on merits.

While the petitioners have not availed the statutory remedy of appeal, the assessing/revisional authorities have also chosen to ignore or by-pass the judgments of the Division Bench of this Court (which is the jurisdictional High Court) and have, instead, placed reliance on judgments of other High Courts. As larger issues regarding the scope of certain provisions of the CST Act arise for consideration, we have examined all the issues raised both on behalf of the petitioners and the respondents, even though they may not have been dealt with in the impugned orders, as a quietus must be given to the oft recurring questions regarding the jurisdiction of the authorities to subject similar transactions to tax under the AP VAT Act. While doing so, we have been careful to limit our scrutiny within the parameters applicable to certiorari proceedings. We see no reason, therefore, to now relegate the petitioners to the statutory remedy of appeals under the provisions of the AP VAT Act.

II. ARE THE SUBJECT CONTRACTS DIVISIBLE OR INDIVISIBLE CONTRACTS?

It is submitted, on behalf of the petitioners, that the assessing authority has integrated two divisible separate contracts as a composite indivisible contract drawing an adverse legal inference that the contracting parties are one and the same; courts have recognized dual capacities between the same contracting parties; it is open to the petitioner to sell goods in transit or as high sea sales, and to secure the same back as free supplies or as an agent or as a bailee, and execute the installation and commissioning work; it is for the contracting parties to design their contracts - either as divisible or indivisible; courts/tribunals cannot substitute or rewrite contracts; it is only if, in reality, the contracting parties execute an indivisible works contract, and the property actually passes at the time of accretion or incorporation, can splitting up of the contracts, into sale and service contracts, be construed a camouflage; a contract cannot be re-characterized based on the strength of a possible tax treatment; the subject contracts are divisible in nature; though not all contracts contain a cross-fall breach clause, such a clause has been ascribed to all the contracts in a sweeping manner; a cross-fall breach clause only ensures redressal measures being taken by way of a claim for damages, and neither encumbers nor restores

title; this clause is of discharge of service obligations, and does not postpone passage of title to the goods; normally the bidding documents, for participating in the contract, require one entity to apply for both the supply and erection parts; award of the contract depends upon the lowest price for both supply and erection contracts; from the point of view of the buyer it is considered as one indivisible works contract; these conditions are prescribed in government contracts as per government policy, and are not relevant for taxation of goods; some of the contracts are negotiated contracts, no bidding took place and no bidding documents exist; and the effort of the assessing authority, to call the contracts indivisible works contracts, though they are not, is of no consequence since an indivisible contract is also divisible by legal fiction.

Sri K. Vivek Reddy, Learned Counsel for the respondent, would submit that the assessing/revisional authorities have held that, even though the petitioners had entered into supply and erection contracts, it constituted a "composite contract" i.e. an indivisible works contract; in arriving at this finding, they had reviewed the contracts, evidence, documents and the nature of the work done by the petitioners, in particular, on (a) the presence of a cross fall breach clause in the contracts in various manifestations; (b) the contractual clauses, and the description of the documents, itself show that the petitioner was executing one work; (c) the intention between the parties is only to execute the work with the material supplied by the contractor; (d) the rights of the dealer (supplier) over the property in the goods and the risk due to injury and loss to the goods, remains with the supplier till the commissioning of the turnkey project; (e) the assessee remains the owner of the goods till termination of its movement; and (f) the property in the goods is transferred to the employer only at the time of accretion; if the clauses in both the contracts are inter-linked, and are closely related to each other, the fact that they are embodied in two instruments does not alter the nature of the contract; the subject contracts are indivisible works contracts wherein title passes only upon incorporation; all the subject supply contracts not only provide a schedule for supply but also stipulate a schedule for erection; prohibition of assignment also shows that it is an indivisible works contract; the supply contracts (as opposed to the erection

contracts) contemplate a certification clause for the entire work, and not just the supply component; the stipulation, as to the use of goods in the supply contract, shows that the goods are to be used for erection; in the supply contract, the seller is entitled for payment only when the goods, that were supplied, are successfully put to use ie upon successful erection; the presence of a cross fall breach clause in the supply contracts show that the supply and erection contract is an indivisible works contract; all the subject contracts have a cross fall breach clause in various manifestations; the bidding document is the source document, and forms the basis for the supply and erection contracts; the bidding document, for the Siemens-RINL contract, reveals that the employer contemplated only one work i.e., a turnkey project for which the supply and erection contracts have been executed; it is a condition of the bidding document that the parties, to the supply and erection contract, must be the same; the bidders had to quote one price for the entire project including supply and erection; and the petitioners are not in the business of supplying articles, but in executing turnkey projects.

For convenience sake the petitioners shall, hereinafter, be referred to as the contractor; the person, from whom the contractor purchased the goods, as the supplier; and the person, for whom the goods were purchased and incorporated in the works, as the owner. The submission, made on behalf of the petitioners, is that the subject contracts are two independent contracts - one for supply and the other for erection, and the “bailment”/“free issues” clauses in the contracts show that, after the goods are sold by the petitioner - contractor to the owner, the owner then issues the very same material as “free issues” to the petitioner-contractor for being used in the erection and installation of the plant. The contention of the respondents, however, is that the contract is, in effect, an indivisible contract and, while they are styled as two contracts i.e., supply and erection contracts, they are, in fact, one composite indivisible contract.

Prior to the 46th amendment to the Constitution, an indivisible contract would have disabled the revenue from subjecting the goods, which formed part of the turnkey project, to tax as a turnkey project is immovable property, and does not constitute goods (movable/chattel). It is because of

the legal fiction, created by Article 366-29(A)(b), that an indivisible contract can be fictionally divided into two contracts, one for sale of the goods used in the erection and installation of the project, and the other for work and services; and to tax the deemed sale of goods involved in the execution of such a contract.

In effect, the submission of the revenue is that these two contracts (supply contract and erection contract) should be treated as a single indivisible contract; and thereafter, by legal fiction under Article 366-29(A)(b), it should again be divided into two contracts one for sale of goods, and the other for labour and services. Why should the supply and erection contracts be integrated, only for it to be again divided by legal fiction? Would it make any difference if the subject contracts were treated as two separate contracts at the inception, instead of treating them as one, and then fictionally dividing them into two? While the purpose sought to be achieved thereby is not spelt out, we understand the submission of Sri K. Vivek Reddy, Learned Counsel for the respondent, to be that, if it is a single indivisible contract, the property in the goods would pass to the owner on its incorporation in the works, the sale of such goods would not take place during the course of its movement from one State to another, and the petitioners would thereby be disentitled from claiming exemption under Section 6(2) of the CST Act. Secondly, as the transfer of property in the goods would take place on its incorporation in the works, and as the work is executed within the State, transfer of title to the goods would take place within the State; and such a sale would be an intra-state sale liable to tax under the A.P. VAT Act. If these submissions of Sri K. Vivek Reddy, Learned Counsel for the revenue were to merit acceptance, then the measure of tax, even if it be an inter-state sale, would be the value of the goods at the stage of its incorporation in the works, which would include not only the value of the goods at the time of its delivery within the State, but also the expenditure incurred in relation thereto till its incorporation in the works which, as held in **Gannon Dunkerly & Co. v. State of Rajasthan**^[63] would also include the profit element.

It is necessary, therefore, to examine whether the subject contracts are two separate independent contracts or they are, in reality, one composite

indivisible contract disguised as two independent contracts-one for supply of goods and other for services rendered for installation and erection of the turnkey project. Where parties enter into distinct and separate contracts, one for the transfer of material for monetary consideration, and the other for payment of remuneration for services and for work done, there are, ordinarily, two agreements, though there is a single instrument embodying them. (**State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.**,^[64]). In such cases the transaction would not be one and indivisible, but would fall into two separate agreements. (**Hindustan Aeronautics Ltd. v. State of Karnataka**^[65]; **State of Himachal Pradesh v. Associated Hotels of India Ltd.**,^[66]) (five judges). If there are two independent contracts, namely, purchase of the components from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, that would be a contract for labour and service. (**Kone Elevator India (P) Ltd. v. State of T.N.**^[67]).

A composite contract, for supply and installation, should be treated as a works contract as it is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. (**Kone Elevator India (P) Ltd.**⁶⁷). A 'works contract' is an "entire and indivisible" works contract for the construction/execution of a turnkey project to specifications where the person executing the work is entitled to receive the total price (**Thomson Press (I) Ltd. v. State of Haryana**^[68]). While examining the exercise of divisibility, the dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. (**State of Karnataka v. Pro Lab**^[69]; **Larsen and Toubro Ltd. v. State of Karnataka**^[70]). The dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are no longer applicable. (**Kone Elevator India (P) Ltd.**⁶⁷; **Larsen and Toubro Ltd.**⁷⁰). It is open to the taxing authorities to tax that part of the contract which relates to the sale of goods. (**Banarsi Das Bhanot v. State of M.P.**,^[71]; **Gannon Dunkerly (I)**⁶⁴). The contracts, which are the subject matter of all these Writ Petitions,

are all works contracts as they involve both supply of material, and rendering services in connection with the work of erection and installation of the plant.

In **L.S. Chandramouli and Company v. The State of Madras**^[72], the Division Bench of the Madras High Court held that there was nothing wrong in the same person holding two different capacities, one as an agent of a non-resident principal and the other as proprietor of his own business. This judgment was referred to with approval by the Supreme Court in **Karnataka Pawnbrokers' Assn. v. State of Karnataka**^[73]. In **State of Karnataka v. Bangalore Soft Drinks P. Ltd.**^[74], the Supreme Court held that the terms of the contract indicated that the respondent had a dual role to play - one as seller of the goods and the other as that of a transporter or the carrier of the goods. The same person can, no doubt, play a dual role and, merely because both the contracts are entrusted to the same person, two separate and independent contracts would not become a single indivisible contract. Turn-key projects, however, stand on a different footing.

In turn-key projects, more particularly of the kind involved in this batch of Writ Petitions, the same person has been entrusted with the responsibility of procuring material, and of erection and installation of equipment. While in-built safeguards are provided in all the contracts to ensure quality of the material, and effective performance of the erection contract, the supply contracts, in substance, do not absolve the petitioners-contractors of their obligations of erection and installation of equipment after the goods are sold by them to the owner. The petitioners-contractors' obligations, under both the supply and erection contracts, cease only after the turn-key project becomes operational, and after final payment is made both for supply of material and for erection and installation of equipment. While a dual role is not impermissible in execution of turnkey projects, its relevance, in determining whether or not the subject contracts are indivisible works contracts, is insignificant. While we see no reason to burden this judgment with a reference to all the relevant clauses in each of the agreements, it is useful to note some of them.

Payment under clause 4.2.2 of the Alstom – GVK and Alstom –

Goutami supply contract is conditional on performance acceptance under the services contract. Clause 14.4 of the Alstom - GVK and the Alstom – Gautami Supply Contract stipulates that, if the services contract is terminated by the owner, the owner shall have the right to terminate the supply contract. Likewise Clause 15.4 of the erection contract between Alstom – GVK and Alstom – Goutami enables the employer to terminate the erection contract if the supply contract has been terminated. Para 1.1 (v) of Appendix – B thereof provides for 5% of the price of supplies to be made on the occurrence of the provisional performance acceptance of the facility in accordance with Clause 4.2.2 of the agreement.

Clause 14.2.1(c) of the L & T - Konaseema Supply Contract enables the supply contract to be terminated by the owner in the event of termination of the owner's other contracts (erection contract). Clause 1.3 of Appendix – I provides for payment for supplies, and for discharge of the obligations to supply, after test of the material at the facility site. Clause 1.4 of Appendix-B provides for part payment for the supply to be made on issuance a site test certificate i.e., after completion of erection.

Appendix-H of the L & T – Vemagiri supply agreement stipulates that 5% of the price shall be paid on successful test for the identified packages as per the pricing and technical specifications; 5% of the price on provisional acceptance; and 5% of the price on final acceptance. Provisional acceptance is defined under the supply agreement to mean the achievement of provisional acceptance as defined in the civil works and erection agreement, and in accordance with the terms thereof. It is evident, therefore, that 10% of the payment under the supply agreement is required to be made only after provisional and final acceptance as stipulated under the erection agreement.

The aforesaid clauses show that termination of the supply contract would enable the employer to terminate the erection contract and vice-versa. In **Indure Ltd. v. CTO**^[75], the bidder was required to quote a lump sum price in its proposal for the entire scope of the work covered under the bid documents. The total contract was agreed to be divided into two separate contracts, (i) supply contract, and (ii) erection contract, with a cross-fall breach clause wherein breach of either of the contracts entitled the

employer/owner/contractee (NTPC) to cancel the other contract also. NTPC awarded two contracts to Indure Ltd. for performing the work of erection of the plant on a turnkey basis. The Supreme Court, in **Indure Ltd**⁷⁵, held that, even though two contracts were entered into between the parties, it was only one contract for the reason that NTPC kept a right with it with regard to the cross-fall breach clause, meaning thereby that default in one contract would tantamount to default in another, and the whole contract was liable to be cancelled.

Existence of a cross-fall breach clause, or a clause which enables the owner to terminate the supply contract for breach of the erection contract and vice-versa, would mean that, while the contracts are ostensibly two separate contracts – one for supply of material and the other for rendering works and services, they are, in fact, one single indivisible contract. The goods supplied to the owner, under the supply contracts, are tailor made goods, and cannot be bought off the shelf. Such goods cannot, ordinarily, be sold to another except for its use in turnkey projects of a similar nature. The petitioners have been entrusted with the work mainly for their expertise in erection and installation of plants in the execution of turn-key projects. As they were entrusted with the work of erection and installation, the petitioners-contractors have also been entrusted with the task of procuring material therefor. The functions relating to the supply of material, and rendering services of erection and installation, are integrally connected and are inter-dependent.

In some of these cases, the contractors were required to submit a single bid both for supply of material, and for erection and installation of equipment for the turn-key project. Clause 3.2 of the letter of award of the work issued by Power Grid Corporation of India Ltd (“Power Grid” for short) to Siemens Limited stipulates that the contract shall be construed as a single source responsibility contract, and any breach in any part of the contract shall be treated as a breach of the entire contract. Clause 2.3 of the Siemens – Power Grid agreement stipulates that the work, under the letter of Award, shall be performed by the Contractor strictly in line with the bidding documents. Clause 2.3(ii) of the Siemens - Power Grid Supply Contract stipulates that breach, under the erection contract, would automatically be

deemed as a breach of the supply contract and any such breach or occurrence would give Power Grid the right to terminate the erection contract and the supply contract. An identical clause is found in clause 2.3(ii) of the Siemens - Power Grid erection contract also. Clause 3.3 of the Siemens – Power Grid supply contract stipulates that the total ex-works prices for the items are on a lumpsum/lot/set basis. Clause 6.1(iii)(c) of the supply contract stipulates that 10% of the ex-works price component shall be paid on successful completion of erection, testing and commissioning of the sub-station and issuance of taking over certificate. The Siemens - Power Grid supply contract also prescribes an implementation schedule not only for supply but also for erection, testing and commissioning of the power plant.

The tender notice issued by the Rashtriya Ispat Nigam Limited (RINL) shows that both supply and erection fall within the scope of the very same work. Clause 5.1 of the bidding document of RINL stipulates that the work comprises of design and engineering, manufacture and supply of plant and equipment, erection work, testing, start-up and commissioning etc. Clause 4.1 prohibits the contractor from transferring or assigning the contract or any part thereof without the written consent of the employer. The correspondence between Siemens and RINL shows that the subject composite work was awarded to Siemens Limited for a lumpsum amount. Clause 23.2 of the bidding document stipulates that the prices to be quoted are intended to provide for all works duly and properly completed in accordance with the General Conditions of Contract and Special Conditions of Contract, if any, and are required to include the cost of delivery of the equipment. Clause 23.2.2 stipulates that payment against supplies would be released only on receipt and acceptance of material as per payment terms referred to in the General Conditions. Article 8 of the Siemens – RINL agreement stipulates that, in consideration of the payment to be made by the customer (owner) to the contractor, the contractor covenants with the customer to design, manufacture & supply the plant and equipment as per the contract specification and other documents of the contract. A consolidated price is stipulated as the total contract price combining the contract prices of the individual agreements. It is evident that, while the form of the contracts indicate that they are two separate contracts, in substance they are one single indivisible works contract for supply of material and for

erection and installation of equipment. Existence of a bailment clause or a free issues clause does not alter the situation.

Reliance placed by the petitioners on **Larsen & Toubro Ltd.**¹ is misplaced. Mere general observations, or casual expressions of the Court, are of no avail. (**Girnar Traders v. State of Maharashtra**^[76]). A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to have binding effect. (**Jaisri Sahu v. Rajdewan Dubey**^[77]; **Municipal Corporation of Delhi v. Gurnam Kaur**^[78]; **B. Shama Rao v. Union Territory of Pondicherry**^[79]; **State of U.P. v. Synthetics and Chemicals**^[80]). A judgment delivered without argument, without reference to the relevant provisions of the Act, and without any citation of authority need not be followed. (**Gurnam Kaur**⁷⁸). A mere direction of the Court without considering the legal position is not binding. (**Vishnu Dutt Sharma v. Manju Sharma**^[81]). The view, if any, expressed without analysing the statutory provision cannot be treated as a precedent. (**N. Bhargavan Pillai v. State of Kerala**^[82]). Passing observations in a judgment without any argument and without reason do not form part of the ratio, and cannot be treated as having the weight of authority. (**Gurnam Kaur**⁷⁸; **Bengal Club Ltd. v. Susanta Kumar Chowdhury**^[83]). The conclusion of the Division bench, in **Larson & Toubro Ltd**¹, that the contracts before it was a divisible contract is not preceded by any reasons, and is not a declaration of law. The opinion expressed in the said judgment is without an analysis of the relevant contractual provisions or judicial precedents, and is not a precedent binding on a co-ordinate bench.

Placing reliance on **Sangramsinh P. Gaekwad v. Shantadevi P. Gaekwad**^[84] and **Akshaya Restaurant v. P. Anjanappa**^[85] Sri N. Venkataraman, Learned Senior Counsel, would submit that, in para 29 of their writ affidavit, the petitioner (L&T) had inadvertently stated that the contracts are composite indivisible contracts whereas in the very same affidavit, in every other place, there is a consistent plea that the contracts are divisible contracts of sale and erection; the petitioner has filed an affidavit on

24.12.2014 bringing to the notice of this Court this inadvertent error; and this affidavit may be taken on record, the error condoned, and the plea deleted.

On the other hand, relying on **Nagindas Ramdas v. Dalpatram Ichharam**^[86]; **Bishwanath Prasad v. Dwarka Prasad**^[87]; **Viswalakshmi Sasidharan v. Branch Manager, Syndicate Bank**^[88]; **Gautam Sarup v. Leela Jetly**^[89]; **Heeralal v. Kalyan Mal**^[90]; **Modi Spinning & Weaving Mills Company Ltd. v. Ladha Ram & Co.**^[91]; **Steel Authority of India v. Union of India**^[92]; **Union of India v. Pramod Gupta (Dead)** by Lrs.^[93]; **Nichhalbhai Vallabhai v. Jawantlal Zinabha**^[94]; **L. J. Leach and Co. Ltd. v. Jardine Skinner and Co**^[95]; and **Vimal Chand Ghevarchand Jain v. Ramakant Eknath Jadoo**^[96], Sri K. Vivek Reddy, Learned Special Counsel, would submit that the petitioners cannot resile from their categorical admissions that the subject contract is an indivisible works contract; L & T has admitted in its Writ Petition that the contract between the petitioner and owner is an indivisible works contract; the averments in the Writ Affidavit cannot be treated as an inadvertent or a typographical error; the statement made by the petitioner is an admission; and admission in pleadings stand on a higher pedestal than evidentiary admissions. As we have held that the subject contracts are indivisible contracts, it is unnecessary for us to examine the effect of the admission, by L & T in their pleadings, that the contract is an indivisible contract.

III. DOES THE SALE OF GOODS BY THE PETITIONER-CONTRACTORS TO THE OWNERS FALL WITHIN THE AMBIT OF SECTION 6(2) OF THE CST ACT?

(i). SECTION 6(2) OF THE CST ACT: ITS SCOPE:

It is contended, on behalf of the petitioners, that the assessment order does not dispute that the contracts envisage supply of goods from outside the State of Andhra Pradesh either as inter-state sale or transit sale or import sale or that a transit sale had taken place during the movement of goods; the contractual conditions relating to site test, performance guarantee or cross fall breach do not encumber or delay or defer the transfer of title to the goods till the stage of incorporation or accretion; it is the transferred goods, or the

goods sold, which are given back to the supplier as free issues which are used in erection and installation to meet the performance and the liquidated damages test; failure does not defer or postpone transfer of title, and only obligates re-performance or recovery of damages from the contractor; in the present case, the goods were sold in transit by way of endorsement, and after securing necessary statutory forms, raising sales invoices and concluding the sale before termination of movement; the inter-state transactions are transit sales eligible for exemption under Section 6(2) of the CST Act; the sale transactions are sales effected in transit during movement of the goods; appropriation of the goods to the contract took place, even before movement of the goods, at the place of manufacturer itself; and the goods, both in fact and in law, belong to the contractee only.

The contracts, which are the subject matter of these Writ Petitions, broadly envisage purchase of goods/material by the contractor from the identified suppliers referred to in the contract; the material so purchased to be inspected by the owner prior to its transportation from the State where the goods are manufactured; and, thereafter, for the goods to be transported by the contractor to the work site of the owner in the other State where it is to be used in the erection and installation of the turnkey project. These goods are tailor made for being utilised exclusively for the turnkey project.

These contracts are, basically, in two parts – the first relating to supply of material and the second to erection and installation of equipment. The supply contract refers to the suppliers of material from whom the contractor is required to purchase the goods. After the goods are purchased from these pre-identified suppliers, most of whom are dealers outside the State, the goods are then transported by the contractor from outside the State to the State of Andhra Pradesh (now the States of Telangana and Andhra Pradesh). The supply contract stipulates that the contractor should purchase the goods from the identified suppliers outside the state on which tax is paid by the contractor under Section 3(a) of the CST Act; after purchasing the goods from the supplier, the contractor is contractually bound to sell the goods to the owner, during transit, by endorsement of the lorry receipts. While the goods are purchased by the contractor from the supplier at a lower price, the very same goods are sold by the contractor to the owner

at a higher price. No tax is paid on the sale of goods by the petitioner-contractor to the owner. The petitioners state that the goods purchased by them, from suppliers outside the State, was subjected to tax under Section 3(a) of the CST Act, and claim that the goods sold by them to the owner is a transit sale exempt from tax under Section 6(2) of the CST Act. By this arrangement under the “supply contracts”, which requires the contractor to purchase the prescribed goods from identified suppliers outside the State, and to sell the very same goods at a higher price to the owner by endorsement on the LRs when the goods are in transit, the tax paid is lower than what would have been paid if the price, at which the contractor sold the goods to the owner, is taken as the value of the goods sold in the course of inter-state trade and commerce. While it is not in dispute that, by this contractual arrangement between the contractor and the owner, there is a loss of revenue to the public exchequer, the contention, urged on behalf of the petitioners, is that the parties to the agreement are entitled to arrange their affairs in a manner which would result in a lower tax burden on them.

It is no doubt true that every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax. (**IRC v. Duke of Westminster**^[97]; **Union of India v. Azadi Bachao Andolan**^[98]). Tax planning is not illegitimate. Every transaction or arrangement which is permissible under the law, and which has the effect of reducing the tax burden of the assessee, need not be looked upon with disfavour (**Azadi Bachao Andolan**⁹⁸; **M.V. Valliappan v. ITO**^[99]) or viewed with suspicion, or be treated as a device for avoidance of tax irrespective of the legitimacy or the genuineness of the act. (**Banyan and Berry v. CIT**^[100]; **Azadi Bachao Andolan**⁹⁸).

While tax planning may be legitimate, provided it is within the framework of the law, colourable devices cannot be a part of tax planning, and it is wrong to encourage or entertain the belief that it is honourable to

avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay taxes honestly without resorting to subterfuge. (**Mc Dowell v. CTO**^[101]; **Banyan and Berry**¹⁰⁰; **Azadi Bachao Andolan**⁹⁸; **CIT v. A. Raman and Co.**^[102]).

While parties cannot be compelled to enter into agreements in a manner which would generate higher tax revenue, levy of tax, on transactions embodied in a document, would depend upon the meaning and content of the language used in accordance with the ordinary rules of construction. (**C.I.T. v. Motors & General Stores (P) Ltd**^[103]). The name given to a transaction by the contracting parties does not, necessarily, decide the nature of the transaction. The question always is what is the real character of the transaction, not what the parties call it. (**Commissioners of Inland Revenue v. Wesleyan and General Assurance Society**^[104]; **Motors & General Stores (P) Ltd**¹⁰³). The Court must examine the substance of the contract, and not be swayed by its form. In drawing a distinction between the form and substance of the arrangement, the Court cannot brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing that the rights and liabilities of the parties are different from what in law they are. (**Motors & General Stores (P) Ltd**¹⁰³; **Duke of Westminster case**^[105]). The taxing authority is not restricted merely to the letter of the document. He must enquire into the true nature of the transaction after examining the relevant materials, and should ascertain whether it partakes the nature of the transaction which the statute renders taxable. He is, in ascertaining the true nature of the contract, also entitled to consider how the contract was performed. (**Carl Still G.M.B.H.**⁹). Bearing these aspects in mind let us now examine the scope of Sections 3(a), 3(b) and 6(2) of the CST Act to ascertain whether the subject contracts fall within its ambit.

Principles are formulated, under Chapter II of the CST Act, for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or

export. Section 3, in Chapter II, explains when a sale or purchase of goods is said to take place in the course of inter-State trade or commerce. It creates a legal fiction, and requires a sale or purchase of goods to be deemed to take place in the course of inter-state trade or commerce only if it falls within clauses (a) & (b) thereof. Within Section 3(b) are sales in which property in the goods passes during movement of the goods from one State to another by transfer of documents of title thereto, whereas Section 3(a) covers sales, other than those included in clause (b), in which the movement of goods from one State to another is under the contract of sale, and property in the goods passes in either States. A sale which takes place under Section 3(a) stands excluded from the purview of Section 3(b) and vice versa. In respect of an inter-State sale, tax is leviable only once, and that indicates that the two clauses of Section 3 are mutually exclusive. The dividing line between sales under Section 3(a) and those falling under Section 3(b) is that, in the former, the movement is under the contract whereas, in the latter, the contract comes into existence only after commencement and before termination of the inter-State movement of the goods. An inter-State sale is governed under Section 3(b), if it is effected by transfer of documents of title after such movement has started, and before the goods are actually delivered. (**TISCO v. S.R. Sarkar**^[106]; **A&G Projects and Technologies Ltd v. State of Karnataka**^[107]).

For a sale to fall under Section 3(b), the sale must be effected by the transfer of documents of title to the goods. The transfer of documents, contemplated by Section 3(b), is a transfer which, in law, amounts to delivery of the goods. Transfer of documents either by endorsement or delivery completes the transfer of title but, in the absence of an indication to that effect in the statute, the place where the documents are transferred is not necessarily the place of the sale. (**S.R. Sarkar**¹⁰⁶). Transfer of documents of title may be effected by handing them over. An endorsement to that effect on the documents is one mode of proving the fact. (**The Dy. Commissioner of Commercial Tax, Madurai Division, Madurai v. A.R.S. Thirumeninatha Nadar Firm, Tuticorin**^[108]). A railway/lorry receipt is a document of title to the goods and, for all purposes, represents the goods. When the

railway/lorry receipt is handed over to the consignee on payment, the property in the goods is transferred. (**Commissioner of Income-Tax, Madhya Pradesh and Bhopal, Nagpur v. Bhopal Textiles Ltd., Bhopal**^[109]; **Bharat & Co. v. Trade Tax Officer**^[110]).

Where the property in the goods has passed, either before the movement has commenced or after the movement from one State to another has ceased, the sale will not fall within clause (b). A sale effected by transfer of documents of title after commencement of movement and before its conclusion, as defined by the two terminii set out in Explanation (1) of Section 3, and no other sale, will be regarded as an inter-State sale under Section 3(b). (**S.R. Sarkar**¹⁰⁶). The reference to two States in Section 3(b) makes it clear that termination of the journey of the goods takes place when the goods land in the importing State. If the documents of title are transferred after the goods have landed, all sales thereafter are intra-State sales. (**Arjun Dass Gupta & Bros v. Commissioner of Sales Tax, Delhi Administration, Vikash Bhawan, New Delhi**^[111]).

The ingredients of Section 6(2) of the CST Act are (1) there must be a sale of goods in the course of inter-state trade or commerce; (2) the sale (a) has either occasioned movement of such goods from one state to another (ie a Section 3(a) sale) or (b) has been effected by a transfer of documents of title to such goods during their movement from one state to another (ie a Section 3(b) sale); (3) there is a subsequent sale during such movement (ie when the goods are in movement, pursuant to a Section 3(a) or a Section 3(b) sale, the very same goods are again sold); (4) the subsequent sale is effected by a transfer of documents of title to such goods (ie the very same goods which have commenced movement from one State, pursuant to a Section 3(a) or a Section 3(b) sale, but have not yet completed its movement in the other State, are again sold during their movement (transit) by effecting transfer of documents of its title); (5) the sale of goods is to a registered dealer; (6) the goods are of the description referred to in Section 8(3) of the CST Act; (7) if these ingredients are satisfied then the subsequent sale is exempt from tax under the CST Act; (8) such a subsequent sale (ie the subsequent sale referred to in Section 6(2)) shall not be exempt from tax

under Section 6(2) unless the dealer, effecting the subsequent sale, furnishes to the prescribed authority (a) the E-I or E-II certificate from the registered dealer from whom the goods were purchased by him (in terms of Rule 12(4) of the CST (Registration and Turnover) Rules, 1957; and (b) a “C” or “D” form/certificate (in terms of Rule 12(1) of the 1957 Rules) from the registered dealer to whom the subsequent sale was made by him (ie the purchaser of the goods under the first sale becomes the vendor (seller) of the goods in the second (subsequent) sale); and (9) the certificates, referred to at point 8(a) and 8(b) above, are furnished in the prescribed manner within the prescribed time.

Section 6(1) envisages payment of tax on all sales effected in the course of inter-state trade or commerce and, in effect, provides for a multi-point or multi-stage taxation regime for the inter-state sale of goods. Section 6(1) is subject to the other provisions of the CST Act. Section 6(2), which contains a non-obstante clause, has been introduced to avoid the cascading effect of multiple taxation. (**A&G Projects & Technologies Ltd.**¹⁰⁷). In view of the non-obstante clause, the provisions of Section 6(2) prevail over Section 6(1) of the CST Act and all subsequent sale of goods (i.e., the second sale onwards), during their movement from one state to another, are exempt from tax. It is only with a view to ensure free and unhindered movement of goods from one state to another that the first inter-state sale, be it under Section 3(a) or under Section 3(b), is alone subject to tax and all subsequent sales, effected during the movement of such goods from one State to another, are exempt from tax under Section 6(2) of the CST Act.

(ii) SHOULD THE SUBSEQUENT SALE, TO BE EXEMPT UNDER SECTION 6(2), HAVE THE CHARACTERISTICS OF AN INTER-STATE SALE UNDER SECTION 3(b) OF THE CST ACT?

It is contended, on behalf of the petitioners, that a transit sale, exempt under Section 6(2), is not a Section 3(b) sale for the following reasons: (a) a transit sale is necessarily a second or a subsequent sale, whereas a Section 3(b) sale is a first sale; (b) more importantly, since a transit sale is only a second sale or a subsequent sale, it would necessarily be preceded by a first sale; therefore, a Section 6(2) sale cannot be construed as a Section

3(b) sale; the purpose of reference to Section 3(b) along with Section 6(2) is limited; both a Section 3(b) sale and a Section 6(2) sale take place during movement of goods in transit, and by way of transfer of documents of title during their movement; because of this similarity, Explanation I to Section 3 is also read into Section 6(2); the taxing power, and the jurisdictional competence to tax, in the case of sales falling under Section 3(a) and Section 3(b), and the second or the subsequent sale which are not exempt under Section 6(2), are not given to the same States; the stark dissimilarities are a Section 3(b) sale is a first sale whereas a Section 6(2) sale is a second or a subsequent sale; and the power to tax the transactions by the respective States are also not the same.

It is contended, on behalf of the revenue, that a sale ceases to be a sale exempt under Section 6(2) if the following occur: (a) if the title passes on delivery, the sale cannot be a transit-sale because title is passing after movement; (b) if title passes ex-works, the sale cannot be a transit sale since title passes prior to movement (refer: definition of Ex-Works in Black's Law Dictionary, 8th Edn. at Page 626); (c) if title passes upon delivery to the carrier, it cannot be a transit sale since title passes prior to movement; (d) if title passes only upon full payment, it is not a transit sale as title does not pass during movement; (e) if there is a pre-determined sale, or a pre-determined buyer, prior to movement it cannot be a transit sale; (f) if payment is upon successful erection, it is not a transit sale since title passes only after movement is complete; (g) if the property passes after a certificate is issued by the owner, it cannot be a transit sale because title passes after movement; and (h) a sale after inspection cannot be a transit sale as title passes only after delivery; the second inter-state sale has, necessarily, to be a Section 3(b) sale because the language used in Section 6(2), to describe the second inter-state sale, is the same as in Section 3(b); it is not, and cannot be treated, as a third category of inter-state sale; and the CST Act contemplates only two categories of inter-state sales ie either a Section 3(a) or a Section 3(b) sale.

In order to attract Section 6(2), it is essential that the sale must be a subsequent inter-State sale and should be preceded by a prior inter-State sale. (**A&G Projects & Technologies Ltd.**¹⁰⁷). The use of the word

“**subsequent**” means that the sale, on which exemption is claimed under Section 6(2) of the CST Act, must be preceded by an earlier inter-state sale. The words ‘**such goods**’, used in the second limb of Section 6(2), refer to the goods in the first limb which are the goods sold during the course of inter-state trade or commerce either under Section 3(a) or under Section 3(b). The words ‘**during such movement**’ in Section 6(2) suggest that the goods are in movement i.e the goods have commenced movement in one State, but have not completed its movement in the other State. The movement of goods is deemed to commence at the time of delivery of the goods to, and terminate at the time when delivery is taken from, the carrier.

(**Sundaram Industries v. State of Tamil Nadu**^[112]). The requirement of the subsequent sale being effected by transfer of documents of title, and not by physical delivery thereof, indicates that the subsequent sale must have been effected after the goods have commenced movement in one State but have not yet been delivered in the other State.

Similar to a Section 3(b) sale, where sale of goods is effected by a transfer of documents of title to such goods during their movement from one State to another, the subsequent sale under Section 6(2) must also take place during such movement i.e during their movement from one State to another. Like a Section 3(b) sale, the subsequent sale under Section 6(2) must also be effected by way of a transfer of documents of title to such goods. The words ‘**during their movement**’ are used both in Section 3(b) and the first limb of Section 6(2). The words ‘**such movement**’ in the second limb of Section 6(2) can only mean “**during the movement of goods**” as referred to in the first limb of Section 6(2), more so as both the first and the second limb of Section 6(2) require the sale to be effected by transfer of documents of title to such goods during their movement from one State to another. Where the legislature uses the same word or phrase in similar contexts, in different parts of the same Section or Statute, there is a presumption that the word is used in the same sense throughout, and to intend it in each place to bear the same meaning. (**Courtauld v. Legh**^[113]; **Black-Clawson v. Papierwerke**^[114]; **Farrell v. Alexander**^[115]). Ordinarily, a word or expression used at several places in one enactment

should be assigned the same meaning so as to avoid “a head-on clash” between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that “Parliament had given with one hand what it took away with the other”.

(**Central Bank of India v. Ravindra**^[116]; **Farrell**¹¹⁵; **Madras Electric Supply Corporation Ltd (In Liquidation) v. Boarland (Inspector of Taxes)**^[117]).

It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. (**CIT v. Venkateswara Hatcheries (P) Ltd.**,^[118] **Shamrao Vishnu Parulekar v. Distt. Magistrate, Thana**^[119]; **Maxwell’s Interpretation of Statutes**, Edn. 10, p. 522), unless the context suggests otherwise, (**Suresh Chand v. Gulam Chisti**^[120]; **Raghubans Narain Singh v. U.P. Government**^[121] or there is something repugnant in the context, (**Bhogilal Chunilal Pandya v. State of Bombay**^[122]), and is a guide which must yield to indications of a contrary intention. (**Payne (Inspector of Taxes) v. Barratt Developments (Luton) Ltd**^[123]). There is nothing in the context of either Section 3(b) or Section 6(2) which indicates a contrary intention. Consequently it is only a contract of sale which comes into existence when the goods are in movement, pursuant to an earlier inter-state sale either under Section 3(a) or 3(b), which would fall within the ambit of Section 6(2) of the CST Act.

The subsequent sale, exempt under Section 6(2), has a reference only to a sale made during “such movement”. In other words, the second or subsequent sale has to be one which falls under Section 3(b) of the CST Act. (**Mitsubishi Corporation India P. Ltd. v. VAT Officer (Delhi)**^[124]). It must have been effected before the journey of the goods ends or before the goods reach their destination, and must fall within Section 3(b). (**Voltas Ltd. v. State of Orissa**^[125]; **G.E.T. Power Pvt. Ltd. v. State of Odisha**^[126]). The conditions discernible from Section 6(2) are that, while the first sale can be either a Section 3(a) or a Section 3(b) sale, the second or subsequent sale has to be a Section 3(b) sale (**Mitsubishi Corporation India P. Ltd.**¹²⁴)

ie it must necessarily have all the other characteristics of a Section 3(b) sale. Like a Section 3(b) sale, a sale under Section 6(2) also takes place during the movement of goods from one State to another. Again like a Section 3(b) sale the subsequent sale, which is exempt under Section 6(2), is also effected by transfer of document of title during the movement of goods from one State to another. While the situs of a Section 3(a) sale can either be in the State from where the goods move or in the State where the goods are delivered, both a Section 3(b) and a subsequent sale exempt under Section 6(2) can only take place when the goods are in movement from one State to another. A contract of sale entered into either before commencement of movement in the first State, or after completion of movement of the goods in the second State, can neither be a Section 3(b) sale nor a subsequent sale exempt under Section 6(2) of the CST Act.

(iii) IS THE LAW DECLARED BY THE SUPREME COURT, IN “A & G PROJECTS & TECHNOLOGIES LTD. V. STATE OF KARNATAKA” BINDING ON THIS COURT?

In **A&G Projects & Technologies Ltd.**¹⁰⁷, the appellant contended that there were three sales, the second and the third sales were subsequent sales, and they were exempt from tax under Section 6(2) of the CST Act; this argument of the appellant stood rejected by the assessing authority who held that the appellant’s turnover fell under Section 3(a) of the CST Act, all the three sales were Section 3(a) sales, and consequently the appellant was not entitled to exemption under Section 6(2) of the CST Act. Relying on the proviso to Section 9(1) of the CST Act, the assessing authority held that the State of Karnataka was competent to levy tax. It is in this context that the Supreme Court held:-

“.....Analysing Section 6(2), it is clear that sub-section (2) has been introduced in Section 6 in order to avoid cascading effect of multiple taxation. A subsequent sale falling under sub-section (2), which satisfies the conditions mentioned in the proviso thereto, is exempt from tax as the first sale has been subjected to tax under sub-section (1) of Section 6 of the CST Act, 1956. Thus, in order to attract Section 6(2), it is essential that the sale concerned must be a subsequent inter-State sale effected by transfer of documents of title to the goods during the movement of the goods from one State to another and it must be preceded by a prior inter-State sale. It is only then that Section 6(2) may be attracted in order to make such subsequent sale exempt from levy of sales tax. However, the proviso to sub-section (2) of Section 6 prescribes further conditions and it is only on fulfilment of those conditions that the subsequent sale stands exempted. If those conditions are not satisfied, then notwithstanding the fact that the sale is a subsequent sale, the exemption would not be admissible to such subsequent sales. This is the scheme of Section 6 of the CST Act, 1956.....”
(emphasis supplied).

It is contended, on behalf of the petitioners, that the Supreme Court in **A&G Project and Technologies**¹⁰⁷ was neither dealing with transactions under Section 3(b) nor under Section 6(2), but only under Section 3(a); while a general analysis of Section 6(2) of the CST Act was made therein, the Supreme Court neither stated that a Section 6(2) sale is a Section 3(b) sale nor has it concluded that a contract should emerge subsequent to movement for a sale to qualify as a transit sale i.e., as a Section 6(2) sale; when it refers to emergence of a contract subsequent to movement, the Supreme Court has identified this condition only for a Section 3(b) sale, and not a Section 6(2) sale; and there is nothing in the judgment to show that the sale, under Section 3(b), cannot have a predetermined customer.

It is no doubt true that the Supreme Court, in **A&G Projects & Technologies Ltd**¹⁰⁷, proceeded on the premise that all the three sales were Section 3(a) sales. Nevertheless the scope of Section 6(2) of the CST Act was considered therein. Once a Judgment is rendered by the Supreme Court, it should not be contended later that a particular point was not raised or considered by the learned Judges or that it is open to the High Court to re-consider the same. (**Delhi Cloth General Mills v. Shambunadh**^[127]; **Government of A.P. v. N. Chowdary**^[128]).

Even if the scope of Section 6(2) of the CST Act was not in issue in **A&G Projects & Technologies Ltd**¹⁰⁷, it is nonetheless binding as the High Court is bound even by the obiter-dicta of the Supreme Court. An 'obiter dictum', as distinguished from a ratio decidendi, is an observation by the Court on a legal question suggested in a case before it, but not arising in such manner as to require a decision. (**State of Haryana v. Ranbir**^[129]; **ADM, Jabalpur v. Shivakant Shukla**^[130]; **Girnar Traders**⁷⁶; **Divisional Controller, KSRTC v. Mahadeva Shetty**^[131]; **Director of Settlements, A.P. v. M.R. Apparao**^[132]). Obiter dicta of the Supreme Court is binding upon other courts in the country (**Sanjay Dutt v. State through CBI, Bombay**^[133]) in the absence of a direct pronouncement on that question

elsewhere by the Supreme Court (**Oriental Insurance Co. Ltd. v. Meena Variyal**^[134]), and is entitled to considerable weight. (**CIT v. Vazir Sultan & Sons**^[135]). We must express our inability to agree with the submission, urged on behalf of the petitioners, that the scope of Section 6(2), as analysed therein, need not be followed.

(iv) CAN A CONTRACT OF SALE OF FUTURE GOODS FALL WITHIN THE AMBIT OF SECTION 6(2) OF THE CST ACT?

It is contended on behalf of the revenue that, in view of Section 4(2) (b) of the CST Act, if the appropriation of future goods of a contract of sale takes place in the respondent State, the respondent is entitled to levy tax thereupon as the sale is deemed to take place within the State; the goods which form the subject matter of the Supply Contracts are future goods and not specific goods; the title to future goods passes only upon unconditional appropriation; the determination of passing of title in future goods has to be decided with reference to Section 23 of the Sale of Goods Act, 1930 ("1930 Act" for short); and reliance placed by the petitioner on Section 20 of the 1930 Act is misplaced.

Section 4 of the CST Act is subject to the provisions of Section 3 thereof. The question, whether a sale is an inter-State sale or not, must be answered with reference to, and on the basis of, Section 3 alone. Section 4 is not relevant to the said question. (**Bharat Heavy Electricals Ltd.**⁴⁴). If the transaction of sale satisfies the requirement of Section 3(a) or Section 3(b) it is deemed to be a sale of goods in the course of inter-State trade or commerce and, by virtue of Articles 269 and 286 of the Constitution, is beyond the legislative competence of a State legislature to tax. (**State of A.P. v. National Thermal Power Corpn. Ltd.**,^[136]; **S.R. Sarkar**¹⁰⁶; **20th Century Finance Corpn. Ltd v. State of Maharashtra**^[137]). Section 4(2) (b) of the CST Act is similar to Section 23 of the Sale of Goods Act. While Section 4(2)(b) of the CST Act deems sale of unascertained or future goods to take place within a State, at the time of its appropriation to the contract of Sale by the seller or the buyer, it is evident from Section 4(1) that the deeming provision in Section 4(2) is subject to the provisions contained in Section 3 of the CST Act. If the sale of goods falls within the ambit of

Section 3 of the CST Act, it would then be an inter-state sale notwithstanding that, in terms of Section 4(2)(b), the unascertained goods were appropriated to the contract of sale within the territorial limits of the State where the goods were delivered.

The 1930 Act classifies “goods” into three categories (i) specific goods (ii) future goods, and (iii) unascertained goods. Specific goods and future goods are defined in Section 2(6) and 2(14) of the 1930 Act. Section 20 of the 1930 Act is applicable only to specific goods. The goods, which are the subject matter of these contracts, are future goods as they were required to be purchased by the petitioner-contractor only after the contract was entered into. Section 20 of the 1930 Act applies only if there is an unconditional contract for sale. In these Writ Petitions the contracts of sale, which purport to “effect the present sale of future goods”, are merely agreements to sell, and not a Sale (Section 6(3) of the 1930 Act). Section 20 stipulates that the time for payment of price can be postponed. The petitioners supply contracts do not postpone payment, but payment thereunder is itself conditional on successful erection. Section 23 of the 1930 Act relates to the sale of unascertained goods and its appropriation.

Thereunder title, with respect to future goods, passes on fulfilment of the following conditions (a) the goods must be in a deliverable state, (b) the goods must be unconditionally appropriated to the contract, and (c) there must be assent of the buyer if the appropriation is by the seller. The phrase “*deliverable state*” has been defined in Section 2(3) of the 1930 Act to mean “*buyer under the contract is bound to take delivery*”. For sale of future goods to happen, during the course of transit, all the aforesaid events should take place during the course of movement; if any of these events occur before or after movement, the title does not pass during movement and, therefore, the sale ceases to be a transit sale. Future goods are goods which come into existence after the contract of sale is entered into, and only thereafter can it be moved from one State to another. A contract of sale of future goods would invariably be entered into prior to commencement of movement.

Sale of unascertained goods can also take place after its delivery in the other State when the contract requires the buyer to ascertain and, thereafter, to buy the goods. When the movement of the goods starts,

pursuant to a sale, they shed the character of either unascertained goods or future goods. Sale of goods, by transfer of documents of title during its movement from one State to another, can only be the sale of specific or ascertained goods (**Balabhagas Hulaschand v. State of Orissa**^[138]). It is only a contract of sale of specific goods which can be effected by transfer of documents of title during its movement, and not a sale of future goods.

Reliance is placed, on behalf of the petitioners, on **State of Tamil Nadu v. Bombay Metal Depot**^[139]; and **State of Karnataka v. ECE Industries Ltd**^[140] wherein it was held that where the description of the goods is clear and the goods, sent in conformity with the description, have been accepted by the purchaser on the basis that they conform to the description, there is ascertainment and appropriation of the goods to the contract; where the goods are ascertainable, and goods of that description are despatched, then the goods so despatched can be taken as appropriated to the contract unconditionally; and the circumstance that the purchaser has a right of rejection does not postpone the transfer of property in the goods. We must express our inability to agree with the declaration of law in the aforesaid judgments as the Supreme Court, in **Salar Jung Sugar Mills Ltd. v. State of Mysore**^[141], held that unascertained goods are distinct from specific or ascertained goods, in the sense that future goods include goods not yet in existence, or goods in existence but not yet acquired by the seller; future goods, for the purposes of passing of property, can never be specific; future goods, if and when sufficiently identified, may be specific goods; goods to be manufactured by the seller are future goods; under Section 23 of the Sale of Goods Act, when there is a contract of sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained; where there is a contract for the sale of unascertained or future goods by description, the property in the goods passes to the buyer only when the goods of that description, and in a deliverable state, are unconditionally appropriated to the contract; and it is this unconditional appropriation which would pass the property. In **National Thermal Power Corpn. Ltd.**,¹³⁶; and **20th Century Finance Corporation**

Ltd.¹³⁷ the Supreme Court held that, where the goods are not in existence, such transactions may be effected by the delivery of the goods in which case the taxable event would be on the delivery of goods.

In the present batch of Writ Petitions the contracts were entered into, between the owner and the petitioner-contractor, prior to an order being placed by the petitioner-contractor on suppliers outside the State for supply of the goods required for installation and erection of the project within the State of A.P. (now Telangana and A.P.); the supply contracts, between the contractor and the owner, were for the sale of future goods which were required to be manufactured by the suppliers, identified in the contract, on an order being placed on them by the petitioner-contractors in terms of the contract entered into between the contractor and the owner. As the subject contracts provide for sale of future goods, they could not have been, and were not, entered into when the goods were in movement from one State to another. A contract for the sale of future goods can neither be a Section 3(b) sale nor a subsequent sale exempt from tax under Section 6(2) of the CST Act. As the subject contracts provide for the sale of future goods, the said contracts cannot be said to have arisen after commencement of movement of the goods i.e., during the movement of the goods from one State to another. It cannot, therefore, be a subsequent sale exempt from tax under Section 6(2) of the CST Act.

It is, however, contended on behalf of the petitioners that the subject contracts are merely agreements to sell which, in turn, provides for the sale of goods when it is in transit from one State to another. Before a transaction can be considered as a sale, there must be a transfer of property in goods for, without such a transfer, there cannot be any sale. (**Commissioner of Sales Tax, M.P. v. Purshottam Premji**^[142]). The word 'goods' in the definition of 'sale' in a Sales Tax Act must be interpreted according to its definition therein, and not according to the definition in Section 2(7) of the Sale of Goods Act. (**Commissioner of Sales Tax, Eastern Division, Nagpur v. Husenali Adamji and Co.**^[143]). Section 2(d) of the CST Act defines "goods" to include all materials, articles, commodities and all other kinds of actionable claims. Section 2(g) of the CST Act, after its substitution

by Act No.20 of 2002 w.e.f. 11.05.2002, is an inclusive decision. The main part of Section 2(g), (other than the inclusive part), is similar to the pre-amended Section 2(g) and defines a “sale” to mean any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration.

A transaction of sale is subject to tax under the CST Act on the completion of the sale. A mere contract of sale is not a sale within the definition of "sale" in Section 2 (g) thereof. (**TELCO Ltd.**⁶²; **S. R. Sarkar**¹⁰⁶; **Ben Gorm Nilgiri Plantations Co., Conoor v. Sales Tax Officer, Special Circle, Ernakulam**^[144]). In **Chem-Dyes Corporation**³, the Division bench of the Gujarat High Court held that one of the conditions for applicability of Section 3(b) is "sale" of goods, and not an agreement to sell; and both the conditions should be satisfied - sale as well as transfer of documents of title to the goods - during their movement from one State to another.

Without expressing any opinion on the merits of the submission we shall proceed on the premise that the subject contracts, which provide for the sale of future goods, is an agreement to sell and the “sale” of goods took place subsequent thereto. It is necessary, therefore, to ascertain whether the sale of goods, by the petitioner-contractor to the owner, took place when the goods were in movement from one State to another, for it is only then can such a sale fall within the ambit of Section 6(2) of the CST Act. While examining the contractual provisions in this light, it must be borne in mind that Courts and tribunals cannot rewrite contracts (**LIC of India v. S. Sindhu**^[145]) and must read the agreement as it is. The contract must be read as a whole and not be dissected, by taking out a part. (**Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.**^[146]). It is the substance of the contract document/s, and not merely the form, which has to be looked into. (**Hindustan Shipyard Ltd. v. State of A.P.**^[147]).

It is the case of the petitioners that, in terms of the transit-sale clause in the contract (for instance clause 5.3.2 of the L&T - Konaseema contract), the sale of goods took place during transit by effecting transfer of documents of title to the goods. Article 5.3.2 (ii) of the L&T - Konaseema contract stipulates that the sales tax, included in the contract price stated in Article

5.1, includes central sales tax, leviable on the sale transaction between the supplier and his sub-supplier/vendors situated outside Andhra Pradesh @ 4% on equipment and materials, sale of which to the Owner will be effected by the Supplier by endorsing the documents while the goods are in transit under Section 6(2) of the CST Act; the sale to the Supplier, having taken place in the course of inter-state trade or commerce, the sale by the Supplier to the Owner shall similarly be deemed to have taken place in the course of inter-state trade or commerce; and necessary concessional sales tax forms shall be furnished by the Owner to the Supplier.

The aforesaid clause, and similar clauses in other supply agreements, cannot be read in isolation or out of context. It is necessary to read the contract as a whole to ascertain whether the parties, in fact, intended to transfer title to the goods during its movement from one state to another, or after the goods have landed and have been utilized or incorporated in the works of the owner, bearing in mind that, in the orders impugned in these Writ Petitions, the respondent-authorities have held that it does not.

The petitioners rely on the transit insurance clauses, the liquidated damages clauses, and the bailment/free issues clauses in the subject contracts in support of their submission that the sale of goods, by the petitioners-contractors to the owners, is only when the goods were in movement from one State to another. It is necessary, therefore, to examine these contractual provisions.

(v) TRANSIT INSURANCE:

It is contended, on behalf of the petitioners, that, unless the goods are sold and title in the goods vest with the owner, there is no obligation on the owner to take and cover the goods under insurance policies especially transit insurance, the cost of which is wholly borne by the owner.

Article 13.1 of the L&T - Konaseema contract stipulates that from notice to proceed date, until the issuance of the site test certificate for the equipment, the Owner (Konaseema) shall take a combined insurance for transit, erection, and all risks; and the supplier and its sub-suppliers will be mentioned as a co-insured in the policy to the extent of marine transit and third party liability insurance. Clause 8.1.1 of the Seimens – Power Grid agreement stipulates that all the equipment and materials, being supplied by

Seimens Ltd, shall be kept completely insured by them at their cost from the time of despatch from their works, upto the completion of erection, testing and commissioning at site, and taking over of the sub-stations by POWER GRID in accordance with the Contract.

Ownership of the property is not relevant in so far as insurance of the goods is concerned. It is not necessary that the person, insuring the interest, must be the owner of the property. There may be insurance to cover the interest of others. (**Escorts JCB Ltd. v. CCE**^[148]; **Benjamin's Sale of Goods, 4th Edn; Colinvauz's Law of Insurance, 6th Edn. by Robert Merkin; State of Maharashtra v. Embee Corporation, Bombay**^[149]). Insurance can be taken by a third person on behalf of another. A seller, in possession of the goods when the property and risks have passed, may insure his buyer's interest. A bailee, apart from its interest, may also insure the interest of the owner of the property. (**Escorts JCB Ltd.**¹⁴⁸; **Chitty on Contracts, 28th Edn., Vol. 2, Special Contracts, p. 978, Chapter 41, Note 007; Prudential Staff Union v .Hall**^[150]; **Hepburn v. A. Tomlinson (Hauliers) Ltd.**^[151]).

In **Larsen & Toubro Ltd v. State of A.P**^[152] and **State of Tamil Nadu v. Mahindra & Mahindra Ltd**^[153], it was held that the fact that the insurance coverage was borne by the assessee/supplier, per se, would not stand in the way of its being an inter -State sale. As ownership of the goods is not determined on the basis of who insured the goods, it matters little that, in some of the contracts, the goods were insured, for its inter-state movement, by the owner.

(vi) LIQUIDATED DAMAGES CLAUSES:

It is contended, on behalf of the petitioners, that the clauses relating to liquidated damages envisage only recovery of damages from the contractor by the owner; the supply contract only mandates payment of liquidated damages in case of delay in the supply of goods; the clauses relating to minimum performance guarantee and liquidated damages would only reinforce the fact that the title to the goods has allegedly passed to the

owner; the owner can only insist on re-performance and, in case of failure, to recover damages; there is no obligation on the contractor-supplier to take back the goods if they are of defective quality; the supply contract enables the employer to claim liquidated damages for supply of defective goods; a reading of Sections 4(3) and 4(4) of the 1930 Act would show that (a) it is not as if every condition would convert a sale into an agreement to sell; Sections 4(3) and 4(4) of the 1930 Act make it clear that any encumbrance or condition, deferring passage of title, would make the sale conditional, and transfer would take place only upon fulfilment of the conditions; Section 4(4) amplifies and introduces the nexus test; it is not all or any conditions, but only such conditions, which need to be fulfilled, subject to which the property in the goods would be transferred; the condition, if any, should be such that it encumbers or limits the transfer of title to the goods; none of the clauses, relied upon by the revenue, encumber transfer of title; the contracts provide separate parameters for damages to be claimed on the supply of goods and service; compensation is fixed for delay in delivery of goods as per the schedule dates for individual goods, and is not dependant on service and vice versa; and, in the case of erection and commissioning, the contract provides for completion of the work in a defined manner which is on integration of individual goods.

It is contended, on behalf of the revenue, that the liquidated damages clauses in the supply contracts are not relevant for the purposes of ascertaining whether title has passed during movement; if the contract has an inspection or a certification clause, or stipulates a conditional payment, the title does not pass till the said inspection or certification is given; in all these cases the satisfaction of these conditions only happens after movement, and not during movement; the 1930 Act makes a clear distinction between conditions and warranties; breach of warranty only gives a right to a damages claim but, if there is a breach of a condition, the contract itself can be repudiated in addition to damages; there is an implied condition that the goods shall be reasonably fit for the purpose for which the goods are required (Chitty on Contracts Vol. II at page 1471); the purpose for which the owner is procuring the goods has been expressly made known to the petitioner at the bidding stage itself; and, consequently, if the goods are not

fit for the purpose, the entire contract can be repudiated.

Article 8.1.2 of the L&T - Konaseema contract stipulates that, in the event of the guaranteed delivery dates not being adhered to, due to reasons attributable to the Supplier (L&T), the Supplier shall pay to the Owner (Konaseema), subject to the Owner incurring a commercial loss due to the delay attributable to the Supplier, liquidated damages. Clause 10 of the Seimens – Power Grid Agreement provides for liquidated damages for delay in completion and, thereunder, if Seimens Ltd fails to complete the successful commissioning of the sub-stations covered under the contract, within the period stipulated, they shall pay POWERGRID liquidated damages for the delay. Article -11 of the Seimens – RINL agreement provides that liquidated damages shall be applicable only for late delivery and delay in erection for reasons solely attributable to the contractor; if the Contractor fails in the due performance of the contract to deliver any part of the equipment, within the time fixed by the contract, the Contractor shall be liable to pay liquidated damages; if the contractor fails to complete the work within the “time of completion”, the contractor shall be liable to pay liquidated damages; and, in case of non-achievement of performance guarantee parameters, imposition of liquidated damages, if any, shall not exceed 7.5% of the total contract value.

Section 12 of the 1930 Act relates to conditions and warranties. Under sub-section (1) thereof, a stipulation in a contract of sale, with reference to goods which are the subject thereof, may be a condition or a warranty. Section 12(2) states that a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. Section 12(3) states that a warranty is a stipulation collateral to the main purpose of a contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Section 12(4) stipulates that whether a stipulation in a contract of sale is a condition or a warranty depends, in each case, on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract. Section 16 of the 1930 Act relates to implied conditions as to quality or fitness and, under sub-section (1) thereof, where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the

buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

The subject contracts, for the supply of goods and erection and installation, have been entrusted to the petitioners for their acknowledged expertise in executing turnkey projects. The goods purchased by the petitioners-contractors, for execution of the turnkey projects, is for its usage as components or parts of the plant, and for its erection and installation. The owner relies on the skill/judgment of the petitioner-contractor in the procurement of such goods. The subject contracts expressly stipulate the purpose for which the goods are required by the owner ie for its use in connection with the erection and installation of the plant. Even if it is called a warranty (liquidated damages clause) in the contract, it would nonetheless, in view of Section 12(4) of the 1930 Act, be a "condition". Consequently supply of defective goods would confer a right on the owner to reject the goods, and to treat the contract as repudiated, and not merely to claim damages.

Reliance placed by the petitioners, on Sections 4(3) and 4(4) of the 1930 Act, is of no avail. Section 4 of the 1930 Act explains the distinction between a "sale" and "an agreement to sell". Under sub-section (1) thereof, a contract for the sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. Sub-section (2) states that a contract of sale may be absolute or conditional. Under sub-section (3) where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Section 4(4) stipulates that an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Section 2(6) of the 1930 Act defines "future goods" to mean goods to be manufactured or produced or acquired by the seller after making the contract of sale. An agreement to sell future goods is, in view of Section 4(3)

of the 1930 Act, an agreement to sell and not a contract of sale. In case the contract is conditional, Section 4(4) stipulates that an agreement of sale becomes a sale when the conditions, subject to which the property in the goods is to be transferred, is fulfilled. As the quality and fitness of the goods is, in terms of Section 16(1) of the 1930 Act, an implied condition, failure to fulfil the condition would not result in an agreement to sell becoming a sale, and the property in the goods would not pass from the petitioner-contractor to the owner. Transfer of title to the goods, as shall be elaborated hereinafter, passes only after post-delivery inspection of the goods, on completion of its erection and installation in the turn-key project, and on a take over certificate being issued by the owner to the petitioner-contractor thereafter. As compliance with these conditions, by the petitioners-contractors, take place only after completion of movement of the goods, the liquidation damages clause in the subject contracts would not bring the sale within the ambit of Section 6(2) of the CST Act. The finding recorded by the revenue in this regard, in the impugned orders, cannot be said to be perverse necessitating interference under Article 226 of the Constitution of India.

(vii) BAILMENT/FREE ISSUES CLAUSES:

It is contended, on behalf of the petitioners, that the petitioners effect inter-state sale and transit sale of goods to the owners in Telangana and Andhra Pradesh; in terms of the contract, these goods are handed over as free issue materials to the petitioners for installation and erection; the petitioner takes care and custody of these free issue material, acts as an agent or as a bailee of the goods; the goods are handed back to the owner after installation and commissioning; the concept of free issues is well recognized in the field of execution of projects or works; tax laws envisage a non-inclusion or exclusion of the value of such free issue material on the basis that free issues do not involve sale of goods, and cannot form part of the intrinsic value or the sale price; "bailment" does not mean that the goods, originally entrusted, should alone be returned; it is always subject to the understanding between the parties; in the present case, the expression 'bailment' has not been expressly used in all the contracts; some of the contracts contemplate issue of the material, received by the owner in the course of inter-State trade, to the petitioner for execution under the service

contract; in order to determine whether a sale is taxable or not, a minor difference between the statutory definition of 'bailment' and the transactions are immaterial; in almost all the contracts, delivery of the goods were taken by the respective contractees, and accounted as their excisable stock to avail cenvat credit; subsequently, they were issued to the petitioner through issue slips as provided under the Excise Rules; the petitioner, after effecting the sale, can also be treated as an agent of the contractee for erection and commissioning; the respondent erred in not considering the clauses in the agreement on the control that the contracting parties had over the goods, and which required the goods to be issued to the petitioner only as a bailee for the execution of the project; the bailment/material issue certificate, which are understood as free issues, do not stipulate restoration of the goods in the very same condition; and unless the goods are sold to the owner, and title to the goods passes to the owner, the owner cannot issue equipment or material as free issues.

It is submitted, on behalf of the revenue, that there cannot be a pre-existing bailment agreement as such an agreement can be entered with the bailor (owner) only when the bailor is in possession of the goods; the essence of a bailment is a transfer of possession, and not ownership; and the contract of bailment would require the goods to be returned in the very same condition, and not in a completely different form; while the owner is said to have entrusted different goods to the petitioners-contractors, what was returned to them was a completed turn-key project.

Article 2.1.1 (B) of the L&T – Konaseema Erection Contract stipulates that the scope of the contract shall include, in relation to erection, commissioning and testing of equipment “free-issues” to the contractor by the owner; to receive such equipment, from the owners contractor for transportation on behalf of the owner, at the facility site; and to store at the facility site as designated by the owner under the terms and conditions of bailment. In terms of the Alstom – GVK contract, a material received/issued certificate is prepared under which the material is handed over for storage, erection and commissioning. Clause 2.3 (iii) of the Seimens – Power Grid agreement stipulates that, for the equipment & materials to be provided by Seimens under the 'First Contract', it would be the responsibility of Siemens

to take delivery, unload and store the same at the site and execute an Indemnity Bond in favour of POWER GRID against loss, damage and any risks involved for the full value of the equipment/materials; and the indemnity bond shall be valid till the commissioning and handing over of the sub-station(s) to POWERGRID. Clause 9.3.3 of the Seimens - RINL agreement stipulates that, on receipt of delivery advise/lorry receipt/railway receipt, the Engineer or his authorised representative shall endorse the same to the Contractor for taking delivery of the goods on submission of bailment agreement by the Contractor as per Appendix 10, to store them in his site store and to take custody of them until they are erected and handed over to the Employer (owner).

Section 148 of the Indian Contract Act stipulates that a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee. Section 160 relates to the return of goods bailed on expiration of time or accomplishment of purpose and, thereunder, it is the duty of the bailee to return or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

If the intention and result of the contract is to transfer for a price property in which the transferee had no previous property then the contract is a contract of sale. Where, however, the passing of property is merely ancillary to the contract for the performance of work such a contract does not thereby become a contract of sale. (**Benjamin's Treatise on the Law of Sale of Personal Property, Eighth Edition (1950)**). Bailment is a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee. Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the subject matter in its original or an altered form, it is a transfer of property for value – it is a sale and not a bailment. (**The South Australian Insurance Company v. William Beavis**

Randell and Samuel Randell^[154]). The test is whether the identical subject matter was to be restored either as it stood or in an altered form; or whether a different thing was to be given for it as an equivalent for, in the latter case, it is a sale and not a bailment. (**William Beavis Randell and Samuel Randell**¹⁵⁴; **Indian Metal and Metallurgical Corporation v. State of Madras**^[155]; **M.M. Traders v. State of M.P.**^[156]).

When the petitioner and the owner entered into the subject agreement, neither the petitioner nor the owner were in possession of the goods, as the goods had to be acquired thereafter from the supplier. It is difficult, therefore, to hold that it is a bailment agreement. As is evident from Section 148 read with Section 160 of the Indian Contract Act, a bailment contract entails the return of goods in an identical form. After entrustment of the goods, and after the purpose of entrustment is accomplished, the goods must either be returned or otherwise disposed of according to the directions of the bailor. While some alteration of the goods is permitted, the identity of the original goods cannot be destroyed or substituted by the bailee. In the present case the goods, allegedly given under bailment by the owner to the petitioner-contractor, were in the raw form, and in return the owner received a finished product in the form of an erected power plant. In an alteration, the identity of the original goods is not destroyed. For instance when a car is sent for repair, the contractual relationship is one of bailment. If, for instance, the clutch plates of the car are replaced, the identity of the car is not lost, though the repair has resulted in an alteration. It is evident that, in the subject contracts, the identity of the original goods was lost in the process, the goods originally entrusted were not returned in the same or altered form, and notwithstanding the form in which the clause is couched there is, in substance, no bailment.

The concept of “free issues” is based on the premise that the owner has entrusted the goods to the contractor for being used or utilized in the works executed by the contractor for the benefit of the “owner”. It is true that, in computation of sales tax, the net sale price, excluding the cost of free issue material, alone should be taken into consideration. Ordinarily the price paid, to the dealer selling the goods, would not include the value of the free

issue material. (**V.S. Engineering (P) Ltd. v. State of A.P.**^[157]). As shall be detailed hereinafter, the intention of the parties, as is evident from the certification and other clauses of the contract, is to effect transfer of title to the goods from the supplier-contractor to the owner only after inspection and issuance of the taking over certificate ie after completion of erection of the plant. Reliance placed on behalf of the petitioners on the bailment clauses/free issue certificates is, therefore, of no avail.

(viii) TITLE CLAUSES IN THE SUPPLY CONTRACTS:

It is contended, on behalf of the petitioners, that Article 5.3.2 of the L&T – Konaseema supply contract would govern, as the other clauses in the agreement can be read harmoniously therewith; the odd reference, of full payment for transfer of title, under Article 17 of the contract, has to be subsumed only as an irrelevance, and an out of context reference, as this condition does not gel with any other clause in both the agreements. It is contended, on behalf of the revenue, that the question of passing of title should be ascertained by construing the contract as a whole and the surrounding circumstances, and not merely the title clause; even otherwise, the title clause in the L&T - Konaseema Supply contract shows that title passes at the time of incorporation and not during movement; the title passes, under the L&T Vemagiri, Alstom Supply Contracts and Siemens title clauses, only when the seller dispatches the goods i.e., prior to movement.

Clause 17 of the L & T – Konaseema supply contract stipulates that the legal title to the property in the equipment shall be deemed to have been transferred from the supplier to the owner when the equipment has been delivered to the owner's contractor for transportation (carrier), subject to transfer by the contractor to the owner of the carrier's receipt or any other document of title to the goods endorsed by the Supplier in favour of the owner, and full payment thereof by the owner. The supply contract provides for full payment only after a site test certification is issued by the owner after inspection and successful erection. Clause 17 thus makes it clear that title to the goods does not pass during movement. Under clause 11.1 of the L & T – Vemagiri agreement, title to all indigenous equipment shall pass to the owner upon the earlier of (a) payment of a part or whole of the indigenous

equipment or (b) when delivered to the transportation contractor or (c) the time that title to the indigenous equipment passes from the onshore supply sub-contractors to the onshore supplier. The payment schedule is prescribed in Appendix-H of the agreement and, thereunder, 10% of the onshore supply contract price is to be paid as advance payment. The words “part – payment” in Appendix H would bring within its ambit advance payment also. Title to the goods, thus, passes even before commencement of movement.

Clause 22.1.3 of the Alstom – GVK and Alstom – Goutami Supply Contract stipulates that the title to supplies (ex-works) shall pass to the owner upon the earlier of payment in full therefor, or when delivered to the carrier ex-works Indian Factory; and 5% of the supply contract price shall be due at the occurrence of the provisional acceptance of the facility in accordance with Clause 4.2.2 of the agreement. It is evident that, under the title clause, title passes either upon full payment (which is after the successful erection i.e., after completion of movement), or delivery to the carrier ex-works (i.e., prior to commencement of movement). Title does not pass under the aforesaid agreement during movement from one State to another. Clause 2.3 (iii) of the Siemens – Power Grid contract stipulates that the title, of the equipment and materials to be supplied by Siemens to Power Grid, shall pass on to Power Grid on ex-works despatch and with negotiation of despatch documents. The said clause also stipulates that transfer of title shall not relieve Siemens from the responsibility for all risks of loss or damage to the equipment and materials till its taking over by Power Grid, as specified in the bidding document. That the supplier is held responsible for risk, loss and damage of goods till they are taken over by the owner shows that the parties intended, in terms of Section 26 of the 1930 Act, that title would pass to the owner only after completion of movement. If parties really intended otherwise, the supplier would then have been absolved of all responsibility after despatch of goods ex-works.

Under the L & T – Konaseema supply contract, full payment is made only after a site test certificate is issued by the owner after inspection and successful erection. Likewise, under Alstom supply contracts, title to the

goods passes either upon payment for supply in full (which is only after completion of erection) or when the goods were delivered to the carrier ex-works Indian factory ie prior to commencement of movement. Under the Seimens – Power Grid supply contract the responsibility for all risk, damages and losses relating to the goods continue with the supplier till the goods are taken over by Power Grid (after erection) despite title allegedly passing on ex-works despatch with negotiation of despatch documents. A transit sale, to be exempt under Section 6(2) of the CST Act, is a sale whereby transfer of title to the goods takes place when they are in movement from one State to another. The aforesaid title clauses show that the parties intended to transfer title to the goods either before commencement of its movement in the State where they were purchased by the petitioner-contractor, or after its delivery in the State where the works were being executed by the contractor for the Owner. In either event, transfer of title to the goods does not take place when the goods are in movement from one State to another.

(ix) INSPECTION AND CERTIFICATION CLAUSES:

It is contended, on behalf of the petitioners, that the site performance test and the performance guarantee test, envisaged in both the agreements, only mandate a re-performance by the contractor so as to ensure no defects or liabilities, and to achieve minimum performance guarantee; in case of failure, it entitles the owner to reject and recover cost; even in a normal sale of goods, an inspection clause would be found, but that does not postpone the sale; the mere fact that there is an inspection prior and post-dispatch would not destroy the inter-State character of the sale; inspection at the seller's premises, and also at the premises of the buyer, is a common commercial feature; reliance placed by the revenue on **Usha Beltron Ltd. v. State of Punjab** ^[158], is misplaced, as it is not under the CST Act; the nexus test i.e, the conditions, if any, should encumber or postpone the transfer of title under Section 4(4), and the fact that passage of title and risk need not be concurrent and is left to the contracting parties, as envisaged in Section 26 of the 1930 Act, were neither brought to the notice of the Court nor argued; the final performance test would not delay transfer of title to the goods; inspection is pre-delivery and prior to sale; if the goods are rejected, no sale

takes place; if goods are approved, the same are sold inter-state; and the only requirement is to verify the actual receipt of stock, post the sale.

It is contended, on behalf of the revenue, that the inspection and certification clauses show that title has not passed during movement; most of the subject supply contracts stipulate not only a pre-despatch inspection, but also a post despatch inspection; in all these contracts the supplier becomes entitled to a portion of the payment only if the inspection is successful; the certification clauses in the L&T Konaseema Supply Contract, L&T Vemagiri Onshore Supply Contract, and Siemens Power Grid Contract, show that, in addition to post-despatch inspection, the supply contracts (as opposed to the erection contracts) also contemplate a certification after erection; by virtue of the said clause, the owner certifies as to the successful operation of the facility; the said certification is given after the owner inspects the facility, and finds that all the units and components, which have been supplied, are working; the scope of certification extends not only to the civil work, but also to the goods supplied under the supply contract; in all the contracts, the supplier becomes entitled to full payment only upon receipt of such certification; the payment is linked to successful inspection and certification; if the contract has an inspection or a certification clause, title does not pass till the inspection and certification are successful, and the buyer / owner has indicated his approval; the Supreme Court, in **Usha Belltron**¹⁵⁸, held that title passes only upon certification; and *the petitioners contention* that the taking over certificate was merely for ensuring proper quality of goods supplied, and does not relate to passing of property in the goods, is not tenable.

Clause 7.2.1 of the L&T – Konaseema supply contract records the agreement of the supplier for the goods to be tested, and to be approved to perform the site test on the materials. The site test procedures, prescribed in Appendix-I of the said contract, includes the reliability test to demonstrate that the materials can continuously operate safely, and without failure, at design conditions and requires it to work on continuous operation for seven days at various loads and modes of operation. Clause 2.10.5 of the L & T – Vemagiri onshore supply contract stipulates that, if as a result of inspection, examination, testing or re-testing, it is found that the onshore supply is

defective, or otherwise not in accordance with the agreement, the owner may reject such onshore supply. The clause requires the onshore supplier, following any such rejection, to replace or otherwise repair such goods. Clause 6.13.1 of the L & T – Vemagiri supply contract provides for final acceptance and, thereunder, final acceptance of the plant is achieved after provisional acceptance of the plant has been achieved; and, in case the civil contractor has adopted the corrective action plan, after provisional acceptance and any corrective and remedial action has been taken in respect of the plant. Clause 2.2.28 of the Seimens – RINL agreement requires the Contractor to carry out the relevant performance tests; and on satisfactory completion of the performance tests, the employer (owner) is required to issue to the Contractor a provisional acceptance certificate as per the provision of the General Conditions of the Contract.

In **Usha Beltron Ltd.**¹⁵⁸, the petitioner contended that the property in the goods had passed to the Government of India before it entered the Municipal limits; this was a contract for sale of specific goods in a deliverable state; the property in the goods passed to the buyer when the contract was made; and it was immaterial as to what was the time of delivery of the goods. Clause 5.5, of the bid document therein, provided for the issue a taking over certificate when the performance tests had been successfully carried out; and, while issuance of such a certificate would certify receipt of goods in a safe and sound condition, it would not discharge the supplier of their warranty obligations. Clause 6.1 of the bid document stipulated that delivery of the goods shall be made by the supplier in accordance with the terms of the contract; and the goods were to remain at the risk of the supplier until delivery was completed. The Supreme Court held that clause 5.5 and 6.1 of the bid document clearly indicated that the property in the goods remained at the risk of the appellant till delivery was completed; it showed that delivery would be completed only after the take-over certificate was issued; as per Section 19 of the Sale of Goods Act, the property in the goods passes when the parties intended it to pass; in this case the contract provided that property in the goods does not pass till after delivery, and after successful testing and issuance of the take-over certificate; and the High Court was right in concluding that the property in the goods had not passed

at the time the goods entered the municipal limits.

In **Chem-Dyes Corporation**³ the assessee purchased goods from Bombay, despatched them to Rajkot, and handed over the railway receipts to the purchasers of the goods at Rajkot. These purchasers, after taking delivery of the goods from the railways, carried out inspection and then made payment for the goods. The Tribunal held that, as per the relevant terms of agreement, all supplies of goods were subject to checking and approval by the purchasers; the purchasers had the right to reject the goods, at the cost of the assessee, even after taking delivery; there was no sale till the purchasers took delivery of the goods, inspected and ultimately approved them; at the time of endorsement of the railway receipts, in favour of the purchasers, the purchasers were neither required to pay nor had they paid any part of the purchase price of the goods to the assessee; the purchasers had paid the price of the goods to the assessee only after they had checked the goods, and found that they were in order; when the railway receipts were endorsed in favour of the intending purchaser by the assessee, the sale did not take place; the sale took place only after the goods reached the destination, and were inspected and approved by the purchasers; and the provisions of Section 3(b) of the CST Act were not attracted. The Division bench of the Gujarat High Court held that there was nothing to indicate that the intending purchasers had entered into an agreement to sell in which there was a stipulation regarding transfer of the property in the goods; and the property in the goods had passed only after the goods had reached the destination at Rajkot, after the intending purchaser took delivery and, thereafter, inspected and approved the same.

Section 23 of the 1930 Act stipulates that title, in a sale of future goods, passes only when the goods are in a deliverable state, they are unconditionally appropriated to the contract, and there is assent of the buyer. If the contract has a post-delivery inspection or a certification clause, the unconditional appropriation, ordinarily, takes place, and the assent of the buyer is also given, only upon inspection and certification. Under Section 24 of the 1930 Act title passes upon approval which, in the subject contracts, is only after inspection. The post-delivery inspection clauses in the subject contracts would fall within the ambit of the phrase “on approval” in Section

24 as delivery of the goods is taken only after inspection. The “taking over” certificate also shows that the buyer indicates his approval only after certification. The inspection and certification clauses in the contract would fall within the ambit of the phrase “other similar terms” in Section 24. The presence of an inspection and certification clause in the supply contract defers passing of title till the owner has expressed its assent. Such assent is given only after inspection and certification.

The law declared by the Supreme Court, in **Usha Beltron Ltd**¹⁵⁸, is binding on this Court. It is not for the High Court to distinguish a binding precedent on the specious plea that certain aspects were not noticed by the Supreme Court. Even otherwise, reliance placed on behalf of the petitioners, on Section 26 of the 1930 Act, is misplaced. Clause 2.3 (iii) of the Seimens – Power Grid contract makes it clear that, notwithstanding that title would pass to Power Grid ex-works despatch and with negotiation of despatch documents, the responsibility for all risk of loss and damage to the goods continued with the Seimens Ltd till its taking over by Power Grid on completion of erection of the plant. Section 26 stipulates that risk, prima-facie, passes with the property and, thereunder, unless otherwise agreed, the goods remain at the sellers risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer’s risk whether delivery has been made or not. Section 26 is not attracted where the contract provides otherwise. While the question, as to when title to the goods is transferred from the seller to the buyer, must be determined from the conditions stipulated in the subject contracts, if the parties have agreed that the responsibility for risk of loss and damage to the goods would be that of the supplier till erection of the plant is completed, it is evident that transfer of title to the goods was intended to pass only on erection, and not prior thereto.

Section 41(2) of the 1930 Act stipulates that, unless otherwise agreed, when the seller tenders delivery of the goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. Section 42 relates to acceptance and, thereunder, the buyer is deemed to have accepted the goods when he intimates to the seller that he

has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. The post-delivery inspection clauses, in the supply contracts, are in conformity with Section 41(2), and the certification clauses therein accord with the requirement of Section 42 of the 1930 Act.

The aforementioned clauses of the L & T, Siemens and Alstom supply agreements provide for performance of a site test of materials, inspection and testing, for rejection of the goods by the employer if the goods are found defective on inspection and testing, for a part of the price of the supplies to be made after testing and issuance of a taking over certificate, and for payment under the supply contract being conditional on performance acceptance under the service contract. The unconditional appropriation of the goods to the contract by the buyer, with the assent of the seller, under the subject contracts takes place only after the goods are tested after delivery at the site, and on performance acceptance and issuance of a “taking over” certificate. As acceptance of the goods by the buyer takes place only post-delivery within the State, the transfer of title does not take place during movement of the goods from one State to another, notwithstanding the “transit sale” clause in some of the subject contracts. As transfer of title to the goods does not pass to the employer, during movement of the goods from one State to another, the sale of goods, under the subject contracts, is not a transit sale and rejection of the petitioners claim for exemption, under Section 6(2) of the CST Act, by the respondents-authorities cannot be faulted.

(x) PAYMENT ON MILESTONE BASIS:

It is contended, on behalf of the petitioners, that Section 2(g) of the CST Act recognises that a sale is also occasioned by deferred payment of the amount due; the terms of payment as agreed upon, and the passing of title, are independent of each other; transfer of title is not kept in abeyance merely because payment is deferred; the contention, that a sale is not complete till final payment is made, if accepted, would defeat the very foundation of sales tax law that transfer is complete - whether the seller receives consideration or not; whatever restrictions apply to a normal sale, would equally apply to a deemed sale; the payment terms are not milestones; percentage-wise payment terms have been provided for supply

of goods; as the balance payment is to be paid on completion of commissioning, it implies that the goods have to perform on commissioning; there is a major difference in Private and Govt Contracts; Government Contracts link the balance 5% or 10% payment, through a cross fall breach clause, for performance of the goods supplied; in private contracts the same would be decided through mutual discussion or arbitration, and on determination of the parties responsible for the default; payment or non-payment does not defer passage of title; failure to perform the service obligations may require a repeat of the performance to the satisfaction of the employer or, at best, result in withholding of payment; and this does not defer transfer of title which takes place, without any limitation, during transit.

It is contended, on behalf of the revenue, that the conditional payment clauses show that title does not pass during movement; price is the essential characteristic of a sale; "*Price is the lynchpin of the definition of sale*" under Section 4(1) read with Section 2(10) of the 1930 Act; one of the essential characteristics of a sale is that the seller is entitled to payment only upon passing of title; if the Seller does not receive payment even after title in the goods has passed, the seller is entitled to maintain a suit for price under Section 55 of the 1930 Act; in the present case, the petitioners contend that title has passed during movement; consequently the petitioners should be entitled to complete payment after passing of title; but, under the Supply Contract, payment is made only upon successful erection; the petitioner-seller cannot maintain the suit for price, even after all the goods are supplied in a fit condition; if the erection is not successful, the seller is not entitled to payment at all; title passes only when the petitioner becomes entitled to payment after successful erection; title passes only after erection and not during movement; conditional payment is not deferred payment; an instalment payment can be characterised as a deferred payment because there is certainty of payment; and, unlike an instalment payment, the factum of payment in these contracts is subject to the satisfaction of a condition, and is uncertain.

As noted hereinabove it is the petitioners case that the subject contract is merely an agreement to sell for, if it is treated as a contract of sale, the contract, not having come into existence during the movement of

goods from one State to another, would not fall within the ambit of Section 6(2) of the CST Act. A contract of sale of goods may be defined as a mutual agreement between the owner of the goods and another that the property in the goods shall, for some price or consideration, be transferred to the other, at such a time and in such a manner, as is then agreed. (**Indian Metal and Metallurgical Corporation**¹⁵⁵). In order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to the goods, it must be supported by money consideration and, as a result of the transaction, the property must actually pass in the goods. Unless all these elements are present, there would be no sale. (**Gannon Dunkerley & Co. (I)**⁶⁴; **Hindustan Aeronautics Ltd.**⁶⁵; and **Member Board of Revenue v. Swaika Oil Mills**^[159]).

Section 4(1) of the 1930 Act stipulates that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. Section 2(10) of the said Act defines “price” to mean the money consideration for a sale of goods. Under Section 4(3) thereof, where the transfer of property in the goods is subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell which, under Section 4(4), becomes a sale when the conditions, subject to which the property in the goods is to be transferred, are fulfilled.

Clause 6.1(iii) of the Siemens – Power Grid supply contract stipulates that the balance 80%, of the ex-works price component of the equipment and materials, shall be paid progressively on certification of the engineer. From out of this 80%, 10% of the ex-works price component is to be paid only on successful completion of erection, testing and commissioning of the sub-station and issuance of the taking over certificate. Clause 4.2.2 of the Alstom – GVK and Alstom – Goutami supply contract provides that upon provisional performance acceptance of the facility, as set forth in the Services Contract, the remaining portion of the Contract Price shall be paid to the supplier. Payment under the supply contract is conditional on performance acceptance under the services contract. Similar clauses are to be found in the other supply contracts as well, and the aforesaid clauses have been referred to as illustrative of similar clauses in all the supply contracts. The aforesaid clauses show that a part of the price, to be paid for

supply of the goods, is conditional on successful completion of erection, testing and commissioning of the plant, and issuance of a taking over certificate. In other words, if the condition is not fulfilled, ie the plant is not successfully erected, the owner is not contractually obligated to pay that part of the price which is conditional on successful erection of the plant.

Under Section 55(1) of the 1930 Act where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of goods. On the property in the goods passing to the buyer (owner), the seller (petitioner-contractor) can sue the buyer for the price if the buyer wrongfully neglects or refuses to pay the price. The right to sue the owner for the price accrues to the contractor only after the property in the goods passes to the owner which, in terms of the clauses aforementioned, is only after successful completion of erection, and not prior thereto. This clause also makes it clear that the parties to the contract did not intend that the property in the goods would pass from the petitioners-contractors to the owners when the goods were in movement from one State to another.

“Price” is as an essential element of a contract of sale of goods. It is only a transfer of property in goods ***“for cash or deferred payment or any other valuable consideration”*** which constitutes a ***“sale”*** under Section 2(g) of the CST Act. **Blacks Law Dictionary** defines “deferred payment” as a principal and interest payment which is a postponed and instalment payment. The essential characteristics of a deferred payment is that, while there is certainty of payment, the payment is postponed. While the buyer is bound to make payment, a contract may provide for “deferred payment”, enabling payment to be postponed to a date even after title to the goods have passed. The essential distinction between a ***“deferred payment”*** and ***“fulfilment of conditions after which payment is to be made”*** must be borne in mind. While there is certainty of payment, and the date of payment is alone postponed, in the former, the payment is uncertain in the latter for, failure to fulfil the conditions, would mean that there is no sale of goods, and the owner is under no obligation to make payment. The contractor can only take back the goods, and cannot sue for “price”. It is only a “sale” of goods which can be subjected to tax under the CST Act, and not an agreement to

sell which does not eventually result in a sale of goods.

(xi) WHEN DOES TITLE TO THE GOODS PASS FROM THE CONTRACTOR TO THE OWNER?

It is contended, on behalf of the petitioners, that, if the goods are said not to have been sold and the title to the goods as not to have passed to the owner till accretion or incorporation, none of the clauses ie transit-insurance, free issues and liquidated damages clauses would have existed the way it had been contracted for; if the title has to pass on accretion or incorporation, as contended by the revenue, then the cost of insurance should have been borne by the contractor; equipment and material would not have been received on a free issue basis; and, if title has not passed, there would be no clause on liquidated damages as the contractor would be free to take back the goods; the title to the goods passes in transit, and during movement by way of an endorsement; for non-payment, the petitioner cannot take back the equipment already supplied; and, in the present case, the parties have clearly understood that the title passes upon delivery of the goods, or payment of price in full, whichever is earlier.

It is contended, on behalf of the revenue, that the timing of passing of title has to be ascertained by construing the subject contracts; merely because the parties say that title passes at a particular time does not, by itself, mean that title has passed at the said time; the description given by the parties is relevant, but is not decisive; the passing of title has to be ascertained by holistically examining the contract and its various clauses; and, as held in **Hindustan Shipyard Ltd.**¹⁴⁷, the Court should not only look into the form, but also at the circumstances of the transaction, the custom of the trade, and the substance of the contract document.

As the scope of Sections 4(3) & (4), 16 and 24 of the 1930 Act have already been dealt with in the earlier paragraphs, it would suffice to observe that reliance placed by the petitioners thereupon is misplaced. Section 19(1) of the 1930 Act stipulates that, where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 19(2) stipulates that, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the

parties and the circumstances of the case. Section 19(1) relates to *specific or ascertained goods*, whereas the goods in the present case are future goods as the petitioner-contractor was not in the possession of the goods when the supply contract was executed. Section 19(2) indicates that the time of passing of title has to be ascertained by looking at the terms of the contract, conduct of the parties, and the circumstances of the case. The Court is required, by Section 19(2), to go beyond the terms of the contract to ascertain the intention of the parties. In the present case, the terms of the contract itself show that title has not passed during movement. Section 19(3) of the 1930 Act stipulates that, unless a different intention appears, the rules contained in Sections 20 to 24 are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. As no different intention appears, from a reading of the contract as a whole, application of the rules contained in Sections 23 and 24 of the 1930 Act shows that the intention of the parties (the contractor-supplier and the owner-buyer), regarding the time at which the property in the goods is to pass to the buyer, is only upon completion of erection of the plant and the issue of a takeover certificate thereafter by the owner, and not when the goods are in movement from one State to another.

In **Husenali Adamji & Co.**¹⁴³ it was contended that the property in the goods passed from the respondent to WIMCO (consignee) at the railway stations within the Central Provinces as soon as the logs were loaded on the wagons and the railway receipts were taken out in the name of WIMCO. The Supreme Court held that Clause 4 of the contract required that the logs should be despatched by rail from certain stations within the Central Provinces; the contention that this clause had the effect of passing the property therein to WIMCO, at the railway stations in the Central Provinces, was, *prima facie*, sound unless there be some other provisions in the contract to negative this conclusion, ie that the logs must be carried to Ambernath and delivered there; the cumulative effect of the provisions of clause 2 that the property in the rejected logs would pass to WIMCO upon the failure of the respondent to remove the same after rejection, of clause 3 that the goods shall be delivered at Ambernath in the presence of WIMCO's Factory Manager, and of clause 6 that the prices will be "F.O.R. Ambernath"

militated against the theory of passing of property immediately on the goods being loaded into the wagons; Explanation II to Section 2(g) of the Sales Tax Act would apply only if the goods " in respect of " which the contract of sale was entered into were, at the date of such contract, actually in the Central Provinces; the goods, in respect of which the contract of sale was made, must, at the date of the contract, be in existence in the Central Provinces ie the goods must, at the date of the contract, be there in the form in which they are agreed to be sold; and there was not an iota of evidence on that point.

The law declared by Supreme Court, in **Husenali Adamji & Co**¹⁴³, is that (i) in a contract for sale of goods, the time of passing of title has to be ascertained on a reading of the contract as a whole; (ii) if the contract contemplates inspection after delivery, the title passes only upon delivery, notwithstanding the fact that the contract also contemplates pre-delivery inspection; (iii) in a contract, for the sale of future goods, title passes only when there has been a unconditional appropriation of the goods to the contract; consequently, if the contract contemplates post-delivery inspection, appropriation of the goods to the contract only happens after inspection; and a mere endorsement on the railway receipts does not transfer title.

The rule of construction, applicable to all written instruments, is that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses. Just as a document cannot be interpreted by picking out only a few clauses ignoring the other relevant ones, in the same way the nature and meaning of a document cannot be determined by its end-result or one of the results or the consequences which flow from it. The nomenclature and description given to a contract is not determinative of the real nature of the document or of the transactions thereunder. It must be determined from all the terms and clauses of the document and all the rights and results flowing therefrom, and not by picking and choosing certain clauses and the ultimate effect or result. (**Titaghur Paper Mills Co. Ltd.**⁵; **Halsbury's Laws of England, Fourth Edition, Volume 12, paragraph 1469 at page 602**). The contract must be read as a whole, and a single clause, or a few clauses, in the contract should not be read out of context to

determine the intention of the parties.

A conjoint reading of the various clauses referred to herein above (such as the title clause, the post-delivery inspection clause, the taking over certificate clause etc.) make it clear that, notwithstanding the bailment/free issues, and liquidated damages clauses, the parties to the contract intended that the title to the goods would be transferred from the contractor to the owner only after erection and commissioning of the plant, and not prior thereto. It is evident, therefore, that the title to the goods was not transferred during its movement from one State to another, but only after the goods were incorporated in the works in the State of Andhra Pradesh (now the States of Telangana and Andhra Pradesh). Consequently the revenue was justified in rejecting the petitioners' claim of the sale of goods, under the subject contracts, being subsequent sales exempt from tax under Section 6(2) of the CST Act.

(xii) CAN THERE BE AN INTER-STATE SALE IN AN INDIVISIBLE WORKS CONTRACT?

It is contended, on behalf of the revenue, that the facts of the present cases demonstrate that (a) there was no sale in the course of inter-state movement, as title did not pass during movement; (b) on a proper construction, the supply and erection contracts demonstrate an indivisible single composite works contract where title passes during incorporation; there cannot be a transit sale in an indivisible works contract, since the essential ingredient of a transit sale is that title passes during movement; and the petitioners have not been able to show a single precedent of a transit sale in an indivisible works contract.

While the submission, urged on behalf of the revenue, that there cannot be a transit sale (a subsequent sale exempt under Section 6(2) of the CST Act) in an indivisible works contract has considerable force, it is wholly unnecessary for us to examine this aspect in adjudicating the issues which arise for consideration in this batch of writ petitions. Suffice it to hold that, in the indivisible works contracts, which are the subject matter of these Writ Petitions, the various clauses of the contracts show that, notwithstanding the transit-sale clause, the parties intended to sell the goods (ie for the title in the goods to pass) only after completion of erection of the plant, and on issuance by the owner of a certificate as proof of having taken

over the turnkey project.

(xiii) CAN ONE TRANSACTION OF SALE FALL BOTH UNDER SECTION 3(a) AND SECTION 6(2) OF THE CST ACT?

It is contended, on behalf of the revenue, that a single transaction of sale would not fall both under Section 3(a) and 6(2) of the CST Act; and, as the petitioners contention that the sale of goods in the subject contracts fall within the ambit of Section 6(2) of the CST Act necessitates rejection, their contention that the transaction would also fall under Section 3(a) must be negated.

Can the very same contract of sale which occasions movement of goods from one State to another, also result in the sale of the very same goods during its movement from one state to another? Can the sale of goods to the eventual purchaser, for whose benefit and at whose instance the goods commence movement from one State to another, fall within the ambit of Section 6(2) of the CST Act? As noted hereinabove, a Section 3(b) sale can arise only during movement of goods from one State to another for, otherwise, the inter-state sale would a Sale under Section 3(a) of the CST Act.

Mere movement of goods from one state to another would not suffice. The movement must involve a sale. For instance, if dealer "A" purchases goods in State 'X' and transports it to his godown in State 'Y', the goods purchased by him in State 'X' is an intra-state sale within State "X", and the movement of goods from State 'X' to State 'Y' is otherwise than by way of a sale as dealer "A", who is transporting the goods purchased by him in State "X" to his own godown in State 'Y', cannot be said to have sold the goods to himself. Such movement of goods is not liable to tax as it is not a sale. If, during such movement of goods from State 'X' to State 'Y', dealer "A" sells the same goods to dealer "B", by transfer of documents of title, then such a sale is an inter-state sale in terms of Section 3(b) of the CST Act. If the very same goods, during its movement from State "X" to State "Y", are again sold by dealer "B" (who purchased the goods from dealer "A") to dealer "C", again by transfer of documents of title to the goods, the sale by dealer "B" to dealer "C" is a subsequent sale exempt from tax under Section 6(2) of the CST Act.

Likewise if the movement of goods from State "X" to State "Y" is occasioned by the sale of goods by dealer "A" to dealer "B" it is a Section 3(a) sale. If, during the movement of the very same goods from State "X" to State "Y", dealer "B" sells them to dealer "C", such a sale by dealer "B" (who purchased the goods from dealer "A") to dealer "C" is a subsequent sale exempt from tax under Section 6(2) of the CST Act. If, after delivery of goods in State "Y", the very same goods are again sold, and such a sale also occasions movement of goods from one state to another, then the second sale is also a Section 3(a) sale, and is not exempt from tax under Section 6(2) of the CST Act. In the illustration given hereinabove if, after the goods are delivered in State "Y", dealer "C" enters into a contract, for the sale of the very same goods, with dealer "D" in State "Z", the movement of goods from State "Y" to State "Z" is occasioned by the contract of sale between dealer "C" and dealer "D", and is a second Section 3(a) sale liable to tax under the CST Act.

The test to determine whether a sale of goods takes place in the course of inter-State trade and commerce is stipulated only by Section 3 of the CST Act. Section 6(2) merely exempts from tax the subsequent sale which takes place in the course of inter-state trade and commerce. The nature of the subject contracts, in the present batch of writ petitions, can be better explained by way of illustrations. Dealer "A" enters into a contract with dealer "C" in State "Y" that dealer "A" would purchase the goods, which dealer "C" requires, from dealer "B" in State "X"; transport the said goods from State "X" to State "Y"; during the course of movement of the goods from State "X" to State "Y", dealer "A" would sell the goods to dealer "C" by transfer of document of title; and, thereby, claim that the sale of goods by dealer "A" to dealer "C" is exempt from tax under Section 6(2) of the CST Act. If, pursuant to the contract of sale entered into between dealer "A" with dealer "C" in State "Y", dealer "A" purchases goods in State "X" from dealer "B" and, as a result, the goods move from State "X" to State "Y", the movement of the goods is occasioned by the contract of sale between dealer "A" and dealer "C" and is a Section 3(a) sale. If, during such movement, the goods are sold by dealer "A" to dealer "C" by transfer of documents of title, such a sale would not fall within the ambit of Section 6(2) of the CST Act as

the same contract of sale cannot be both a Section 3(a) sale and a subsequent sale exempt from tax under Section 6(2) of the CST Act. As the movement of goods from State “X” is only because they were intended to be sold by dealer “A” to dealer “C” in State “Y”, such a sale is the first inter-state sale liable to tax under Section 3(a) of the CST Act. The person, whose contract of sale with another has occasioned movement of goods from one State to another in terms of Section 3(a), cannot sell the very same goods to the very same person again. It is only where the purchaser of goods, under a Section 3(a) or a 3(b) sale, sells the goods to a third party, would such a sale be a subsequent sale falling within the ambit of Section 6(2) of the CST Act.

A transaction of sale is a single transaction whereby the property in the goods passes through the seller to the buyer, and there can never be two transactions of sale in one sale. (**Kalpna Glass Fibre Pvt. Ltd.**⁴⁸; **Edel Cast India v. Sales Tax Officer**^[160]). There can never be two sales between the same parties under the same contract - one under Section 3(a) and the second under Section 6(2), as a Section 3(a) sale is the first sale, and the sale exempt under Section 6(2) is the second sale which takes place when the goods are in continuous movement pursuant to the first sale. As the first sale cannot, simultaneously, be a second sale also, a Section 3(a) or a 3(b) sale cannot, at the same time, be a subsequent sale exempt from tax under Section 6(2) of the CST Act.

The intention of the legislature, in a taxation statute, is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. (**Mathuram Agrawal v. State of M.P.**^[161]; **Azadi Bachao Andolan**⁹⁸; **Bank of Chettinad Ltd. v. CIT Madras**^[162]; **Motors & General Stores (P) Ltd**¹⁰³). There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (**Mahim Patram Private Ltd. v. Union of India**^[163]; **State of West Bengal v. Kesoram Industries Ltd.**^[164]). It is no doubt true that, in case of doubt or ambiguity in the

statute, the construction, in favour of the taxpayer and against the Revenue, should be accepted. (**Mahim Patram Private Ltd.**¹⁶³; **Sneh Enterprises v. Commissioner of Customs, New Delhi**^[165]; **M/s Ispat Industries Ltd. v. Commissioner of Customs, Mumbai**^[166]). If the statutory provision does not suffer from any ambiguity, grant of a relief, in the teeth of the express provisions of the statute to the contrary, is not permissible. On equitable considerations, the Court cannot ignore or overlook the provisions of the statute. Equity must yield to the law. (**Shamsu Suhara Beevi v. G. Alex**^[167]).

On a literal construction, it is evident that a subsequent sale under Section 6(2) is akin to a Section 3(b) sale except that, while a Section 3(b) sale is the first sale in the course of inter-state trade or commerce, the sale, exempt under Section 6(2), is a second sale. This construction would also prevent leakage of revenue. The contracts, in the present batch of Writ Petitions, show that the contractors, with a view to fulfil their obligations under the contract with the owner, have purchased goods from the supplier at a lower price and, during movement of the goods intended only to reach the owner, have sold the goods to the owner at a higher price. While tax, under the CST Act, is paid by the contractor on the purchase of goods from the supplier, no tax is paid by them on the sale of goods to the owner. As the value of the goods purchased by the contractor from the supplier is far less than the value of the goods sold by the contractor to the owner, the tax paid under the CST Act is far lower than what should have been paid if the value of the goods, sold by the contractor to the owner, is taken as the measure of tax. While a subsequent sale of goods, independent of the first sale, may also have a similar effect, such a consequence was in the contemplation of Parliament, and revenue generation was consciously foregone in such cases, to ensure free and unrestricted movement of goods from one State to another.

As held in the preceding paragraphs, for a sale to be exempt under Section 6(2), the contract of sale should have come into existence, and the title to the goods should have been transferred, during movement alone. Any sale of goods prior to commencement of its movement from one State to

another, or after its completion, would not be exempt under Section 6(2) of the CST Act. It is only for this limited purpose have we examining the elaborate submissions urged by learned counsel on either side. We may not be understood to have held that the sale of goods, from the petitioner-contractor to the owner in terms of the subject contracts, is not an intra-state sale for, even if the sale does not come within the purview of Section 6(2) or Section 3(b) of the CST Act, it could still fall within the ambit of Section 3(a) of the CST Act.

IV. SECTION 3(a) OF THE CST ACT:

(i) ARE THE PETITIONERS DISABLED FROM CONTENDING THAT THE SALE OF GOODS UNDER THE SUBJECT CONTRACTS FALL WITHIN THE AMBIT OF SECTION 3(a) OF THE CST ACT, MERELY BECAUSE THEIR CONTENTION, THAT THE SUBJECT SALES, FALL UNDER SECTION 6(2) OF THE CST ACT, WAS REJECTED?

While the submission urged on behalf of the petitioners, that the sale of goods by the petitioners-contractors to the owner falls within the ambit of Section 6(2) of the CST Act, does not merit acceptance, are the petitioners thereby barred from contending that, alternatively, these transactions are sales falling within the ambit of Section 3(a) of the CST Act? Sri K. Vivek Reddy, Learned Counsel for the respondent, would submit that, since the petitioners have invoked Section 3(a) (without any foundation in the pleadings), and as an alternative argument, the respondents are making their submissions on the same; the petitioner's plea that the second sale may also be treated as a Section 3(a) sale is destructive of their claim that it is a transit sale under Section 6(2); the moment the petitioners assert that the second sale is a Section 3(a) sale, it automatically ceases to be a Section 3(b) sale and a Section 6(2) sale; the petitioners can only assert that the sale is either a Section 3(a) or a Section 3(b) sale; if the petitioners assert both, it would be a case of mutually destructive pleading; and, in the face of such destructive pleadings, the petitioners' claim that the second sale is an inter-state sale is not tenable. Reliance is placed by the Learned Counsel on **Steel Authority of India**⁹² and **Vimal Chand Ghevarchand Jain**⁹⁶ in this regard.

It is contended, on behalf of the petitioners, that reliance placed on Section 3(a) is in the alternative, and is to the effect that the contract with the

owner had occasioned inter-State movement of goods from the other State from known vendors; these are not mutually destructive arguments; reliance placed on **Steel Authority of India**⁹² is misplaced; and, in taxing statutes, alternate arguments can be raised without prejudice to each other.

The contention, urged on behalf of the respondent, that the petitioner's plea that the subject transactions are exempt from tax under Section 6(2) is mutually destructive of their plea that it is a Section 3(a) sale, is only to be noted to be rejected. It is no doubt true that pleadings of the parties are required to be read as a whole; although alternative and inconsistent pleas can be raised, pleas which are mutually destructive of each other cannot be permitted, (**Vimal Chand Ghevarchand Jain**⁹⁶; **Ranganayakamma v. K.S. Prakash (dead)**^[168]), when a definite stand is taken, it would not lie in the mouth of the petitioner to take a contradictory and inconsistent plea, and to raise a mutually destructive plea is impermissible in law. (**Steel Authority of India**⁹²).

It cannot, however, be lost sight of that acquiescence or consent would not confer jurisdiction on the assessing/revisional authorities to levy tax, under the AP VAT Act, on inter-state sales. In view of Article 265 of the Constitution, no tax can be recovered which is not permitted by law. The executive can neither levy tax, (**National Mineral Development Corpn. Ltd. v. State of M.P.**,^[169]), nor can it take recourse to the process of interpretation of a statute, (**Indian Banks' Association v. Devkala Consultancy Service**^[170]), to levy tax contrary to law. The consent of parties does not, by itself, confer jurisdiction upon a statutory authority. It is not open to the parties to confer, by their agreement, jurisdiction on a Court/Tribunal which it does not possess. The distinction lies in the jurisdiction to decide matters, and the ambit of the matters to be heard by a Tribunal having jurisdiction to deal therewith. While, in the latter, the question of acquiescence or irregularity may be considered and overlooked, in cases where the question is of the jurisdiction of the Court/Tribunal to make the order, no question of acquiescence or consent can affect the decision. (**U.C. Bank v. Their Workmen**^[171]; and **Hakam Singh v.**

**Gammon (India) Ltd^[172]; Estate Officer and Manager (Recoveries),
APIIC Ltd. v. Recovery Officer, Debts Recovery Tribunal^[173].**

Be it a Section 3(a) or a 3(b) or a 5(2) sale or a sale exempt under Section 6(2) of the CST Act, the respondents lack jurisdiction to subject such sales to tax under the A.P. VAT Act treating them as intra-state sales. Even if the petitioners had not contended, alternatively, that it is a Section 3(a) sale, their acquiescence or consent would not confer jurisdiction on the respondents to subject these transactions to tax under the AP VAT Act. If, from the material on record, it can be established that the sale is a Section 3(a) sale, then the jurisdiction of the respondent authorities to levy tax on such sales, under the AP VAT Act, is ousted. While an inter-state sale cannot fall within the ambit of both Sections 3(a) and 6(2) of the CST Act at the same time, our conclusion, that the subject sales are not exempt under Section 6(2) of the CST Act, would not bar the petitioners from contending that the transaction falls within the ambit of Section 3(a) of the CST Act.

(ii) SECTION 3(a) SALE: ITS SCOPE:

It is contended, on behalf of the petitioners, that the assessing authority did not dispute the fact that the goods were manufactured to the design and the specifications of the contracting parties; the transaction would, therefore, qualify as an inter-state sale by reason of the inter-state movement of goods pursuant to the contract between the parties which contemplated such movement from outside the State; after inspection by the contracting parties alone, did the goods start moving; appropriation to the contract took place outside the State itself, and movement of goods was from outside the State; the respondent has not denied the fact that the goods were manufactured and moved as per the terms of the contract; the goods, involved in the execution of these works contracts, are specific goods tailor made for the particular project, and are required to be procured only from approved vendors from outside the State; the petitioner placed orders on the concerned vendors for manufacture and supply of equipment; after manufacture, inspection and pre-despatch tests were carried out in the presence of the owner; after satisfactory inspection, and approval of the test report by the customer, the goods were cleared for despatch; the vendors handed the goods over to the carrier; there is no diversion of the specified

goods to others; the petitioner could not have offered these goods to others without committing breach of the supply agreement; and the inextricable link between the inter-state movement of the goods and the works contract is evident from the fact that there is a pre-despatch inspection by the contractee/owner or through his agent.

Sri K. Vivek Reddy, Learned Special Counsel, would submit that the alleged sales, under the supply agreements, do not satisfy the requirement of a Section 3(a) sale for the following reasons: (a) movement of goods was pursuant only to an agreement of sale, and not of sale; (b) even if there was a sale, the sale agreement did not occasion the inter-state movement; the inter-state movement of goods was pursuant to the contract between the supplier and the petitioner-contractor, and not between the petitioner-contractor and the owner; the deeming fiction in Section 3(a) lays down the following ingredients: (a) there must be a sale or purchase; and (b) the sale or purchase must occasion the inter-state movement; a sale occasioning inter-state movement (Section 3(a)), export (Section 5(1)) or import (Section 5(2)), would arise only if there is privity between the seller and the foreign buyer; if there is any intermediary to effect the sale, it is not exempt from tax; to overcome the ruling in **Mohd. Serajuddin v. State of Orissa**^[174], the Parliament introduced Section 5(3) in the CST Act which is confined only to exports; the law declared by the Constitution Benches of the Supreme Court, in **Ben Gorm**¹⁴⁴; **Coffee Board v. Jt. CTO**^[175]; **Binani Bros v. Union of India**^[176] and **Serajuddin**¹⁷⁴, continue to hold the field in respect of a Section 3(a) or a 5(2) sale; if Parliament intended to dispense with the rule of privity, and thereby include even two sales, it would have extended the scope of the amendment even to imports and inter-state sales; the interpretation of “sale occasioning movement” under Section 3(a) may be summarized as follows: (a) the sale must be the immediate and direct cause of the inter-state movement of goods; if the movement was under any other contract, it is not a Section 3(a) sale; (b) there must be an inextricable link between the contract and the inter-state movement of goods; (c) there must be privity between the seller and the final purchaser, pursuant to which there must be inter-state movement of goods; the judgments cited by the

petitioners, in **K.G. Khosla & Co. (P) Ltd. v. Deputy Commissioner of Commercial Taxes, Madras Division, Madras**^[177] and **English Electric Company India v. DCT**^[178], are distinguishable; the judgment in **Indure**⁷⁵, was rendered on the peculiar facts and circumstances of the case, the Supreme Court did not dispense with the requirement of privity or inextricable relationship as held in the Constitution Bench judgments in **Binani Bros**¹⁷⁶, **Coffee Board_(I)**¹⁷⁵ and **Serajuddin**¹⁷⁴, the Court did not even consider the ruling of the Constitution Bench in **National Thermal Power Corporation**¹³⁶), and it did not differ with the ruling in **K. Gopinanthan Nair v. State of Kerala**^[179]; the sale, between the petitioner-contractor and the owner, did not occasion the inter-state movement under Section 3(a) for the following reasons: (i) the inter-state movement was under the penultimate contract i.e., under the contract between the supplier and the petitioner-contractor; (ii) the sale contract with the owner did not immediately cause the inter-state movement; (iii) there was no privity between the supplier, who was effecting the movement, and the owner who was the end consumer; and (iv) the supplier-contractor supply contract, and the contractor-owner contract, are separate and independent contracts.

Let us refer, *albeit* briefly, to the judgments relied upon by the petitioners. In **The State of Bihar v. Tata Engineering and Locomotive Co. Ltd.**^[180], the Supreme Court held that the dealers of the respondent-company were required, under the contract, to remove the trucks, purchased by them, from the State of Bihar to places outside Bihar; they would have committed breach of their contracts, and incurred the penalty prescribed in their dealership agreements, if they had failed to abide by the terms requiring them to move the goods outside the State of Bihar; where, under the terms of a contract of sale, the buyer is required to remove the goods from the State in which he purchased those goods to another State, and when the goods are so moved, the sale in question must be considered as a sale in the course of inter-State trade or commerce; and the ratio of the decision in **Coffee Board (I)**¹⁷⁵, did not bear on the facts wherein, under the terms of the contract of sale, the purchasers were required to remove the

goods from one State to another State.

In **Union of India v. K.G. Khosla and Co. Ltd.**^[181], the Supreme Court observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. A similar view was expressed in **Sahney Steel and Press Works Ltd. v. CTO**^[182]; and **National Thermal Power Corpn. Ltd.**,¹³⁶.

In **DCM Ltd. v. CST**^[183], the Supreme Court held that taking delivery of the goods in Delhi by the purchasing dealers, for their assigned territories outside Delhi, would not take away the transactions from the category of inter-State sales; the determinative test to be applied was whether the purchasing dealers were obliged contractually to remove the goods from Delhi, (in which they were bought), to the assigned territories; and whether, in fact, the goods stood actually removed.

In **Asea Brown Boveri Ltd. v. State of Karnataka**^[184], it was contended, on behalf of the revenue, that movement of the goods from outside the State was neither as a result of the contract nor was it incidental to the contract; the General Conditions of Contract did not mention about inter -State vendors; and, therefore, it could not be stated that the goods were moved in pursuance of the contract. The Karnataka High Court Division bench held that, in the present case, the movement of goods from one State to another may or may not be as a result of a covenant, but it was definitely an incident of the contract.

A sale, in the course of inter-State trade, has three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, (express or implied), regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. (**National Thermal Power Corpn. Ltd.**,¹³⁶; **Manganese Ore (I)**

Ltd. v. Regional Asst. Commissioner^[185]; **Balabhagas Hulaschand**¹³⁸). The State Legislature cannot, by law, treat Section 3(a) sales as “sales within the State” as it is within the exclusive domain of the appropriate legislature i.e. Parliament to fix the location of the sale by way of a legal fiction or otherwise. The State, where the goods are delivered in the transaction of an inter-State sale, cannot levy a tax on the basis that one of the events in the chain has taken place within the State. (**National Thermal Power Corpn. Ltd.**,¹³⁶; **20th Century Finance Corpn.**¹³⁷; **Builders Association of India v. Union of India**^[186]). Whenever a question arises whether a sale is an inter-State sale or not, it has to be answered with reference to Section 3 alone. (**Zunaid Enterprises**⁴⁷; **S.R. Sarkar**¹⁰⁶).

A sale being, by definition, a transfer of property becomes taxable under Section 3(a) if the movement of goods from one State to another is under a covenant or incident of the contract of sale, and the property in the goods passes to the purchaser otherwise than by transfer of documents of title when the goods are in movement from one State to another. It does not matter in which State the property passes. (**S.R. Sarkar**¹⁰⁶). The sale must be shown to have occasioned the movement of the goods from one State to another. The movement must be the result of a covenant or incident of the contract of sale (**State of Bihar v. TELCO**¹⁸⁰; **Ben Gorm**¹⁴⁴; **State Trading Corporation of India Ltd. v. State of Mysore**^[187]; **K.G. Khosla & Co. (P) Ltd. (I)**¹⁷⁷; **Singareni Collieries Co. v. Commissioner of Commercial Taxes, Hyderabad**^[188]; **Sahney Steel and Press Works Ltd.**¹⁸²; **State of Orissa v. K.B.Saha & Sons Industries (P) Ltd.**^[189]; **TELCO Ltd.**⁶²; and the property in the goods may pass in either State. (**K.B.Saha & Sons Industries (P) Ltd.**¹⁸⁹; **Commissioner of Sales Tax v. Bakhtawar Lal Kailash Chand Arhti**^[190]; **K.G. Khosla & Co. (II)**¹⁸¹; **S.R. Sarkar**¹⁰⁶; **Cement Marketing Co. of India v. State of Mysore**^[191]; **State Trading Corporation of India**¹⁸⁷; **Singareni Collieries Co.**¹⁸⁸; **State of Jammu &**

Kashmir v. Caltex (India) Ltd.^[192]; and **Oil India Ltd. v. The Superintendent of Taxes**^[193]). What is decisive is whether the sale is one which occasions the movement of goods from one State to another. (**English Electric Co. of India Ltd.**¹⁷⁸; **National Thermal Power Corpn. Ltd.**,¹³⁶). Such movement, may be express, implied or incidental but should be inseparably connected with the transaction. (**M.M. Traders**¹⁵⁶).

Even if the agreement does not expressly provide for movement of the goods, if the parties envisaged movement of goods, pursuant to the contract, from one State to another, such movement of the goods is an incident of the contract of sale. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. (**O i I India Ltd.**¹⁹³; **Balabhagas Hulaschand**¹³⁸). It is also immaterial whether the property in the goods passes in one state or another, (**Indian Oil Corporation Ltd. v. Union of India**^[194]; **S. R. Sarkar**¹⁰⁶; **Kelvinator of India Ltd. v. The State of Haryana**^[195]; **English Electric Company of India Ltd.**¹⁷⁸; **Oil India Ltd.**¹⁹³; **State Trading Corporation**¹⁸⁷; **Balabhagas Hulaschand**¹³⁸ and **K. G. Khosla & Co. (P) Ltd. (II)**¹⁸¹, or whether a completed sale precedes the movement of goods or follows it. What is important is that the movement of goods and the sale must be inseparably connected. If the goods move from one State to another pursuant to an agreement of sale, and the sale is completed in the other State, it is an inter-State sale. (**K.B. Saha & Sons Industries (P) Ltd.**¹⁸⁹; **Bakhtwar Lal Kailash Chand Arhti**¹⁹⁰).

In order to occasion the transportation of goods there must exist such a bond, between the contract of sale and the actual transportation outside the State, that each link is inextricably connected with the one immediately preceding it. Where the transportation is the result of a sale, the transportation being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the mutual understanding between the buyer and the seller arising from the nature of the transaction, the sale must be held to be in the course of inter-State trade or commerce.

(**Commissioner of Commercial Taxes v. Bhag Singh Milkha Singh**^[196];
State of Travancore-Cochin v. Bombay Co. Ltd., Alleppey^[197]; **Ben Gorm**¹⁴⁴; and **State of Travancore-Cochin v. Shanmugha Vilas Cashew-nut Factory**^[198]). If the inter-state movement of goods was within the contemplation of the parties, and if a reasonable presumption can be drawn that, to fulfill the terms of the contract, such inter-state movement of goods is necessary, it would fall under Section 3(a) of the CST Act. (**ABB Limited v. Commissioner, Delhi Value Added Tax**^[199]). What is important is that the movement of goods and the sale must be inseparably connected. (**K.B. Saha and Sons Industries (P) Ltd.**,¹⁸⁹).

Even if there is a conceivable link between the movement of the goods and the buyer's contract and if, in the course of inter-State movement, the goods move only to reach the buyer in satisfaction of his contract of purchase, and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have taken place in the course of inter-State trade or commerce as such a sale or purchase occasioned the movement of the goods from one State to another. (**English Electric Company of India Ltd.**¹⁷⁸). Where the transfer invoices denote the same quantity, and such goods are dispatched to identified customers, these dispatches, from one State to another to an identified customer, result in an inter-State sale. (**Swastik Rubber Products (P) Ltd. v. Commissioner of Sales Tax, UP**^[200]; **Bombay Metal Depot**¹³⁹).

Where the movement of goods from one State to another is inextricably connected with the sale/purchase, the purchase and transport are but parts of one transaction. They cannot be dissociated, and there is no break between the purchase and the movement of the goods to another State. It is sufficient if the movement of goods is implicit in the sale, and the sale and movement of goods are not unconnected and dissociated transactions. (**The Co-operative Sugar (Chittur) Ltd. v. State of T.N.**^[201]). The question whether the movement of goods, from one State to another, is as a result of a covenant in the contract of sale or an incident thereof, will depend on the contract. (**State Trade Corporation of India**

Ltd.¹⁸⁷).

To make the sale, one in the course of inter-State trade or commerce, there must be an obligation to transport the goods outside the State. The obligation may be of the seller or the buyer and it may arise by reason of a statute, a contract between the parties, or from mutual understanding or agreement between them or even from the nature of the transaction which linked the sale to such transportation. Such an obligation may be imposed expressly under the contract itself or impliedly by a mutual understanding. It is not necessary that, in all cases, there must be direct evidence showing such obligation in a written contract or oral agreement. Such obligations are inferable from circumstantial evidence also. (**Bhag Singh Milkha Singh**¹⁹⁶; **Shankerjee Raut Gopalji Raut v. State**^[202]).

Each case turns on its own facts and the question is whether, applying the settled principles to the facts of the present cases, the deemed sale of goods can be said to be inter-state sales. An attempt to show that some of the factors present in the instant cases are present or absent in some other cases, in which the sale was held either to be a local sale or an inter-state sale, hardly serves any useful purpose. (**Indian Oil Corporation Ltd.**¹⁹⁴). In the present batch of Writ Petitions, the link is the requirement of the supply contracts. Article 3 of the L&T Konaseema supply contract relates to sub-suppliers. Appendix - E is the list of major suppliers agreed to by the parties, and from which the contractor shall select for the provision of materials under the contract. The agreement between Seimens and Powergrid required Seimens to procure items from the suppliers appearing in the "Compendium of Suppliers" as agreed to by Power Grid. Article 3.1 of the Alstom-GVK supply contract refers to Appendix - K which contains a list of suppliers agreed to by the parties, and from whom Alstom was obligated to select the suppliers.

Clause 2.6.1 of the L&T-Konaseema supply contract confers a right on the owner to depute personnel to the manufacturers factory to witness test of material as identified in Appendix – J to the agreement. Under the Seimens-Powergrid agreement, Power Grid reserved the right to associate itself with the inspection of the goods after it is manufactured by the suppliers. Clause 2.1.4 of the Alstom-GVK supply contract gives an option

to GVK or its representative to be present at all inspections. The aforesaid clauses show that the owner was associated with the goods right from the inception. Not only did they identify suppliers from whom alone the petitioner-contractors were obligated to purchase the goods, they were also actively involved in other aspects of the supply (including ensuring quality of the goods supplied), reserving to themselves the right to inspect the goods at the manufacturer's site before commencement of its movement etc.

The goods moved from one State to another, in satisfaction of the contractual obligations of the petitioners-contractors under the supply contracts, only to reach the site where they were incorporated in the works of the owner resulting in a sale/deemed sale of goods. The nexus between the transportation of goods from one State to another is otherwise inexplicable. As there is a conceivable link, between the movement of goods and its sale, it is an inter-state sale. The inter-State movement is integrally and inextricably connected to the contract, and the mere fact that the goods were delivered within the State, and appropriation took place thereat, is of no consequence. It does not matter in which State the property in the goods passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. (**English Electric Co.**¹⁷⁸).

(iii) SECTION 3(a) OF THE CST ACT: THE WORD “SALE” USED THEREIN INCLUDES AN AGREEMENT TO SELL:

It is contended, on behalf of the petitioners, that, even assuming that the supply contracts are only agreements to sell, and the sale is not complete until the entire consideration is paid to the petitioner, such transactions would nonetheless constitute inter-state sales; sale of goods under Section 3 includes an agreement to sell; an agreement to sell is also a sale within the meaning of Section 2(g) of the CST Act; once it is accepted that there is inter-state movement of goods within the contemplation of all the three parties i.e, the manufacturer/supplier, intermediate seller and the ultimate buyer and, as a result of the agreement to sell, the contracted goods move from one State to another, both the first sale and the second sale can only be inter-state sales.

It is contended, on behalf of the revenue, that, for Section 3(a) to apply, there must be a contract of sale which results in passing of title;

consequently, an agreement of sale would not fall within the ambit of “sale” because it does not have the effect of transferring title; the supply agreements, between the petitioners and the owners, do not relate to specific goods, but to “future goods”; since the supply agreement seeks to pass title in future goods, the said agreement does not result in passing of title in the goods, and it is only an agreement to sell; the title passes only when the goods have come into existence, and when the same have been unconditionally appropriated to the contract; and, consequently, any movement pursuant to the supply agreement, which is only an agreement to sell, is not a “sale occasioning movement”.

A purchase made inside a State, for sale outside the State, cannot by itself be held to be in the course of inter-State trade. (**Endupuri Narasimham & Son v. State of Orissa**^[203]; **Bengal Immunity Company Limited**¹²). To make a sale in the course of inter-State trade, it is necessary that the contract must envisage the completion of the sale as well as the movement of the goods to the other State in the course of inter-State trade. (**State of Orissa v. Johrimal Gajanand**^[204]). A sale consists of three logical steps - (i) there is an offer; (ii) there is an agreement to sell when the offer is accepted; and (iii) in pursuance of the said agreement a concluded sale takes place. When the statute uses the words "sale or purchase of goods" it automatically attracts the definition of sale of goods as given in Section 4 of the 1930 Act. (**Balabhagas Hulaschand**¹³⁸). In order to constitute a sale there must be (1) an agreement to sell, by which alone the property does not pass; and (2) an actual sale by which the property passes. The definition of a contract of sale, in **Benjamin on Sale, (8th Edn.)**, includes an agreement to sell as well as an actual sale. (**The Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash**^[205]; **Balabhagas Hulaschand**¹³⁸). An agreement to sell, by which the property does not actually pass, is also an element of sale. (**Balabhagas Hulaschand**¹³⁸).

After taking note of the judgment of the Supreme Court, in **S.R. Sarkar**¹⁰⁶, wherein it was held that a transaction of sale is subject to tax under the CST Act on the completion of the sale, and a mere contract of sale

is not a sale within the definition of “Sale” in Section 2(g), the Supreme Court, in **Balabhagas Hulaschand**¹³⁸, held that the word 'sale' defined in Section 2(g), and used in Section 3 and other Sections of the CST Act, is wide enough to include not only a concluded contract of sale but also a contract or agreement of sale provided the agreement of sale stipulates a transfer of property or movement of goods. Judgment of smaller benches of the Supreme Court, interpreting the judgment of a larger bench of the Supreme Court, is binding on the High Court. (**Sakinala Harinath v. State of A.P.**^[206]). As the Constitution bench judgment of the Supreme Court in **S.R. Sarkar**¹⁰⁶ was considered by the two judge bench of the Supreme Court in **Balabhagas Hulaschand**¹³⁸, the law declared in **Balabhagas Hulaschand**¹³⁸, that the word “sale” used in Section 2(g) and 3 of the CST Act would include an agreement to sell, is binding on the High Court.

In **Consolidated Coffee Ltd. v. Coffee Board**^[207], the Supreme Court held that what was said in **Balabhagas Hulaschand**¹³⁸ was that the word “sale”, as used in Section 3 (a) and Section 4(2) (a) and (b) of the CST Act was wide enough to include not only a concluded contract of sale but also an agreement of sale provided that the latter stipulated that there was a transfer of property or movement of goods; and the ratio of that decision was inapplicable to Section 5(3) which dealt with the question as to when a penultimate sale shall also be deemed to be in the course of export. It is evident that, atleast for the purposes of Section 3(a) of the CST Act, the word “sale” would include within its ambit an agreement of sale also.

In so far as Section 3(a) of the CST Act is concerned, there is no distinction between unascertained or future goods and goods which are already in existence if, at the time when the sale takes place, these goods have come into actual existence. (**K.G. Khosla and Co. Ltd.**¹⁸¹; **National Thermal Power Corpn. Ltd.**,¹³⁶; and **Manganese Ore (India) Ltd.**¹⁸⁵). For the purpose of application of Section 3 (a) of the CST Act, the question whether the contract is a forward contract or not makes no material difference. (**Balabhagas Hulaschand**¹³⁸). The submission of Sri K.Vivek Reddy, Learned Special Counsel, that movement of the goods, pursuant to the supply contracts, is not a “sale occasioning movement” is, therefore, not

tenable.

The combined effect of Section 3 of the CST Act and Section 4 of the 1930 Act is that an agreement to sell is also an essential ingredient of sale provided it contains a stipulation for transfer of goods from the seller to the buyer. If there is a movement of goods from one State to another, not in pursuance of the sale itself, but pursuant to an agreement to sell, which later merges into a sale, such movement would be deemed to have been occasioned by the sale itself wherever it takes place. (**Balabhagas Hulaschand**¹³⁸). The subject supply contracts, which are agreements of sale, contain stipulations obligating the petitioner – contractors to supply the goods to the owner. Failure to supply the goods, purchased by them from outside the State, to the owner whose works are being executed within the State, would have resulted in a breach of the supply contracts. Notwithstanding that the supply contracts are agreements to sell, the said contracts have occasioned movement of the goods from one State to another, eventually to reach the owner. Such agreements of sale fall within the ambit of Section 3(a) of the CST Act.

For a sale, to be held to be a Section 3(a) sale in the course of inter-State trade or commerce, the situs of the sale is wholly irrelevant as regards its inter-State character. (**Triveni Engineering & Industries Ltd. v. State**^[208]; **Onkarlal Nandlal v. State of Rajasthan**^[209]; **Bengal Immunity Co. Ltd.**¹²; **Gannon Dunkerley & Co. (II)**⁶³). Even an inter-State sale must have a situs, and the situs may be in one State or another. (**Onkarlal Nandlal**²⁰⁹; **Gannon Dunkerley & Co. (II)**⁶³). The mere fact that the goods have been delivered to the owner within the State does not empower the respondents to levy tax on such inter-state sale of goods, treating them as intra-state sales under the A.P. VAT Act.

(iv) SECTION 4(7)(g) OF THE AP VAT ACT:

It is contended, on behalf of the petitioners, that Section 4(7)(g) was inserted in the AP VAT Act after the decision in **Larsen & Toubro Limited v. State of Andhra Pradesh**^[210]; the Commissioner of Commercial Taxes, in his circular dated 23.1.2006, has held that if there is a contractual obligation to import goods from other States, and such movement has an

inextricable link with the contract, such value should be excluded from the scope of levy of VAT; the impugned assessment orders, raising the demand, are contrary to the circular of the Commissioner; if the goods have moved from outside the State, and have been used in contract, the States have no power to levy tax; and such turnover is protected from State levy in view of the restrictions under Article 286 of the Constitution of India read with Section 4(7)(g) of the AP VAT Act.

Section 4(7)(g) of the AP VAT Act, (as inserted by Act 5 of 2007 dated 22.01.2007 with effect from 01.09.2006), stipulates that, notwithstanding anything contained in clauses (a) to (f) of Section 4(7), no tax shall be leviable on the turnover relating to the transfer of property in goods, whether as goods or in some other form involved in the execution of a works contract, if such transfer from the contractor to the contractee constituted a sale in the course of inter-State trade or commerce under Section 3 or a sale outside the State under Section 4, or a sale in the course of import or export under Section 5 of the CST Act.

The power of the State Legislature to enact a law to levy tax, with reference to Entry 54 of List II of the Seventh Schedule has two limitations: the first arising out of the entry itself, and the second flowing from the restriction embodied in the Constitution. The bans imposed by Articles 286 and 269, on the taxation powers of the State, are independent and separate and must be crossed before a State Legislature can impose tax on transactions of sale or purchase of goods. (**National Thermal Power Corpn. Ltd.**,¹³⁶; **Bengal Immunity Co. Ltd.**¹² **Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax**^[211]). The power of the State Legislature, under Entry 54 in List II, remains subject to Article 286 and Entry 92-A of List I of the VII Schedule to the Constitution whereunder Parliament alone has the power to levy taxes on the sale of goods where such sale takes place in the course of inter-state trade and commerce. This principle that, in cases covered by Sections 3, 4 and 5 of the CST Act, the State Legislature has no competence, to provide for the levy of sales tax, would apply even in the case of works contracts, where an indivisible contract is made divisible by the legal fiction introduced by legislation made pursuant to the 46th amendment to the Constitution. (**Thomson Press (I) Ltd.**⁶⁸; **Asea**

Brown Boveri Ltd.¹⁸⁴; **East India Cotton Manufacturing Company**⁵⁶; **Gannon Dunkerly & Co. (II)**⁶³). A sale, in the course of inter-state trade or commerce cannot be taxed by a State Legislature even if its situs is within the State, as the State Legislature lacks legislative competence to impose a tax on such a sale, which can only be imposed by Parliament. If, therefore, a question arises whether a sale is exigible to tax by the State Legislature, the answer thereto is to be found by ascertaining whether or not it is a sale in the course of inter-state trade or commerce. (**Onkarlal Nandlal**²⁰⁹).

The State Legislature cannot frame its law in a manner as to convert an outside sale or a sale in the course of import or export into a sale inside the State. Even works contracts, assessable under the A.P. VAT Act, are subject to Sections 3, 4 and 5 of the CST Act. As noted hereinabove Section 4 of the CST Act, which provides when a sale or purchase is said to take place inside the State, is subject to Section 3 of the CST Act. (**Gannon Dunkerley & Co. (II)**⁶³; **Larsen & Toubro**¹⁵²). If a sale of goods falls within the ambit of Section 3(a) of the CST Act, the State legislature cannot subject it to tax under the State Act. By introducing Section 4(7)(g) in the A.P.VAT Act, the State Legislature has recognised that there can be a deemed inter-state sale under clauses (a) & (b) of Section 3, and a deemed sale in the course of import under Section 5(2) of the CST Act involved in the execution of a works contract. It also acknowledges that such a deemed sale, either under Section 3(a) & (b) or under Section 5(2) of the CST Act, cannot be subjected to tax under the A.P. VAT Act.

(v) INTER-STATE WORKS CONTRACTS:

It is contended, on behalf of the petitioners, the impugned orders failed to notice that there is an inter-state movement of goods, and such movement is occasioned by the works contract executed by the petitioner for the owner/contractee; the contracts with the owner occasioned the inter-state movement, and delivery is effected to the owner at the site; the petitioner has procured the goods from outside the State as a necessary requirement under the contract, and the movement of such goods is incidental to the deemed contract of sale; and, even if it is assumed that the actual sale took place within the State, in view of the undisputed fact that the goods moved from another State into the State, as a result of the contract

between the parties, it is an inter-state contract of sale; in inter-State works contracts, the theory of incorporation has no bearing on taxability; and after the 46th amendment to the Constitution, even in the case of deemed sale of goods in an indivisible contract, the value of the goods and the service turnover are to be segregated in the inter-state movement of goods involved in the execution of a works contract, as in the case of a normal sale.

For sustaining the levy of tax on the goods, deemed to have been sold in the execution of a works contract, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form.

(**Larsen and Toubro Ltd.**⁷⁰). Section 2(ja) of the CST Act, (as inserted by Act No.18 of 2005 with effect from 01.04.2005), defines “works contract” to mean a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing etc of any movable or immovable property. Where the main object of the work, undertaken by the payee of the price, is not the transfer of a chattel qua chattel, the contract is one for work and labour. (**Hindustan Shipyard Ltd.**¹⁴⁷). Where the finished product supplied to a particular customer is not a commercial commodity in the sense that it cannot be sold in the market to any other person, the transaction is only a works contract. (**Commissioner of Sales Tax v. Prabhudayal Prem Narain**^[212]; **Thomson Press (I) Ltd.**⁶⁸; **The Court Press Job Branch, Salem v. State of Tamil Nadu**^[213] and **Commissioner of Sales Tax, MP v. Ratna Fine Arts Printing Press**^[214]). For being classified as a works contract the transaction, under consideration, must be a composite transaction involving both goods and services. If a transaction involves only service, i.e. work and labour, then it cannot be treated as a works contract. (**Pro Lab.**⁶⁹).

The expression “sale of goods” in Entry 48 of List II of the VII Schedule to the Government of India Act, 1935 had the same meaning which it had in the Sale of Goods Act, 1930. (**Banarsi Das Bhanot**⁷¹). As a similar expression is used in Entry 54 of List II to the VII Schedule to the

Constitution, the meaning of “goods” under Section 2(7) of the Sale of Goods Act was held applicable to Entry 54 as well. In **Gannon Dunkerley & Co. (I)**⁶⁴, the Supreme Court held that, to constitute a transaction of sale there should be an agreement, express or implied, relating to the goods to be completed by passing of title in those goods; both the agreement and the sale should relate to the same subject-matter; where the goods delivered under the contract are not the goods contracted for, the purchaser has the right to reject them, or to accept them and claim damages for breach of warranty; there cannot be an agreement relating to one kind of property and a sale as regards another; and, on a true interpretation of the expression “sale of goods”, there must be an agreement between the parties for the sale of the very goods in which, eventually, the property passes.

Even after the decision of the Supreme Court in the **Gannon Dunkerley (I)**⁶⁴, it was possible that, where a contract consisted of two parts, namely, one part relating to the sale of material used in the execution of the work by the contractor to the person who had assigned the contract, and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. In order to overcome the effect of the decision of the Supreme Court, in **Gannon Dunkerly (I)**⁶⁴, Parliament, by the 46th amendment to the Constitution, amended Article 366 by introducing sub-clause (b) of clause (29-A).

The law declared by the Supreme Court in **Gannon Dunkerley-I**⁶⁴, wherein the expression “sale” was given a restricted meaning by adopting the definition of “sale” in the Sale of Goods Act, has been undone by the Forty-sixth Constitutional Amendment so as to include works contracts. (**Larsen and Toubro Ltd. v. State of Karnataka**^[215]). The expression “sale or purchase of goods”, which was an undefined expression prior to the 46th amendment, was defined under Article 366 (29-A). The transfer of goods, utilised by a contractor in the execution of a works contract, is deemed to be a sale of goods in favour of the owner under the legal fiction

created under Article 366(29A)(b). (**Larsen & Toubro**¹⁵²). After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which sales tax was leviable on the price of the goods and the material supplied in a contract which had been entered into in two distinct and separate parts.

By use of the expression “in some other form”, in Article 366(29-A)(b), the ordinary understanding of the term “goods” has been enlarged by bringing within its fold goods in a form other than as goods. In other words, goods which, by incorporation, have become a part of immovable property are deemed to be goods. The definition of “tax on the sale or purchase of goods” includes a tax on the transfer of property in the goods as goods or goods, which because of its usage in the execution of a work contract, has lost its original form as goods, and has acquired some other form. (**Larsen and Toubro Ltd.**⁷⁰; **Pro Lab.**⁶⁹; **Kone Elevator India (P) Ltd.**⁶⁷). Article 366(29-A)(b) serves to bring transactions, where the essential ingredients of “sale” defined in the Sale of Goods Act, 1930 are absent, within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be a sale even though it may not be a “Sale” within the meaning of the Sale of Goods Act. (**Larson and Toubro**²¹⁵).

The term ‘works contract’, in [Article 366\(29-A\)\(b\)](#), encompasses a wide range and many varieties of contracts. Once the characteristics or elements of a works contract are satisfied in a contract then, irrespective of the additional obligations, such a contract would be covered by the term ‘works contract’. Nothing in [Article 366\(29-A\)\(b\)](#) limits the term “works contract” to a contract for labour and service only, and it is a contract for undertaking or bringing into existence some “works”. The Parliament had all genre of works contract in view when clause 29-A was inserted in [Article 366](#). (**Pro Lab.**⁶⁹; **Kone Elevator India Pvt. Ltd.**⁶⁷; **Larsen and Toubro Ltd.**⁷⁰). The narrow meaning given to the term “works contract” in **Gannon Dunkerley (1)**⁶⁴ now no longer survives. (**Larsen and Toubro Ltd.**²¹⁵). The contracts, which are the subject matter of these Writ Petitions, are all composite transactions involving both sale of goods and rendering of

services. These contracts were entrusted to the petitioner – contractor for erection and installation of plants in turn-key projects. As these contracts are for undertaking or bringing into existence “works”, they are all “works contracts”.

The judgments in **Usha Breco Ltd**⁵⁴; **Larsen & Toubro Limited**¹; **Dwaraka Prasad Radhey Ramalal**⁵⁵; **ECE Industries Ltd**¹⁴⁰; **Sundaram Industries Limited**¹¹² and **Asea Brown Boveri Ltd.**¹⁸⁴ have all declared that the subject contracts involved an inter-state deemed sale of goods in the execution of works contracts; and such inter-state sale of goods, which fell within the ambit of Section 3(a) of the CST Act, could not be subject to tax under the State Act.

The object of Article 366(29-A)(b) of the Constitution is to enlarge the scope of the expression '**tax on the sale or purchase of goods**' wherever it occurs in the Constitution. The expression 'tax on the sale or purchase of goods' in Article 286 of the Constitution, and in Entry 54 of the State List, includes a tax on the transfer of property in goods involved in the execution of a works contract also. (**Builders' Association of India**¹⁸⁶; **Gannon Dunkerley (II)**⁶³; **Larsen and Toubro Ltd.**²¹⁵). It is not permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale under Sections 3, 4 and 5 of the CST Act. (**Gannon Dunkerley (II)**⁶³; **Triveni Engineering & Industries Ltd.**²⁰⁸; **Siemens Ltd.**⁶⁰). Consequently an inter-state sale of goods which would, otherwise, have fallen within the ambit of Section 3(a) of the CST Act, cannot be subject to tax by a law made by the State Legislature merely because the said goods have been incorporated in the “works” executed within the State.

(vi) CAN THERE BE AN INTER-STATE SALE OF GOODS IN THE EXECUTION OF A WORKS CONTRACT?

It is contended, on behalf of the petitioners, that a works contract, which was earlier held not to be conventional or Nomen Juris (vide first **Gannon Dunkerley**⁶⁴ is now deemed to be a sale; whether it is an ordinary inter-state sale or export or import sale or a deemed inter-state sale, the constitutional restrictions and conditions would *mutatis mutandis* apply to both sets of transactions; it is not open to the State tax authorities to tax what

is otherwise an inter-state sale or an export/import sale as a local sale; Parliament conceived of an inter-State sale in the execution of a works contract, notwithstanding the theory of accretion; the facts of the present case clinchingly show that there is an inter-state sale under Section 3(a), and a sale in the course of import under Section 5(2) of the CST Act; from 13.5.2002 onwards, inter-state works contracts are liable to be taxed under the CST Act; if the goods have moved from other States, for the specific use in a works contract for a particular contractee, transfer of property in the goods takes place in the course of inter-state trade; if the argument of the assessing authority is accepted, there can be no inter-state sale at all in a works contract; and this would be contrary to the intention of Parliament which has defined “works contract” in Section 2(ja) of the CST Act with effect from 01.04.2005.

Sri K. Vivek Reddy, Learned Special Counsel, would submit that, even if the goods have moved from outside the State, since they culminate in a work, involving erection and installation, it would only be a works contract; there cannot be a inter-state sale, under Section 3(a), in a works contract be it divisible or indivisible; tax on works contracts is on accretion, which can take place only in a local territory; and, therefore, the State authorities are entitled to tax the contract, as a works contract, under the A.P. VAT Act.

In a works contract the property in the goods would, ordinarily, pass to the owner/contractee on its incorporation in the works executed. (**State of Andhra Pradesh v. Larsen & Tourbo Ltd**^[216]). It cannot however be said that, in a works contract, the ownership of the goods must always pass by way of accretion to the owner of the immovable property to which they are affixed. (**Larsen & Toubro Ltd.**²¹⁵). Taxing the sale of goods element, in a works contract, is permissible even after incorporation of the goods, provided tax is directed to the value of the goods at the time of incorporation, and does not purport to tax the transfer of immovable property. (**Larsen & Toubro Ltd.**²¹⁵).

It is no doubt true that, in **Gannon Dunkerley (II)**⁶³, the Supreme Court held that the question, whether a deemed sale results from transfer of property in goods involved under Section 3, 4 and 5 of the CST Act, has to

be decided in the light of the particular terms of the works contract, and cannot be decided in the abstract; and, as at present advised, they were not in a position to say that, in no case, could there be a sale under Sections 3, 4 and 5 of the CST Act in respect of a deemed sale resulting from transfer of property in goods involved in the execution of a works contract falling within the ambit of sub-clause (b) of Clause (29-A) of Article 366 of the Constitution.

In view of Article 366(29-A)(b) of the Constitution, a fiction can be introduced by Legislation that the goods, involved in the execution of a works contract, have been sold. However the limitation on the competence of the State Legislature, in respect of even a fictional sale which takes place in the course of inter-state trade and commerce, subsists. The State Legislature is not competent to provide for the levy of tax on such a fictional sale when it takes place in the course of inter-state trade and commerce. (**Thomson Press (I) Ltd.**⁶⁸; **Gannon Dunkerley (II)**⁶³; **Builders' Association**¹⁸⁶; **East India Cotton Manufacturing Company v. The State of Haryana**^[217]). The mere fact that the goods, which moved from one State to another, were incorporated in the works within the States of Telangana and Andhra Pradesh does not make the deemed inter-state sale an intra-State sale within the States of Telangana and Andhra Pradesh. While it would still continue to be an inter-state deemed sale of goods, falling within the ambit of Section 3(a) of the CST Act, its incorporation in the works within the State is not without significance.

The charging section and the computation provisions of a taxing statute together constitute an integrated code. (**Mahim Patram Private Ltd.**¹⁶³; **C.I.T., Bangalore etc. v. B.C. Srinivasa Setty**^[218]). The measure or value, to which the rate of tax is applied for computing the tax liability, is one of the components of tax. (**Mahim Patram Private Ltd.**¹⁶³; **M/s. Govind Saran Ganga Saran v. Commissioner of Sales Tax**^[219]). While tax is imposed on the transfer of property in the goods, involved in the execution of a works contract, the measure, for the levy of tax contemplated by Article 366(29-A)(b), is the value of the goods involved in the execution of a works contract. Since the taxable event is the transfer of property in the goods

involved in the execution of a works contract, and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods, which would constitute the measure for the levy of the tax, has to be the value of the goods at the time of its incorporation in the works, and not the cost of acquisition of the goods by the contractor. (**Larsen and Toubro Ltd.**²¹⁵; **Gannon Dunkerley (II)**⁶³).

The principles laid down in the context of an intra-state deemed sale of goods involved in the execution of a works contract would equally apply to an inter-state deemed sale of goods involved in the execution of a works contract. As the situs of the sale is irrelevant to a sale falling within the ambit of Section 3(a) of the CST Act, and it would suffice if the movement of goods from one State to another is occasioned by the contract of sale or an agreement of sale containing a stipulation for the sale of goods or even as an incidence of such contracts, the measure or value of the goods on which tax, under Section 3(a) of the CST Act, is to be levied would be the value of the goods when it is incorporated in the works, and neither the cost of acquisition of the goods by the contractor nor the price at which the goods were sold by the contractor to the owner under the supply contract. The value of the goods would also include the expenses incurred by the contractor, (after the goods have been delivered by the carrier within the State), for transporting the goods to the site, the profit component involved in the inter-state deemed sale of goods etc.

(vii) SHOULD THE PETITIONERS HAVE EFFECTED BRANCH TRANSFERS, INSTEAD OF AN INTER-STATE SALE?

It is contended, on behalf of the revenue, that the supply contract did not require inter-state movement; the test is whether it would be a breach of the contract if the seller did not procure the goods from outside the State or country; mere inter-state movement does not result in an inter-state sale; in the present case, the supply contract does not require inter-state movement because the supply do not either expressly, or by necessary implication, require the goods to be obtained from outside the State; the owner is indifferent as to whether the goods are procured locally or from outside the State; if the Contractor procures the goods locally from the approved

vendors, it would not be a breach of the sale agreement; and delivery of the goods within the State locally, by way of a branch transfer, is permissible and would not constitute a breach of the contract.

It is for the contracting parties to decide how, and from where, the goods should be purchased. It is not open to the State to contend that, even if the suppliers are identified in advance, they should have effected branch transfers, and then sold the goods to the contractee. When the goods move to a pre-determined buyer in the destination State, then the State from which the goods commence their journey would treat it as inter-State movement under Section 3, and levy tax without giving exemption towards branch transfer. As noted hereinabove the goods, in the present cases, are tailor-made for its use in the execution of the turnkey project. They are not off-the-shelf goods, which can be sold to any other person if the owner refuses to receive them. The contracts provide stringent conditions on specifications, manufacture and supply of goods. The contract entered into between the parties is the result of an informed and conscious commercial decision agreeing on the terms of the subject contract.

It is not for the revenue to suggest how the parties should frame the terms of their contract. All that the assessing and revisional authorities are required to examine is whether the subject transactions, on a reading of the contract as a whole, fall within the ambit of either Section 3(a) or Section 3(b) of the CST Act. It is not open to them to consider whether, instead of an inter-state sale, the goods could have been transferred by the petitioner-contractor to themselves within the state, and then sold the goods to the owner only to enable the revenue to levy tax on such sales as intra-state sales. Likewise there is no obligation cast on the supplier, either under the CST Act or under the contract, to make a branch transfer, and then sell the goods to the contractor. Questions, as to how a contract should be structured, and whether the goods should be sold in the course of inter-state trade or commerce or brought within the state as branch transfers, are commercial decisions, for the contracting parties to take, and not for the assessing/revisional authorities to impose.

(viii) AUTHORITY COMPETENT TO LEVY TAX ON INTER-STATE SALES UNDER SECTION 3(a) OF THE CST ACT:

It is contended, on behalf of the petitioners, that the jurisdiction to levy tax, under Section 3(a) of the CST Act, is conferred on the assessing authority of the State from where the movement of goods commence; and, as the respondent-authorities are the taxing authorities in the State where the goods are delivered, they lack jurisdiction to assess the petitioners to tax under Section 3(a) of the CST Act.

As noted hereinabove, the petitioner-contractors are liable to pay tax under Section 3(a) of the CST Act on the deemed inter-state sale of goods involved in the execution of the works contracts. The value of the goods, on which tax is liable to be paid by the petitioners – contractors, is the value of such goods at the time of its incorporation in the works. Section 9 of the CST Act relates to levy and collection of tax and penalties and, under sub-section (1) thereof, the tax payable by any dealer, under the CST Act, on the sale of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of Section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced. Where a question arises, in which State is the tax under the CST Act leviable, one must look to and apply the test prescribed in Section 9(1). No other provision is relevant on this question. (**Bharat Heavy Electricals Ltd.**⁴⁴). As Section 9(1) of the CST Act confers power on the assessing authorities of the State, from where the goods commence movement, to levy tax under Section 3(a) of the CST Act, and the respondents are the authorities of the State where the goods have been delivered, they lack jurisdiction to levy tax on the petitioners even under Section 3(a) of the CST Act.

V. SECTION 5(2) OF THE CST ACT

(i) HIGH-SEA SALES:

It is contended, on behalf of the petitioners, that it is the owner who secured release of the goods from the carrier, and filed the bill of entry for the imported goods; as the name of the owner is reflected in the bill of entry, it is evident that it is he who imported the goods; accepting the submission of the revenue would mean that, though the owner imported the goods, it is the contractor who continues to hold title thereto; and such a reasoning does not

explain the status under which the “Owner” imported the goods.

Sri K.Vivek Reddy, Learned Special Counsel, would submit that the L & T offshore sales do not qualify as high sea sales; a high sea sale, under Section 5(2), is like a transit sale under Section 3(b); all the characteristics of a transit sale are also applicable to a high sea sale; the L&T sale cannot be considered as a high sea sale as title, for reasons stated with respect to a Section 6(2) r/w. Section 3(b) sale, does not pass during movement; in the petitioners cases, the unconditional appropriation happens only upon inspection and certification which happens only after the goods have crossed the customs frontier; the conditional payment clause demonstrates that title does not pass in the high seas; in a high sea sale, like a transit sale under Section 3(b), the contract has to come into existence during the course of movement of the goods; in the case of L&T, there was a pre-existing contract pursuant to which the goods had moved; the movement was under the auspices of the contract; title has also not passed during movement; the submission made with respect to Section 3(b) are applicable to a high sea sale also; a person can be an importer even without being the owner of the goods; and Section 2(26) of the Customs Act makes it clear that even a person, holding himself out to be an importer, can also be an importer.

Section 5, in Chapter II of the CST Act, stipulates when a sale or purchase of goods is said to take place in the course of import or export and, under sub-section (2) thereof, a sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. Section 2(ab) of the CST Act defines the expression “crossing the customs frontiers of India” to mean crossing the limits of the area of a customs station in which imported goods are ordinarily kept before clearance by the customs authorities. Under the Explanation thereto, for the purpose of clause (ab) of Section 2, the words “customs station” and “customs authorities” shall have the same meaning as in the Customs Act, 1962.

In **Union of India v. Sampat Raj Dugar**^[220], the Supreme Court held that, if the definition of 'importer' in Section 2(26) of the Customs Act were kept aside, a person who did not pay for, and receive the documents of title, did not become the owner of the goods; the definition of 'importer', in Section 2(26) of the Customs Act, was not relevant to the question of title; it only defined the expression 'importer'; the idea is to hold the licensee responsible for anything and everything that happens from the time of import till they are cleared through Customs, whether or not he is the owner of such goods in law; ownership of the imported goods cannot be attributed to the importer even in a case where he abandons them, i.e. in a situation where he does not pay for and receive the documents of title; holding otherwise would place the exporter in a very difficult position; he would lose the goods without receiving payment, and his only remedy would be to sue the importer for the price of goods, and for such damage as he may have suffered; and this would not be conducive to international trade.

Unless the goods, brought into the country for the purpose of use, enjoyment, consumption, sale or distribution, are incorporated in and get mixed up with the totality of the property in the country, they cannot be said to have been imported. (**Shri Ramlinga Mills Pvt. Ltd. v. Assistant Collector of Customs**^[221]; **The Central India Spinning and Weaving and Manufacturing Co., Ltd, The Empress Mills, Nagpur v. The Municipal Committee, Wardha**^[222]; **K.R. Ahmed Shah v. Additional Collector of Customs, Madras**^[223]). The importer of the goods is, therefore, the person who brings into India the goods from a place outside. The course of import of goods starts at a point when the goods cross the customs barrier of the foreign country and ends at a point in the importing country after the goods cross its customs barriers. The sale which occasions the import is a sale in the course of import. A purchase by an importer of goods, when they are on the high seas by payment against shipping documents, is also a purchase in the course of import. A sale by an importer of goods, after the property in the goods has passed to him either after receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import. (**J.B. Trading**

Corporation v. Union of India ^[224]).

An “importer” is, ordinarily, the person who brings into India goods from any place outside India. In view of the expanded definition of “importer” in Section 2(26) of the Customs Act while any person, who imports goods from a foreign country into India, would undoubtedly be an importer, the owner of the goods and a person holding himself out to be an importer would also be an “importer”, however only during the period between the importation of the goods and the time they are cleared for home consumption, and not prior thereto or thereafter. That limb of the definition of “importer”, in Section 2(26) of the Customs Act, is designed to protect the interests of the owner or the exporter where the goods have not been claimed or redeemed by the designated importer in India. The definition cannot be used to usurp the identity of an “importer” from the person who filed the bill of entry. As Section 2(26) is an inclusive definition, the person in whose name the bill of entry is filed does not cease to be the importer. In other words, the person who has secured the release of the goods from the carrier, who has filed the bill of entry, and who has undertaken the work of clearance, continues to be an importer. **(M/s. Vellanki Frame Works, Visakhapatnam v. The Commercial Tax Officer, Chinawaltair Circle, Visakhapatnam** ^[225]). If the name of the “Owner” is reflected in the bill of entry as the importer of the goods, it would be difficult to accept the submission of the revenue that, notwithstanding the “Owner” being the importer of the goods, the title to the goods continued to remain with the contractor. The person, whose name is reflected in the bill of entry, is assessed to customs duty under the Customs Act. While the importer of the goods can also be an agent of the owner of the goods such a presumption, in the present batch of Writ Petitions, would be incongruous as that would mean that the person, shown as the importer of the goods in the bill of entry, has acted as the agent of the contractor in importing the goods only for the contractor to sell the goods to him later.

While the submission, urged on behalf of the revenue, that an import sale, falling within the second limb of Section 5(2) of the CST Act, has the characteristics of a Section 3(b) sale has considerable force, Section 5(2) must be read in conjunction with, and its scope examined in the light of, the

provisions of the Customs Act. This requirement of an import sale, falling within the ambit of the second limb of Section 5(2), being read in conjunction with the provisions of the Customs Act would place it on a slightly different footing from Section 3(b) of the CST Act. The transfer of title to the goods on high seas is, ordinarily, by endorsement on the bill of lading. A “bill of lading” is the symbol of the goods, and the right to possess those passes to the transferee of the bill of lading. Its transfer is symbolic of the transfer of the goods themselves and, until the goods have been delivered, the delivery of the duly endorsed bill of lading operates as between the transferor or transferee, and all who claim through them, as a physical delivery of the goods would do. The bill of lading also carries with it the rights and liabilities under the contract, where the property in the goods also is transferred. The property in the cargo passes to the consignee or the endorsee of the bill of lading, but the contract, whereunder the consignment or endorsement is made, has always to be taken into consideration. The consignee or an endorsee gets only such rights as its consignor or endorser had in respect of the goods mentioned in the bill of lading. (**British India Steam Navigation Co. Ltd.**⁵⁹).

An endorsement on the bill of lading in favour of the owner, in relation to the imported goods, before the goods have crossed the customers frontiers, *prima facie*, shows that it is the “Owner” who is the importer of the goods, and not the petitioner-contractor. If the bill of entry has also been filed by the “Owner” that would also indicate that the goods have been imported by the “Owner”. It would be inappropriate for us to examine, in certiorari proceedings, whether it is the contractor or the owner who secured release of the goods from the carrier, and whether the bill of entry for import of the goods was filed by the contractor or the owner. On remand the authorities, who passed the impugned orders, shall examine these aspects in the light of the observations made hereinabove. It is unnecessary for us to delve on this aspect any further as the respondents cannot subject the petitioners to tax, under the A.P. VAT Act, even if the import of the goods, under the subject contracts, fall within the ambit of the first limb of Section 5(2) of the CST Act. That some of the petitioners have contended that these are high sea sales, falling within the ambit of the second limb of Section 5(2)

of the CST Act, would not disable them from contending that the subject imports fall within the first limb of Section 5(2) as, in either event of an import falling within the first or the second limb of Section 5(2) of the CST Act, the respondents lack jurisdiction to levy tax on such sales under the provisions of the A.P. VAT Act.

(ii) SALES WHICH OCCASION IMPORT:

It is contended by Sri S.Ravi, Learned Senior Counsel, that some of the goods for the turnkey project were imported by Alstrom Projects from Indonesia under Chapter 98 of the Customs Tariff Act after the owner had obtained prior approval from the Government of Andhra Pradesh; the State Government gave a letter to the Commissioner of Customs, Kakinada to allow import under the Project Import Regulations; the order was placed by the Petitioner on the Foreign Supplier; the goods were dispatched after inspection and approval by the owner; the order and the bill of lading refer only to the owner; the bills of entry were filed by the petitioners and the goods were cleared on account of the owner; the goods were cleared from Customs by paying concessional rate of duty, as goods imported for a power project; the Commissioner of Customs had certified that the goods had been cleared from Customs by the petitioner through Bills of Entry dated 16.3.2005 and 1.6.2005 respectively under Project Import Regulations, and had been installed in the factory premises of the owner; the supply contract with the owner required the petitioner to provide such equipment which were to be imported from abroad; an order was placed on Alstom Power Energy System, Indonesia; the consignment was, thereafter, shipped to India; the petitioner submitted an undertaking to the custom authorities stating that the imported equipment would be used only for the power project of the owner; thereafter, installation certificates were issued by the Custom authorities; the petitioners' claim was under the first limb of Section 5(2); the petitioner could not have offered the imported equipment to anyone else without committing a breach of the supply contract with the owner; this unconditional passing of title was also reflected in the bills of lading; the imported equipment were designed and engineered to meet the specifications, and the requirement of the power project; they were sold in the course of import; the title to the imported equipment passed outside the customs frontiers of India; the first limb of Section 5(2) of the CST Act was satisfied; the sale, by the petitioner

to the owner, was the direct and proximate cause of the import of the subject equipment; the contract with the owner occasioned the import of goods from a foreign country; the documents filed by the petitioner clinchingly establish that the goods had moved from a foreign country for the specific use in the works contract with the owner; the Commissioner of Customs certified that they were installed in the Project of GPL; and, absence of a similar provision, for import of goods like Section 5(3), would not set at naught the decisions of the Supreme Court, particularly in **Indure Limited**⁷⁵.

Sri K. Vivek Reddy, Learned Special Counsel, would submit that inconsistent and mutually destructive pleas have been taken; an import sale, under Section 5(2), can only happen in two ways; (i) the sale or purchase occasions import; (ii) the sale is effected by transfer of documents of title to the goods before the goods have crossed the customs frontier of India i.e. high sea sale; [c] like a Section 3(a) and a Section 3(b) sale, there are two mutually exclusive categories under Section 5(2), and one cannot fall within the other; the import sale should either be a high sea sale or a sale occasioning import; in a high sea sale, the transfer of title to the goods must have happened “before the goods have crossed the customs frontier of India”; there is no high sea sale as the supply contracts clearly show that title has passed only in India; the Project Import Regulations require the employer’s name to be mentioned in the import documents so as to ensure that the goods are actually being used for the specified power project; neither the said Regulations, nor the documents, demonstrate that the owner becomes the importer; Alstom’s claim that it is a sale occasioning import, under Section 5(2), is not tenable because the agreement is only an agreement to sell and not a sale, the goods are future goods and not specific goods, the movement of goods is not pursuant to the supply contract between Alstom India and the owner, but rather the movement was pursuant to the contract between the foreign supplier (Alstom Indonesia) and the petitioner (Alstom India); and there is no privity of contract between the foreign supplier (Alstom Indonesia) and the owner.

The sale which occasions import, under the first limb of Section 5(2), is a sale which occasions the import of goods from a foreign country into India. The movement of goods from the foreign country into India must have

been occasioned by the sale or must be as an incident of such sale. The import of the goods and the sale must be inextricably connected, and the movement of goods from the foreign country into India must be otherwise inexplicable. The expression "occasions the movement of goods", occurring in Section 3(a) and Section 5(2) of the CST Act has the same meaning. (**S. R. Sarkar**¹⁰⁶; **K.G. Khosla (I)**¹⁷⁷). Likewise the expression "sale occasions import", in Section 5(2) of the CST Act, has to be given the same meaning which the expression "occasions the movement of goods" in Section 3(a) has received. (**Embee Corporation**¹⁴⁹). In order that the sale should be one in the course of import it must occasion the import, and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be snapped. (**Deputy Commissioner of Agricultural Income Tax & Sales Tax v. Indian Explosives Ltd**^[226]).

Let us now examine the judgments cited by Learned Counsel on either side on the scope of Section 5 of the CST Act. In **K.G. Khosla**¹⁷⁷ the Supreme Court held that it was clear from the contract that the movement of axle-box bodies from Belgium to Madras was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee; movement of the goods from Belgium to India was in pursuance of the contract between the assessee and the Director-General of Supplies; there was no possibility of these goods being diverted by the assessee for any other purpose; and, consequently, the sale took place in the course of import of goods within Section 5(2) of the Act and were, therefore, exempt from taxation. In answer to the contention, that the decision of the Constitution Bench of the Supreme Court in **K.G. Khosla (I)**¹⁷⁷ had not been correctly decided and should be referred to a larger Bench, the Supreme Court, in **Indure**⁷⁵, opined that **K.G. Khosla (I)**¹⁷⁷ had held the field for more than three decades; and its correctness has not been doubted so far.

In **Coffee Board (I)**¹⁷⁵, the Supreme Court held that three essentials are required to be met before the sale can be said to be in the course of import, (i) there must be a sale; (ii) the goods must actually be imported; and (iii) the sale must be a part and parcel of the import; if there are two independent sales, the link between the imported goods and their actual delivery to their actual users would be broken; and the integrated course of import would then be found wanting. In **Binani Bros. (P) Ltd.**¹⁷⁶, the Supreme Court held that the movement of goods was occasioned by the contracts for purchase which the petitioner entered into with the foreign sellers; no movement of goods, in the course of import, took place pursuant to the contracts of sale made by the petitioner with the DGS&D; the petitioner's sales to DGS&D were distinct and separate from his purchases from foreign sellers; the sales, by the petitioner to the DGS&D, did not occasion the import; it was the purchases, made by the petitioner from the foreign sellers, which occasioned the import of the goods; the purchase of the goods, and import of the goods pursuant to the contract of purchases were, no doubt, for sale to the DGS&D; it did not follow that the sale or contracts of sale to DGS&D occasioned the movement of the goods into this country; there was no privity of contract between DGS&D and the foreign sellers; the foreign sellers did not enter into any contract by themselves or through the agency of the petitioner to the DGS&D; the movement of goods from the foreign countries was not occasioned on account of sales by the petitioner to DGS & D; and therefore, even if the contracts envisaged the import of goods and their supply to the DGS&D from out of the goods imported, it did not follow that the movement of the goods in the course of import was occasioned by the contracts of sale by the petitioner with DGS & D.

In **Mohd. Serajuddin**¹⁷⁴ the Supreme Court held that the expression "in the course" in Section 5 implied not only a period of time during which the movement was in progress, but postulated a connected relation; and sale in the course of export out of the territory of India meant sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of, or connected with, such activities. It is to remove the basis of the judgment, in **Mohd. Serajuddin**¹⁷⁴, that Parliament

introduced sub-section (3) into Section 5 of the CST Act. While upholding the validity of Section 5(3) of the CST Act the Supreme Court, in **Coffee Board**²⁰⁷ held that Section 5(3) of the CST Act has been enacted to extend the exemption, from tax liability under the Act, not to any kind of penultimate sale but only to such a penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order; and it is only then that such penultimate sale is deemed to be a sale in the course of export.

In **Indian Explosives Ltd.**²²⁶, the Supreme Court held that **Binani Bros.**¹⁷⁶ was clearly distinguishable on two material aspects; in that case the assessee itself held the import licence and the goods were imported on the strength of such import licence, and not on the strength of any actual users licence; secondly, there was no term or condition prohibiting diversion of the goods after the import; it is these two factors which establish the integral connection or inextricable link between the transactions of sale and the actual import making the sales in the course of import; and, if the movement of the goods from the foreign country to India was in pursuance of the requirements flowing from the contract of sale between the - assessee and the local purchaser, the sale in question must be held to be in the course of import.

In **K. Gopinathan Nair**¹⁷⁹ the Supreme Court held that any purchase of goods imported by a canalising agency, which is the importer of such goods and which sells them to the actual users, would also partake the character of a sale between principal and principal wherein the foreign seller would be out of the picture; such transactions cannot be termed as a well-knit integrated transaction between all the three of them so as to make the transaction one of sale or purchase in the course of import; it may be a transaction because of or by the import carried out by the canalising agency; the decision in **Coffee Board (II)**²⁰⁷ is confined to the validity of the amended Section 5(3); for interpreting the identical phraseology “in the course of”, found both in Section 5(1) and Section 5(2), the decision in **Coffee Board (II)**²⁰⁷ would naturally not be of any assistance, as obviously

the three learned Judges' Bench could not have laid down anything contrary to what the Constitution Benches in **Mohd. Serajuddin**¹⁷⁴ and **Binani Bros.**¹⁷⁶ had laid down on a true construction of the provisions of Sections 5(1) and 5(2); it is only because of the amendment in Section 5(3) that, by legislative fiction, even the penultimate sales were sought to be covered by the said phrase; and no amendment has been introduced by the legislature for extending the sweep of the phrase "sale in the course of import".

On the contention of the respondents that the case was covered by the decisions of the Supreme Court in **Binani Bros.**¹⁷⁶; **Mohd. Serajuddin**¹⁷⁴; and **K. Gopinathan Nair**¹⁷⁹, the Supreme Court, in **Indure**⁷⁵, held that the decision in **Binani Bros.**¹⁷⁶ was distinguishable as, in that case, no obligation was imposed on the appellant to supply the imported goods to DGS&D after they had been imported, and the same could be directed to other channels; similarly the decision in **Mohd. Serajuddin**¹⁷⁴ was not applicable as, in that case, it was found that the appellant therein had sold the goods directly to the Corporation which entered into a contract with a foreign buyer, and the immediate cause of export was the contract between the foreign buyer who was the importer, and the Corporation which was the exporter; this decision rested on the peculiar facts of that case, and no assistance could be derived from the said decision; in **K. Gopinathan Nair**¹⁷⁹, on facts, it was found that, on account of the sale to CCI by the foreign exporters, raw cashew nuts were imported into India - the importer being the CCI, and not the local user; and the Supreme Court had held that the principles evolved by it, in para 12 of the judgment, were not applicable to that case.

This Court is bound by the law declared by the Supreme Court in **Indure**⁷⁵, and the submission of Sri K. Vivek Reddy, Learned Special Counsel, that, notwithstanding the aforesaid observations in **Indure**⁷⁵, the earlier judgments of the Supreme Court in **Binani Bros.**¹⁷⁶; **Mohd Serajuddin**¹⁷⁴ and **K. Gopinathan Nair**¹⁷⁹ should be followed, necessitates rejection. Sri K. Vivek Reddy, Learned Special Counsel, would submit that, as Parliament introduced Section 5(3) to overcome the basis of the judgment

of the Supreme Court in **Mohd. Serajuddin**¹⁷⁴ construing the scope of Section 5(1), the law declared by the Supreme Court, in **Mohd. Serajuddin**¹⁷⁴, would continue to govern the scope of Section 5(2). This submission is based on certain observations in the judgment of the Supreme Court in **K. Gopinathan Nair**¹⁷⁹. As the Supreme Court in **Indure**⁷⁵ noticed its earlier judgments, including **K. Gopinathan Nair**¹⁷⁹, and followed **K.G. Khosla (I)**¹⁷⁷, this Court is bound by the law declared by the Supreme Court in **Indure**⁷⁵ and **K.G. Khosla (I)**¹⁷⁷.

The contract, which was under examination in **Indure**⁷⁵, is similar to the contracts under consideration in the present batch of writ petitions. It is useful, therefore, to note the contentions raised by the revenue, and the law laid down by the Supreme Court, therein. The respondents contended before the Supreme Court that the appellant's obligation was that the materials, used in the execution of the subject contract, should conform to the specification stipulated by N.T.P.C; the appellant had imported the goods on its own accord, and under a special licensing scheme which enabled it to import raw materials and components for manufacture in India; the declarations made by the appellant, to the Licensing Authority, required them not to 'trade' in the imported goods, and they undertook to re-export them after further manufacture and value addition of atleast 33 percent; sale to N.T.P.C, by the appellant, was not of the goods which were imported by them; the Special Import License granted to the appellant entitled them to divert the goods; the imports were neither pursuant to any stipulation in the contract nor as an incidence thereof; the imports did not occasion the sale; they were only acting on behalf of the ultimate purchaser for whom the work was being executed; the goods, which were imported by the appellant, was for their own purposes, though ultimately to be utilised for the N.T.P.C Ash Handling Plant; even when the imported goods were dispatched to the site office of the appellant at N.T.P.C Farakka, the appellant had submitted a declaration undertaking to duly account, to the sales-tax authorities, the disposal of the said goods, and to pay tax on such sales in accordance with the provisions of the State Act; the appellant had admitted that the raw material imported by it were manufactured by it; to secure the value addition of at least 33 percent, such raw material could not remain the same after

being processed into the final product; and, as the matter had been dealt with and considered from all angles, no case for interference by the Supreme Court had been made out.

Rejecting the aforesaid contentions of the revenue the Supreme Court, in **Indure**⁷⁵, held that, while interpreting the expression 'sale occasions import' occurring in Section 5(2) of the Act, it was not necessary that a completed sale should precede the import; in order that the sale should be one in the course of import it must occasion the import; in order to occasion the import there must be an integral connection or an inextricable link between the first sale following the import, and the actual import provided by an obligation to import arising from the statute, contract or mutual understanding or the nature of the transaction which links the sale to import which cannot, without committing a breach of the statute or contract or mutual understanding, be snapped; the appellant had, admittedly, imported the goods into India for completion of the Project, on a turnkey basis, for the NTPC; it was not the respondents' case that the pipes so imported were not necessary components for the erection and commissioning of the plant; admittedly, the said pipes were used as components in the ash handling plant in the same condition as they were imported without altering its originality; such an import would fall within the constitutional umbrella; the appellant had, admittedly, imported the goods into India for completion of the Project of NTPC on a turnkey basis; and thus, by virtue of Article 286(1)(b) of the Constitution, it would not be taxable.

In the contracts, which are the subject matter of the writ petitions before us, the imported goods were designed and engineered to meet the specifications of the plant which was being erected and installed by the petitioner-contractors for the owner; sale of the goods by the petitioners-contractors to the owner was the direct and proximate cause of the import; it is not even the case of the revenue that the imported goods were diverted by the petitioners, and were not utilised for the works contract executed for the owner; there is an inextricable link, which is other wise inexplicable, between the import of the goods/equipment by the petitioner-contractor, and the sale of the imported goods to the owner; and, in the light of the judgment of the Supreme Court in **Indure Ltd**⁷⁵, the sale of imported goods by the

petitioners – contractors to the owner would fall within the ambit of the first limb of Section 5(2) of the CST Act, and the respondents lack jurisdiction to subject such import sales to tax under the A.P. VAT Act.

VI. CONCLUSION:

While the submissions, urged on behalf of the petitioners, that the supply and erection contracts are divisible and independent contracts, and they are entitled to claim exemption under Section 6(2) of the CST Act, necessitate rejection, their contention that the subject sales/deemed sales fall within the ambit of Section 3(a) and 5(2) of the CST Act must be upheld. As the provisions of each contract differ from the other and, even for one assessment period, the petitioners have entered into more than one contract, we have refrained from burdening this already lengthy judgment with a reference to the relevant clauses in each individual contract. We consider it appropriate, instead, to set aside the assessment/revisional orders to the limited extent the turnover, relating to inter-state sales and import sales under Sections 3 and 5 of the CST Act, have been subjected to tax under the AP VAT Act. The assessing/revisional authorities shall, in the light of the observations made hereinabove, pass orders afresh and in accordance with law, after affording the petitioners an opportunity of a personal hearing.

It is only on account of the pendency of these Writ Petitions before this Court that the petitioners were disabled from preferring appeals, against the impugned orders, in so far as the other issues which arise for consideration therein are concerned. There is no provision either under the A.P. VAT Act or under the Writ Proceedings Rules which enable the petitioners to simultaneously invoke the jurisdiction of the High Court and the statutory appellate authorities against the very same assessment/revisional orders, *albeit* on different grounds. That would, however, not justify this Court taking upon itself the task of examining all the issues, which arise for consideration from the impugned orders, merely because the Writ Petitions were entertained on the plea that a part of the assessment/revisional orders suffered from a jurisdictional error. All the Learned Senior Counsel, and the Learned Counsel, appearing on behalf of the petitioners would submit that, since the petitioners have confined their submissions only with reference to Sections 3 to 6 of the CST Act, and the

Writ Petitions were admitted only on this score, they should be permitted to contest all other issues by way of statutory appeals under the AP VAT Act.

The Learned Advocate General for the State of Telangana, Sri K. Vivek Reddy, Learned Special Counsel and Sri S. Suribabu, Learned Special Standing Counsel for Commercial Taxes, would fairly state that, in case the petitioners were to avail the remedy of an appeal to the appellate authority/STAT within four weeks from today, the respondents would not object to the appeals being entertained and decided on merits, notwithstanding that the time stipulated under the Act, for preferring appeals, has expired long ago.

It is wholly unnecessary for us to examine the assessment/ revisional orders, with regards imposition of tax on various other items, as this Court made it clear, even when the hearing of these Writ Petitions commenced, that it would confine its examination to the contentions raised, in this batch of Writ Petitions, only regarding levy of tax, under the A.P. VAT Act, on the sale of goods which the petitioners claimed were transit sales, inter-state sales, high sea sales and import sales; and whether they could be subjected to tax, by the respondents, treating them as intra-state sales taxable under the A.P. VAT Act.

In **Zunaid Enterprises**⁴⁷, the Supreme Court permitted the assesseees, in the appeals/applications filed before it, to file appropriate appeals/revisions before the appellate/revisional authorities within a month; and directed that, if such appeals/revisions were filed within the time granted, the appellate /revisional authorities should dispose of the appeals/revisions on merits, without reference to the period of limitation. We are satisfied that ends of justice would require the exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India, (which, in **L. Chandra Kumar v. Union of India**^[227], has been held to be a part of the basic structure of the Constitution of India), to direct the appellate authorities/STAT, in case appeals are filed by the petitioners herein within four weeks from today, to entertain them despite expiry of the period of limitation for filing appeals under the Act. All the Writ Petitions are disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.

(RAMESH RANGANATHAN, J)

(M. SATYANARAYANA MURTHY, J)

Date: .09.2015.

Note: L.R. copy to be marked.
B/O
MRKR/CS

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[1] (2003) 132 STC 272 (AP) (DB)
[2] (1998) 111 STC 434 = AIR 1999 SC 121 = (1998) 7 SCC 19 (SC)
[3] (1991) 83 STC 488 (Gujarat High Court) (DB)
[4] AIR 1997 SC 1875 = (1997) 4 SCC 82
[5] (1983) 142 ITR 663: (AIR 1983 SC 603
[6] (2014) 1 SCC 603
[7] (2011) 4 SCC 337
[8] AIR 1964 SC 1419
[9] AIR 1961 SC 1615
[10] 1953 SCR 1069
[11] 1954 SCR 1122
[12] AIR 1955 SC 661
[13] (1997) 5 SCC 536
[14] AIR 1952 SC 192
[15] (1985) 1 SCC 260
[16] (1999) 1 SCC 472
[17] (1999) 3 SCC 5
[18] AIR 1961 SC 609
[19] (1999) Supp (2) SCC 312
[20] (1998) 8 SCC 1
[21] (1998) 8 SCC 272
[22] (1999) 1 SCC 209

- [\[23\]](#) (2001) 6 SCC 569
- [\[24\]](#) (2012) 11 SCC 651
- [\[25\]](#) (1979) 3 SCC 83
- [\[26\]](#) AIR 1958 SC 86
- [\[27\]](#) (2003) 2 SCC 107
- [\[28\]](#) (2005) 6 SCC 499
- [\[29\]](#) AIR 1954 SC 207
- [\[30\]](#) AIR 1955 SC 425
- [\[31\]](#) AIR 1957 SC 882
- [\[32\]](#) AIR 1966 SC 1089
- [\[33\]](#) AIR 1959 SC 422
- [\[34\]](#) AIR 1965 SC 1321
- [\[35\]](#) (1984) 2 SCC 436
- [\[36\]](#) (1988) 1 SCC 572
- [\[37\]](#) (1995) 5 SCC 75
- [\[38\]](#) (2000) 6 SCC 293
- [\[39\]](#) (2000) 7 SCC 695
- [\[40\]](#) (2001) 6 SCC 634
- [\[41\]](#) (2001) 8 SCC 509
- [\[42\]](#) (2002) 7 SCC 484
- [\[43\]](#) (2003) 1 SCC 72
- [\[44\]](#) (1996) 4 SCC 230
- [\[45\]](#) (1997) 9 SCC 10
- [\[46\]](#) (2006) 6 SCC 522
- [\[47\]](#) (2012) 4 SCC 211
- [\[48\]](#) (2013) 57 VST 357
- [\[49\]](#) (1974) 1 QB 720
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- [\[60\]](#) (2001) 122 STC 1
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- [\[63\]](#) (1993) 1 SCC 364
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- [\[66\]](#) (1972) 29 STC 474 = AIR 1972 SC 1131
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- [\[76\]](#) (2011) 3 SCC 1
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- [\[78\]](#) (1989)1 SCC 101
- [\[79\]](#) AIR 1967 SC 1480
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- [\[81\]](#) (2009) 6 SCC 379
- [\[82\]](#) (2004) 13 SCC 217
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- [\[84\]](#) (2005) 11 SCC 314
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- [\[87\]](#) (1974) 1 SCC 78
- [\[88\]](#) (1997) 10 SCC 73
- [\[89\]](#) (2008) 7 SCC 85
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- [\[91\]](#) (1976) 4 SCC 320
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- [\[93\]](#) (2005) 12 SCC 1
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[\[108\]](#) (1968) 21 STC 184 (Madras HC) (DB)

[\[109\]](#) AIR 1961 SC 426

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[\[115\]](#) (1976) 2 ALL ER 721

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[\[121\]](#) AIR 1967 SC 465 = (1967) 1 SCR 489

[\[122\]](#) AIR 1959 SC 356 = 1959 Supp (1) SCR 310

[\[123\]](#) (1985) 1 All ER 257

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[\[125\]](#) (2008) 15 VST 401 (Orissa HC) (DB)

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[\[128\]](#) 1993(2) A.P.L.J. 479 = 1993(3) ALT 391

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[\[130\]](#) (1976) 2 SCC 521

[\[131\]](#) (2003) 7 SCC 197 = 2003 SCC (Cri) 1722

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[\[137\]](#) (2000) 6 SCC 12

[\[138\]](#) (1976) 2 SCC 44 = (1976) 37 STC 207

[\[139\]](#) (1978) 41 STC 140 (Madras HC) (DB)

[\[140\]](#) (2006) 144 STC 605 (Karnataka High Court) (DB)

[\[141\]](#) AIR 1972 SC 87

[\[142\]](#) (1970) 2 SCC 287

[\[143\]](#) (1959) 10 STC 297 (SC)

[\[144\]](#) (1964) 7 SCR 706 = AIR 1964 SC 1752

[\[145\]](#) (2006) 5 SCC 258

[\[146\]](#) (2006) 2 SCC 628

[\[147\]](#) (2000) 6 SCC 579

[\[148\]](#) (2003) 1 SCC 281

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- [\[161\]](#) (1999) 8 SCC 667
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- [\[165\]](#) (2006) 7 SCC 714
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- [\[168\]](#) (2008) 15 SCC 673
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