



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED : 28.05.2020

JUDGMENT PRONOUNCED : 12.06.2020

(The Court was lockdown due to COVID-19 pandemic from 24.03.2020 to 30.04.2020)

CORAM :

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

and

THE HONOURABLE MR.JUSTICE **M.DHANDAPANI**

W.A. (MD) .No.649 of 2014

Tvl. Unique Traders,
Represented by its Partner Thiru T.Muralidharan,
No.17/2, Perali Road,
Viruthunagar District.

... Appellant/Petitioner

vs.

Commercial Tax Officer - 1,
Commercial Taxes Building,
Madurai Road, Viruthunagar.

... Respondent

Prayer:- Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 18.03.2014 in W.P. (MD).No. 5291 of 2010.

Prayer in WP. (MD).No.5291 of 2010: Writ Petition is filed under Article 226 of the Constitution of India for the issue of a Writ of Certiorari to call for the records relating to the final assessment order passed by the respondent in Tamil Nadu General Sales Tax in TNGST 5721309/03-04 dated 07.04.2016 received by the petitioner on 09.04.2010 and quash the same.

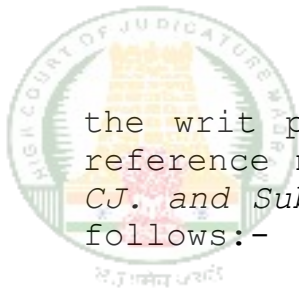
For Appellant :Mr.K.Vadivelu

For Respondent :Mr. K.Vijay Narayan, Advocate General
assisted by Mohammed Shaffiq,
Special Government Pleader (Tax),
Mrs.J.Padmavathi Devi,
Special Government Pleader (Writs)
Ms.Mathuri, Government Advocate.

JUDGMENT

(Judgment was delivered by **C.V.KARTHIKEYAN, J.**)
(**G.R.SWAMINATHAN** and **M.DHANDAPANI, JJ.** concurring)

Writ Appeal filed questioning the order of the learned Single Judge dated 18.03.2014 in WP. (MD).No.5291 of 2010, dismissing



the writ petition. The Writ Appeal has been placed before us on reference made by a learned Division Bench (Amreshwar Pratap Sahi, CJ. and Subramonium Prasad J.). The structure of the judgment is as follows:-

S.No.	Sub-heading	Paragraph Nos.
I	Introduction	2 - 4
II	Order of Reference	5 - 14
III	Judicial Approach Prior to the 46th Amendment of the Constitution of India	15 - 17
IV	The 46th Amendment to the Constitution of India	18 & 19
V	Vires Upheld	20 & 21
VI	March of Law post 46th Amendment to the Constitution of India A) Supreme Court of India A1) A slight slip up A2) The Law reiterated B) Bombay High Court B1) Full Bench B2) A Slip again B3) The Law again reiterated C) Kerala High Court C1) Full Bench	22 & 23 24 25 - 28 29 30 31 & 32 33 & 34
VII	Tamil Nadu State Amendment	35
VIII	Interpretation by the Madras High Court	36 - 45
IX	Necessity for Reference	46 - 56
X	The Reference Answered	57
XI	Conclusion	58 & 60

I) Introduction:-

2. The writ appellant Tvl.Unique Traders at Viruthunagar, had filed a writ petition in the nature of a Certiorari, calling for the records relating to the final assessment order passed by the respondent, Commercial Tax Officer-I, Viruthunagar in Tamil Nadu General Sales Tax in TNGST 5721309/03-04 dated 07.04.2010, for the Assessment Year 2003 -2004.

3. The writ petitioner Tvl.Unique Traders is a registered dealer under the Tamil Nadu Sales Tax Act, 1959. They are also an assessee in the books of the respondent, Commercial Tax Officer-1,



Viruthunagar. They are involved in doing job work, by receiving polythene rolls from various parties and printing them using purchases Ethyl Acetate, Toulene and ink. The Assessment Officer / Commercial Tax Officer-1, Viruthunagar, held that their transaction using printing ink is a works contract and the transfer of ink used in the cooly printing was exigible to tax under Section 3-B of Tamil Nadu General Sales Tax Act, 1959. The petitioner approached this Court invoking Article 226 of the Constitution of India, raising grievance against the assessment of consumable goods which, the petitioner claimed were exempt under Section 3-B(2)(e) of the Tamil Nadu General Sales Tax Act, 1959.

4. The learned Single Judge placed reliance on the judgment of a Division Bench of this Court in **Tax Case (Revision) Nos.69 of 2009, 80 & 81 of 2011**, dated 23.08.2013, **The State of Tamil Nadu, rep. by the Deputy Commissioner (Commercial Taxes), Salem Division, Salem, Vs. Tvl.S.S.M.Processing Mills**, wherein, the Division Bench had followed the ratio laid down in **(2003) 129 STC 167, Apparels and Handloom Exporters Association and others Vs. State of Tamil Nadu and Others**, and held that in view of the amendment of Article 366 of the Constitution of India, by inserting Clause 29-A, items which could not have been otherwise brought to tax must be brought to tax. The Division Bench of this Court had also relied on a Full Bench judgment of the Kerala High Court, reported in **(2011) 39 VST 434 (Ker) (FB)** in the case of **Enviro Chemicals Vs. State of Kerala**. The learned Single Judge confirmed the levy of tax under Section 3-B of the Tamil Nadu General Sales Tax Act, 1959. However, relief from levy of penalty was granted.

II) Order of Reference:-

5. The Writ Appeal had meandered through its own course and was posted before a Division Bench of Amreshwar Pratap Sahi, CJ. and Subramonium Prasad, J. The learned counsel for the appellant had placed reliance on a judgment of a Division Bench of this Court dated 04.05.2017 in **Tax Case (MD).No.202 of 2012, State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process, Kovilpatti** wherein placing reliance on two other decisions of this Court viz., **State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process (Tax Case (Revision)No.687 of 2006)** decided on 05.11.2008 and **State of Tamil Nadu Vs. Premier Litho Works and another**, reported in **(2009) 26 VST 205 (Madras)**, the issue was answered against the Revenue.

6. It was also noted by the Division Bench (Amreshwar Pratap Sahi, CJ. and Subramonium Prasad J.) that the judgment in the case of **State of Tamil Nadu Vs. Premier Litho Works and another, [(2009) 26 VST 205 (Mad)]**, was also challenged by the State before the Hon'ble Supreme Court in **Civil Appeal No.10162 of 2010** and the Special Leave Petition was dismissed on 03.08.2016.



7. The learned counsel for the appellant had also placed reliance on another judgment of a Division Bench of this Court in **State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Mahalakshmi Process, Sivakasi** decided on 29.03.2019 in **Tax Case (Revision) No.495 of 2006**, where, following a judgment of the Bombay High Court in **Commissioner of Sales Tax Vs. Tvl.R.M.D.C.Press Private Limited**, reported in **(1999) 112 STC 307**, the issue was answered against the revenue.

8. The learned Special Government Pleader however confronted the learned Division Bench, with a judgment of the Bombay High Court in **Commissioner of Sales Tax Vs. Matushree Textiles Ltd**, reported in **132 STC 4**, wherein, the judgment in **Tvl.R.M.D.C.Press Private Limited**, (referred supra) was held to be **per incuriam**. It was stated that this observation was confirmed by the another Division Bench of the Bombay High Court in **Commissioner of Sales Tax, Maharashtra State, Bombay Vs. M/s. Ramdas Sobhraj, Sales Tax Reference No.9 of 2003**, decided on 25.10.2012.

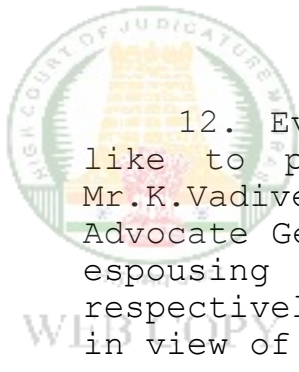
9. In view of the conflicting views expressed by the Division Bench of this Court and by the Bombay High Court, the learned Division Bench (Amreshwar Pratap Sahi, CJ. and Subramonium Prasad J.) had observed that even though the judgment of the Bombay is persuasive, but since, the same has stated the law, it was necessary that an authoritative pronouncement is made keeping in mind the conflicting ratios arising out of the aforesaid judgments. It is under these circumstances, the said Division Bench had referred the matter before the Hon'ble The Chief Justice for constituting a Larger Bench.

10. The reference before this Bench is,

"whether the purchase of ink for printing polythene rolls is taxable in terms of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959 / Tamil Nadu Value Added Tax Act."

It was stated that the reference be answered, keeping in view the provisions of Tamil Nadu General Sales Tax Act, 1959 and the contention of the learned counsel for the petitioner that this is only a simple job work and does not amount to change of form of goods as defined under Article 366 (29-A) of the Constitution of India.

11. Heard arguments advanced by Mr.K.Vadivelu, learned counsel for the appellant and the learned Advocate-General Mr.K.Vijay Narayan, instructed by Mr. Mohammed Shaffiq, Special Government Pleader (Tax), Mrs.J.Padmavathi Devi, Special Government Pleader (Writs) and Ms.Mathuri, Government Advocate.



12. Even before embarking to examine the reference, we would like to place our deep appreciation for the efforts taken by Mr.K.Vadivelu, learned counsel for the appellant and the learned Advocate General and also the learned Special Government Pleaders in espousing the cause of the appellant and the respondent respectively, and in advancing arguments through video conference, in view of the COVID-19 pandemic prevalent as on date.

13. I must also place my deep appreciation for the erudite views expressed during the discussions by my noble brothers G.R.Swaminathan and M.Dhandapani, J.J.

14. The reference has to be answered tracing the judicial approach prior to the 46th Amendment of the Constitution of India, wherein, Clause-29A was inserted on Article 366, the vires and scope of the amendment and the march of law subsequent and consequent to the Amendment.

III) Judicial Approach Prior to the 46th Amendment of the Constitution of India:-

15. In (1958) 9 STC 353, *State of Madras Vs. Gannon Dunkerly & Co. (Madras) Ltd., (Gannon Dunkerley No.1)*, a Constitutional Bench of the Hon'ble Supreme Court of India examined a building contract to determine whether there could be imposition of tax on the supply of materials used in construction of buildings. It was held that the Madras General Sales Tax Act, 1939, was **a law relating not to sale of goods, but to tax on sale of goods**. It was held that in the case of a building contract, the property in materials used, does not pass to the other party to the contract as movable property. It would only pass so, if there is an agreement between the parties to that effect. If there is no such agreement, then the contract is only to construct a building and the materials used therein would become the property of the other party to the contract on the theory of accretion.

16. It was held that in order to constitute a sale, it was necessary that there should be an agreement between the parties for the purpose of transferring the title to goods, which pre-supposes capacity to contract, that it must be supported by money consideration and that as a result of the transaction, property must actually be passed in goods. It was held that unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. It was also held that under the law, there cannot be an agreement between the parties for the sale of the very goods in which eventually property passes. Finally it was held as follows:-

"To sum up, the expression " sale of goods " in Entry 48 is a **nomen juris**, its essential ingredients being **an agreement to sell movables for a price and property passing**



therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

(Emphasis supplied)

17. This ratio was also followed in **The Assistant Sales Tax Officer & Ors., Vs. B.C.Kame, Proprietor Kame Photo Studio, (1977) 1 SCC 634**. In this case, the issue before the Hon'ble Supreme Court was, when a photographer undertakes to take photography, develop the negatives or do other photographic work and thereafter supplies the prints to his clients, whether he can be said to have entered into a contract for sale of goods also. Relying on **State of Madras Vs. Gannon Dunkerly & Co. (Madras) Ltd.**, (referred above), the Hon'ble Supreme Court held on the basis of the following facts:-

"The respondent is the proprietor of Kame Photo Studio. He has apart from his main shop two branches. He carries on business, inter alia, of buying and selling photographic goods. **After buying photographic goods he either sells them to his customers or uses them in three ways--(1) in taking photographs and supplying prints thereof, (2) in making enlargements for the clients who bring their own negatives, and (3) in preparing positive prints of the same size from the negatives brought by the clients. For doing these various types of works the assessee respondent charges consolidated amount depending upon the work involved and the size and number of prints demanded by the client."**

(Emphasis supplied)

and held in para 9 and 10 as follows:-

"9. Keeping the above principles in view, we may now turn to the facts of the present case. **When a photographer like the respondent undertakes to take photograph, develop the negative, or do other photographic work and thereafter supply the prints to his client, he cannot be said to enter into a contract for sale of goods. The contract on the contrary is for use of skill and labour by the photographer to bring about a desired result. The occupation of a photographer, except in so far as he sells the goods purchased by him, in our opinion, is essentially one of skill and labour. A good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, it also reflects his skill and labour. A good photograph in most cases is indeed a thing of beauty. It not only seeks to mirror and portray a scene from actual life, it also catches and preserves for the future**



what belongs to and is a part of the fleeting moment. The ravage brought about by the passage of time, the decay and the ageing process which inevitably set in as the years roll by leave what is preserved in the photograph unaffected. It is no wonder that an old photograph revives nostalgic memories of days no more, but to which we look back through the mist of time with fondness even though such fondness has a tinge of sadness.

10. **We, therefore, find no cogent ground to disagree with the High Court in so far as it has decided against the revenue and has held the contract to be one for work and labour..."**

(Emphasis supplied)

IV) The 46th Amendment to the Constitution of India:-

18. The 46th amendment to the Constitution received the assent of the President on 02.08.1983. By the 46th amendment after Clause-29 in Article 366 of the Constitution, Clause-29A was inserted, which related to tax on the sale or purchase of goods.

19. In order to enlarge the concept of sale, Clause-29A was inserted in Article 366 of the Constitution by the 46th Constitution amendment. Clause-29A which was inserted in Article 366 is as follows:-

"The Constitution (Forty-Sixth Amendment) Act, 1982

(Received the assent of the President on the 2nd February 1983)

4. **Amendment of Article 366.** - In Article 366 of the Constitution, after clause(29), the following clause shall be inserted, namely:-

(29a)...

(a) ...

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

(c) ...

(d) ...

(e) ...

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

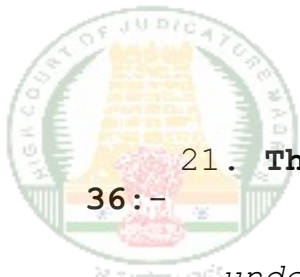
(Emphasis supplied)

V) Vires Upheld:-

20. The vires of the amendment was upheld by the Hon'ble Supreme Court in **Builders Association of India Vs. Union of India,**

(1982) 2 SCC 645.

<https://hcservices.ecourts.gov.in/hcservices/>



21. **The Constitution Bench held as follows in paragraphs 32 and 36:-**

32. Before proceeding further it is necessary to understand what sub-clause (b) of clause 29-A of Article 366 of the Constitution means. Article 366 is the definition clause of the Constitution. It says that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the Constitution as including all materials, commodities and articles. It is true that in the **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd, (supra)** this Court held that a works contract was an indi- visible contract and the turnover of the goods used in the execution of the works contract could not, therefore, become exigible to sales-tax. It was in order to overcome the effect of the said decision Parliament amended Article 366 by introducing sub-clause (b) of clause (29-A). Sub-clause (b) of clause (29-A) states that tax on the sale or purchase of goods includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) Says that 'such' transfer, .delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods' under sub-clause. (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax



on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clause (a) to (f) thereof

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wherever 348 such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also...

36. Even after the decision of this Court in the **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd, (supra)** it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building 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. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. 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 the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above...

VI) March of Law post 46th Amendment to the Constitution of India:-

A) Supreme Court of India:-

22. A Constitution Bench of the Hon'ble Supreme Court in **(1993) 88 STC 204 (SC), Gannon Dunkerley Vs. State of Rajasthan, (Gannon Dunkerley II)**, and **Larsen and Toubro Limited Vs. Union of India and others**, examined the scope of the amendment. The Hon'ble Supreme Court held as follows:-

" 32. The question is whether in the absence of an amendment in the Central Sales Tax Act specifically applying its provisions to a transfer of property in goods involved in the execution of a works contract, the provisions of Sections 3, 4 and 5 contained in Chapter II



can be held applicable to such a transfer. In this context, it may be mentioned that prior to the Forty Sixth Amendment, a distinction was being made between a works contract' which was entire and indivisible and a works contract composed of two distinct and separate contracts - one, for transfer of materials and other, for payment of remuneration for services and for work done. The non-availability of the legislative power of the States under Entry 54 of the State ; List, as construed by this Court in **State of Madras Vs. Gannon Dunkerly & Co. (Madras) Ltd., (1958) 9 STC 353**, was confined, in its application, to works contracts falling in the first category, i.e., contracts which were entire and indivisible and it was permissible for the States to impose tax on sale or purchase of goods where the parties had entered into distinct and separate contracts one for the transfer of materials and other for payment of services and for works done. The provisions of Sections 3, 4 and 5 ; of the Central Sales Tax Act were applicable where there were separate contracts. In Builders' Association case (supra), it has been observed -

After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. 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 the sales tax was leviable on the price of the goods and materials supplied in the building contract which had been entered into in two distinct and separate parts as stated above. (pg.400 of STC; 351 of SCR)

33. **This would mean that as a result of the Forty Sixth Amendment, the contract which . was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services** and as a result such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. Since the provisions of Sections 3, 4 and 5 were applicable to such contracts containing two separate agreements, there is no reason why the said provisions should not apply to a contract which, though single and indivisible, **by legal fiction introduced by the Forty Sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services.** Reference may be made in this context to the oft-quoted observations of **Lord Asquith in East End**



**Dwellings Co. Ltd. v. Finsbury Borough Council, [1952]
A.C. 109 (HL):**

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed; must inevitably have flowed from or accompanied it... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

34. **If the legal fiction introduced by Article 366(29-A) is carried to its logical end** it follows that even in a single and indivisible works contract **there is a deemed sale of the goods which are involved in the execution of a works contract.** Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

(Emphasis supplied)

23. It was further held as follows:-

"45. Keeping in view the legal fiction introduced by the Forty Sixth Amendment whereby the works contract which are entire and indivisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that **labour charges for execution of works [item no (i)] amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel etc. which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services.** The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the



execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, **the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services.** The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in item nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amount so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. **The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services** which would cover:

- a) Labour charges for execution of the works;
- b) amount paid to a sub-contractor for labour and services;
- c) charges for planning, designing and architect's fees;



d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
e) cost of consumables such as water, electricity, fuel etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

g) other similar expenses relatable to supply of labour and services;

h) profit earned by the contractor to the extent it is relatable to supply of labour and services;

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

46. We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view, of Sections 3, 4 and 5 of the Central Sales Tax Act and goods covered by Sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making those deductions and exclusions from the value of the works contract."

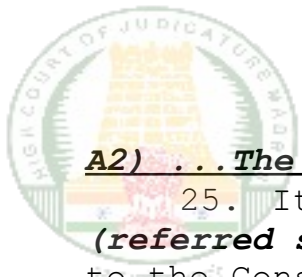
(Emphasis supplied)

A1)A slight slip up:-

24. Thereafter, the issue was again taken up by the Hon'ble Supreme Court in **(2000) 118 STC 9(SC), Rainbow Colour Lab & Another Vs. State of Madhya Pradesh & Ors**, wherein, the Hon'ble Supreme Court held, following the judgment in **(1977) 39 STC 237, Assistant Sales Tax Officer Vs. B.C.Kame**, (referred supra) as follows:-

" Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to the contract, the State cannot impose sales-tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29-A) (b) read with Section 2(n) of the State Act. On facts as we have noticed that the work done by the photographer which as held by this Court in **Kames case (supra)**, is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent-State cannot be sustained."

(Emphasis supplied)

**A2) ...The Law reiterated:-**

25. It must be pointed out that (1977) 39 STC 237, **B.C.Kame (referred supra)** was a judgment delivered **prior** to the 46th Amendment to the Constitution.

26. The Hon'ble Supreme Court came to again consider the very same issue in (2001) 124 STC 59 (SC), **Associated Cement Companies Ltd., Vs. Commissioner of Customs**. A Larger Bench of the Hon'ble Supreme Court referred to **Rainbow Colour Lab (referred supra)**, and held as follows:-

"25. Even though in our opinion the decisions relating to levy of sales tax would have, for reasons to which we shall presently mention, no application to the case of levy of customs duty, **the decision in Rainbow Colour Lab case (supra) requires consideration**. As a result of the Forty-sixth Amendment, sub-article 29A of Article 366 was inserted as a result whereof tax on the sale or purchase of goods was to include a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Taking note of this amendment this Court in Rainbow Colour Lab at page 388-389 observed as follows:

"9. Prior to the amendment of Article 366, in view of the judgment of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in Builders case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is not empowered by the amended law to impose sales tax on such incidental materials used in such contracts"



In arriving at the aforesaid conclusion the Court referred to the decision of **this Court in Hindustan Aeronautics Ltd. vs. State of Karnataka (1984) 1 SCC 706** and **Everest Copiers Vs. State of Tamil Nadu [1996 (103) STC 360]**. But both these cases related to **pre-Forty-sixth Amendment era** where in a works contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. **The conclusion arrived at in Rainbow Colour Lab case, in our opinion, runs counter to the express provision contained in Article 366 (29A) as also of the Constitution Bench decision of this Court in Builders Association of India and Others vs. Union of India and Others (1989) 2 SCC 645."**

(Emphasis supplied)

27. The matter again came up for further consideration in **(2015) 78 VST 451 (SC), State of Karnataka Vs Pro Lab & Ors.** Again the Hon'ble Supreme Court after relying on **Gannon and Dunkerley-II, (1993) 88 STC 204**, held as follows:-

" 21) To sum up, it follows from the reading of the aforesaid judgment that **after insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax.** Further, while going into this exercise of divisibility, **dominant intention** behind such a contract, namely, whether it was for sale of goods or for services, **is rendered otiose or immaterial.** It follows, as a sequitur, that by virtue of clause 29-A of Article 366, **the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales tax thereupon.** It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject.



22) Keeping in mind the aforesaid principle of law, the obvious conclusion would be that Entry 25 of Schedule VI to the Act which makes that part of processing and supplying of photographs, photo prints and photo negatives, which have "goods" component exigible to sales tax is constitutionally valid. Mr. Patil and Mr. Salman Khurshid, learned senior counsel who argued for these assesseees/respondents, made vehement plea to the effect that the processing of photographs etc. was essentially a service, wherein the cost of paper, chemical or other material used in processing and developing photographs, photo prints etc. was negligible. This argument, however, is founded on dominant intention theory which has been repeatedly rejected by this Court as no more valid in view of 46th Amendment to the Constitution.

23) It was also argued that photograph service can be exigible to sales tax only when the same is classifiable as Works Contract. For being classified as Works Contract the transaction under consideration has to be a composite transaction involving both goods and services. If a transaction involves only service i.e. work and labour then the same cannot be treated as Works Contract. It was contended that processing of photography was a contract for service simpliciter with no elements of goods at all and, therefore, Entry 25 could not be saved by taking shelter under clause 29-A of Article 366 of the Constitution. For this proposition, umbrage under the judgment in **B.C. Kame's case** was sought to be taken wherein this Court held that the work involving taking a photograph, developing the negative or doing other photographic work could not be treated as contract for sale of goods. Our attention was drawn to that portion of the judgment where the Court held that such a contract is for use of skill and labour by the photographer to bring about desired results inasmuch as a good photograph reveals not only the aesthetic sense and artistic faculty of the photographer, it also reflects his skill and labour. Such an argument also has to be rejected for more than one reasons. In the first instance, it needs to be pointed out that the judgment in Kame's case was rendered before the 46th Constitutional Amendment. Keeping this in mind, the second aspect which needs to be noted is that the dispute therein was whether there is a contract of sale of goods or a contract for service. This matter was examined in the light of law prevailing at that time, as declared in Dunkerley's case as per which dominant intention of the contract was to be seen and further that such a contract was treated as not divisible. It is for



Court specifically pointed out that Kame's case would not provide an answer to the issue at hand. On the contrary, legal position stands settled by the Constitution Bench of this Court in **Kone Elevator India Pvt. Ltd. v. State of Tamil Nadu and Ors.**, [Writ Petition (C) No.232 of 2005]. Following observations in that case are apt for this purpose: "On the basis of the aforesaid elucidation, it has been deduced that **a transfer of property in goods under Clause (29A) (b) of Article 366 is deemed to be a sale of goods involved in the execution of a Works Contract** by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. One thing is significant to note that in **Larsen and Toubro (supra)**, it has been stated that after the constitutional amendment, **the narrow meaning given to the term "works contract" in Gannon Dunkerley-I (supra) no longer survives at present.** It has been observed in the said case that even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract, for the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. It has been further held that once the characteristics or elements of works contract are satisfied in a contract, then irrespective of additional obligations, **such contract would be covered by the term "works contract" because nothing in Article 366(29A) (b) limits the term "works contract" to contract for labour and service only.**"

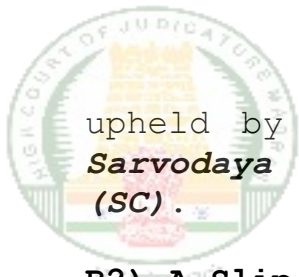
(Emphasis supplied)

28. The underlying position of law is that after the insertion of Clause-29A in Article 366 of the Constitution, "works contract" which was indivisible by legal fiction, altered into a contract, and was permitted to be bifurcated into two: one for sale of goods, and another for services, thereby, making the goods component of the contract exigible to Sales Tax.

B) Bombay High Court:-

B1) Full Bench:-

29. A Full Bench of the Bombay High Court had yet another occasion to examine the issue with specific reference to printing materials in **Sarvodaya Printing Press Vs. State of Maharashtra**. The Full Bench of the Bombay High Court again upheld the ratio that consumables involved in the execution of the works contract are exigible to tax. The order of the Full Bench had been subsequently



upheld by the Hon'ble Supreme Court in **State of Maharashtra Vs. Sarvodaya Printing Press Fine Art**, reported in (1999) 114 STC 242 (SC).

B2) A Slip again...:-

30. In **Commissioner of Sales Tax Vs. Tvl.R.M.D.C.Press Private Limited**, reported in (1999) 112 STC 307, wherein, it had been held as follows:-

"It is difficult that in the execution of job work of printing, there is any transfer of property in the ink which is used for the purpose of printing. In fact, ink is a tool of the printer. It is consumed in the process of printing and loses its identity as "Goods". No property can be said to pass in ink in the execution of the contract of printing, either as ink or in any other form. No customer is concerned with the ink used in printing, its quantity or cost. It cannot be said that when a customer gets ink either as ink or in any other form, there is thus no transfer of ink involved in the execution of works contract of printing. It may be pertinent to observe that what is taxable under the Act is the value of the goods which gets transferred to the customer in the execution of works contract either as goods or in any other form and not the value of goods used or consumed in the execution of the works contract. If such user of consumption does not result in transfer of property in those goods in any form to the customer. That being so, in our opinion, the Tribunal was right in holding that there is no transfer of property in ink involved in the execution of contract of printing either as ink or in any other form."

B3) The law again reiterated:-

31. The judgment of the Division Bench in **Tvl.R.M.D.C.Press Private Limited**, (referred supra), came up for consideration in (2003) 5 MHCJ 455, **Commissioner of Sales Tax Vs. Matushree Textiles Ltd**, and the Division Bench held as follows:-

"The ratio laid down by this Court in the case of **R.M.D.C. Press Pvt. Ltd. [1999] 112 STC 307** has no precedential value in view of the decisions of the apex Court in the case of **Sarvodaya Printing Press [1999] 114 STC 242** and the Constitution Bench (three-Judge Bench) decision in the case of **Associated Cement Companies Ltd. [2001] 124 STC 59**. In the case of **R.M.D.C. Press [1999] 112 STC 307**, this Court took the view that the ink is a tool of the printer and the same is consumed in the process of printing and loses its identity as goods and, therefore, no property can be said to pass in ink used in



the execution of the contract of printing. This finding is contrary to the Full Bench decision of this Court in the case of **Sarvodaya Printing Press v. State of Maharashtra** reported in [1994] 93 STC 387, wherein it is held that the paper and ink used in printing passes to the customer after printing and become the property of the customer by theory of accretion. The Full Bench decision of this Court has been upheld by the apex Court which is reported in **State of Maharashtra v. Sarvodaya Printing Press Fine Art Printer** [1999] 114 STC 242. Therefore, the decision in **R.M.D.C. Press case** [1999] 112 STC 307 rendered by the division Bench without considering the Full Bench decision of this Court in the case of **Sarvodaya Printing Press** [1994] 93 STC 387, (which was binding on the Division Bench), must be held to be per incuriam. Once it is held that the property in goods used in the execution of the works contract passes incidentally or by theory of accretion, such passing, though not a sale under BST Act, would be deemed sale under the Works Contracts Act. In the present case, as the property of the materials used in the process of dyeing and printing are passed on to the customer in the form of coloured shade and such passing amounts to sale, the provisions of the Works Contracts Act are attracted."

(Emphasis supplied)

32. However, **Tvl.R.M.D.C.Press Private Limited, (referred supra)**, came to be again examined in **Tax Case (Revision) No.9 of 2003, by order dated 25.10.2012, Commissioner of Sales Tax, Maharashtra State, Bombay Vs. M/s. Ramdas Sobhraj**. The facts in that case was that the assessee supplied grained zinc and aluminium plates, which were coated by dipping in water, wherein, gun bio chromate was dissolved. Again the issue was with respect to bringing to tax the consumables involved in a works contract. A Division Bench of Bombay High Court answered the reference in favour of the Revenue, relying on **Matushree Textiles Ltd (referred supra)**.

C) Kerala High Court:-

C1) Full Bench:-

33. A Division Bench of the Kerala High Court in **Enviro Chemicals Vs. State of Kerala, (referred supra)**, had referred to a Full Bench a similar issue. The order of reference was as follows:-

"The question raised is whether the service rendered by the petitioner in the form of **chemical treatment of effluent water for the awarder amounts to sale of goods in the execution of works contract**. Petitioner has developed a chemical product by name "Envirofloc" which is used as a chemical for effluent treatment. During the years 1988-89 and 1989-90, for which the issue arises,



the petitioner carried out pollution control treatment for Madura Coats Limited, Koratty, which is a known company engaged in manufacture of yarn. There may be massive pollution of water on account of dye-application on yarn. In the course of effluent treatment entrusted to the petitioner, **the petitioner applies the chemical Envirofloc and it either gets used up in the treatment of effluent water probably by neutralising colour, ordour, etc. Petitioner's case is that no transfer or sale has taken place in the execution of works contract. The department's case is that material is consumed in the process of effluent treatment and it gets transferred in the course of such treatment and there is sale of goods involved in the execution of works contract** which under the definition includes processing, preparing, improvement etc. Counsel for the petitioner cited before us the decision of the Division Bench of this Court in **THE DEPUTY COMMISSIONER OF SALES TAX (LAW), BOARD OF REVENUE (TAXES), ERNAKULAM V. M.K.VELU, 89 STC 40**, wherein this Court following the decision of Patna High Court held that there is no sale of goods in the display of fireworks done by the contractor on behalf of the awarder. Even though this Court has followed the decision of the Patna High Court in the case of pest control, strangely the definition of works under KGST Act is not referred to by Division Bench in their judgment. Another decision of this Court cited by counsel for the petitioner is that of a single Bench in **DYNAMIC INDUSTRIAL AND CLEANING SERVICES (P) LTD. V. STATE OF KERALA AND ANOTHER, 97 STC 564** which is a case of cleaning of boiler with cleaning aids, which the Court found not taxable under the Act. The Government Pleader cited latest decision of the Supreme Court in **TATA CONSULTANCY SERVICES V. STATE OF ANDHRA PRADESH, (2004) 137 STC 620**, and **BSNL AND ANOTHER V. UNION OF INDIA AND OTHERS, (2006) 145 STC 91** wherein the Supreme Court followed the case in **ASSOCIATED CEMENT COMPANIES LTD. V. COMMISSIONER OF CUSTOMS, 124 STC 59** and the case reported in **RAINBOW COLOUR LAB AND ANOTHER V. STATE OF MADHYA PRADESH, 118 STC 9**. It was held by the Supreme Court that in order to attract sales tax, there need not be transfer of any tangible goods. The contract of the nature arising in this case also involves two stages. One supply of goods and the other services rendered with such goods. The petitioner utilises the chemical for treatment of the effluent and brings out an improvement of the effluent quality, conform it with the parameters prescribed by pollution control board for the awarder to retain their

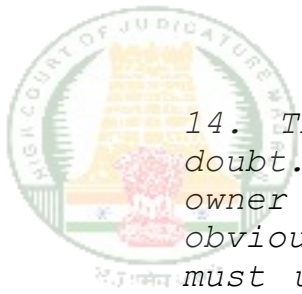


licence. Certainly it is processing of the effluent done by the petitioner with the materials used by him. The point of transfer of goods to the awarder is by way of appropriation to the contract, that is the application of the materials in the water which brings out the desired result, though in the process it gets consumed. Petitioners cited a Division Bench decision of this Court in **AJANTA COLOUR LAB V. STATE OF KERALA, (1999) 2 KLT 445** and another judgment of this Court in **SOUTHERN CABLE AND ENGINEERING WORKS V. STATE OF KERALA, (2002) 1 KLT SN.67**. We feel these judgments do not reflect the correct law by virtue of later decisions of the Supreme Court referred above. Moreover, petitioners' is a case where the product used in effluent treatment is not transferred to the awarder, but consumed in the course of treatment. Having regard to the importance of the issue and since Division Bench judgments above referred apparently are against later decisions of the Supreme Court referred above, we feel the matter requires to be decided by a Full Bench of this Court."

(Emphasis Supplied)

34. Hon'ble Mr.Justice.K.M.Joseph, (as His Lordship then was) held as follows, while delivering the majority decision of the Full Bench reported in **(2011) 39 VST 434 (Ker) (FB), Enviro Chemicals Vs. State of Kerala.**

" After having considered the entire case law cited before us and on a conspectus of the provisions, we would think that the learned Special Government Pleader is right in his contention based on the decision of the Apex Court in **Xerox Modicorp Ltd's case (supra)**. It is no doubt true that the contract as such is not placed before us, if it is one which is reduced to writing. But we will proceed on the basis that the process involved is substantially the same as has been indicated by the assessee and which we have extracted. It is undoubtedly true that even after the 46th amendment, sales tax cannot be levied merely because there is a works contract. There must be transfer of property in the form of goods or otherwise than in the form of goods. What is taxable is the transfer of property in goods (See the definition of sale in the Act in this regard). It does not matter whether the transfer of property takes place in the form of goods or in any other form. It is undoubtedly also true that in view of the decision of the Apex Court in **M/s. Gannon Dunkerley And Co. And Others v. State of Rajasthan And Others (1993 (1) SCC 364)** that the cost of consumables involved in works contract cannot be taxed.



14. That the chemical in question is goods, is beyond doubt. It cannot be disputed that the assessee was the owner of the goods in question, namely the chemical. It is obviously the intention of the parties that the assessee must use the chemical in the effluent treatment process. It is equally indisputable that the assessee has actually used it. No doubt, in the Judgment of the Apex Court in **Xerox Modicorp Ltd. v. State of Karnataka ((2005) 142 STC 209)**, the Apex Court found that the toners and developers are liquids put into the Xerox machine and they perform essentially the same function as ink in the printers and the Court also relied on the provision in the contract that the assessee in the said case would charge for the unaccounted stock at prevailing prices. By using the chemical, the petitioner/assessee rendered the effluent compliant with the standards. It could probably be said that in the case of the toner and developers as the function is that of ink in printers, it shows up in the final product of the xerox machines. But, the decision of the Apex Court is not based on there being any requirement that the items which are used should exist in any form in the resultant product which is the principle laid down by this Court in **Teaktex Processing Complex Limited v. State of Kerala ((2004) 136 STC 435)** and also in **Microtrol Sterilization Services Pvt. Ltd. v. State of Kerala ((2009) 26 VST 213 (Ker))**.

15. We would think that the principle "quicquid plantatur solo, solo cedit" is a principle which is apposite in the context of a building and engineering contract. We get the following Account of the principle "quicquid plantatur solo, solo cedit":

"The well-known principle is that the property in all materials and fittings, once incorporated in or affixed to a building, will pass to the free-holder quicquid plantatur solo, solo cedit. As soon as materials of any description are used in a building or other erection, they cease to be the contractor's property and become that of the free holder. The employer under a building contract may not necessarily be the free-holder, but may be a lessee or licensee, or even have no interest in the land at all, as in the case of a sub-contract. However, once the builder has affixed materials, the property in them passes from him, and at least as against him, they become the absolute property of his employer, whatever the latter's tenure of or title to the lands. The builder has no right to detach them from the soil or building, even though the building owner may himself be entitled to sever them as against some other person - for example, tenant's



fixtures. Nor can the builder reclaim them if the building owner or anyone else has subsequently severed from the soil.

Materials worked by one, into the property of another, becomes part of that property. This is equally true whether it be fixed or moveable property. **Bricks built into a wall becomes part of the house, thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship.** Until, however, the materials are actually built into the work, in the absence of some stipulation intended to pass the property in them, when delivered on the site, they remain the property of the contractor, notwithstanding that they might have been approved by the employer or his agent or brought into the site unless the agreement between the parties evinces a clear intention to the contrary."

(Emphasis Supplied)

VII) Tamil Nadu State Amendment:-

35. Now, the effect of the insertion of Section 3B, in Tamil Nadu General Sales Tax Act, 1959, will have to be examined.

Section 3B and the relevant sub-section (e) read as follows:-

"3B. Levy of tax on the transfer of goods involved in works contract:-

(1) Notwithstanding anything contained in sub-sections ²¹[x x x], (2-B), (3), (4), (7) and (8) of Section 3, or Section 7-A, but subject to the other provisions of this Act including the provisions of sub-section (1) of Section 3, every dealer referred to in item (vi) of clause (g) of Section 2 shall pay, for each year, a tax on his taxable turnover of transfer of property in goods involved in the execution of works contract at the rates mentioned in sub-section (2), ²²[2-A or 2-C] of Section 3 or, as the case may be, in Section 4.

Explanation - Where any works cannot involve more than one item of work, the rate of tax shall be determined separately for each item of work.

(2) The taxable turnover of the dealer of transfer of property involved in the execution of works contract shall, on and from the 26th day of June 1986, be arrived at after deducting the following amounts from the total turnover of that dealer:-

- (a) ...
- (b) ...
- (c) ...

²¹ The figure '2-A' was omitted from 27th March 2002 by the Eighth Amendment Act (47 of) 2002.

²² The figure '2-A' was added from 27th March 2002 and 'or 2-C' from 1st July 2002 by the same Act.



(d) ...

(e) all amounts towards 'labour charges and other like charges' not involving any transfer of property in goods, actually incurred in connection with the execution of works contract, or such amounts calculated at the rate specified in column (3) of the Table below, if they are not ascertainable from the books of accounts maintained and produced by a dealer before the assessing authority.

The Table

Serial number (1)	Type of works contract (2)	Labour or other charges and percentage value of the works contract
1.	Electrical contracts	15
2.	All structural contracts	15
3.	Sanitary contracts	25
4.	Watch and / or clock repair contracts	50
5.	Dyeing contracts	50
6.	All other contracts	30

VIII) Interpretation by the Madras High Court:-

36. The State of Tamil Nadu after the 46th Constitutional Amendment, carried out an amendment to the Tamil Nadu Sales Tax Act and inserted Rules 6A and 6B without bringing in a charging Section. These Rules were challenged in **Larsen and Toubro Ltd., Vs. State of Tamil Nadu, (1993) 88 STC 289** and the Madras High Court struck down the said Rules.

37. Thereafter, the entire system of taxation of works contract was recast and the original charging Section 3B was inserted from 26.06.1986 and by the same, tax was levied on the sale of goods involved in works contract as prescribed in the 4th Schedule to the Act.

38. Subsequently, the present Section 3B was substituted and inserted with effect from 12.03.1993 and a new scheme of taxation was introduced from that date. This came up to be questioned in **Kamatchi Lamination (P) Ltd., Vs. State of Tamil Nadu, (1994) 95 STC 378 (Mad)**, and the Madras High Court had examined the charges that can be included for deduction. They were: "1)

reasonable profit margin in respect of labour charges, 2) Cost of establishment relatable to the supply of labour and services. 3) Cost of consumables not involving any transfer of property inputs."



This judgment was affirmed by the Hon'ble Supreme Court in (1995) 97 STC 503.

39. In **LNIND 2010 MAD 468, M.S.Mohan Offset Printers Vs. State of Tamil Nadu, Rep. By the Deputy Commissioner CT**, a Division Bench of this Court had examined the case of the assessee, who prints and supplies the materials as per specification, design and general layout of the customers with their name and address predominantly printed. The Division Bench examined the core question involved as to whether in the given facts and circumstances of the case, printing ink could be construed to be a consumable one or not and whether such printing ink when used for execution of works contract to printing materials would amount to transfer of property in goods in terms of Sections 2(j) and 2(u) of the TNGST Act and consequently as to whether Section 3-B was attracted.

40. In paragraphs 15, 16 and 18 the Division Bench observed as follows:-

"15. The learned counsel for the petitioner-assessee has contended that when once the printing ink is used in the execution of works contract, it would lose the character as a 'good' and thereafter cannot be called within the definition of 'goods' under Section 2(j) of the TNGST Act. In our opinion, the said submission cannot be accepted. The undisputed facts are that the assessee accepts the job of works contract for supply of printed materials like carton, labels and the customers supply only papers. The assessee engages coolies for the printing works. By the above act of the assessee, the job of works contract is not completed unless the actual printing is undertaken. For the purpose of printing, the printing ink must be used. It is also not in dispute that the customers are not supplying printing ink and the assessee is also not buying the printing ink making the same liable for tax. **The assessee buys the raw materials like pigments, linseed oil and chemicals and manufactures the printing ink. These raw materials are purchased under 'C' forms. By using all these raw materials, a new product, namely, printing ink emerges and that new product had not suffered any tax. Only when this printing ink is used on the material papers supplied by the customers and the actual printing is undertaken, the works contract is completed.**

16. The question is, therefore, whether the printing ink is a consumable one and whether such usage of printing ink on the material papers would amount to transfer of property in goods? **The printing ink by itself is a property.** To be precise, it is a property as defined under Section 6 and it can be sold in open market. **It will not lose its character as a property when it is used for**



printing. When the printing ink is transferred on the papers, it is tangible and without which the works contract cannot be completed. **By virtue of sub-clause (b) of clause (29A) of Article 366 of the Constitution, a deeming transfer of property can be presumed resulting in printing ink used on printing materials, which is liable to be taxed under Section 3-B of the TNGST Act.** In that context, the printing ink cannot be considered to be one of consumable."

(Emphasis supplied)

41. The Division Bench also considered the judgment of the Hon'ble Supreme Court in **Imagic Creative Private Limited Vs. Commissioner of Commercial Taxes & Ors, (2008) 12 VST 371 (SC)** and **TATA Consultancy Services Vs. State of Andhra Pradesh, (2001) 122 STC 198 (SC)**, and finally held as follows:-

" 18. The learned counsel also relied upon yet another judgment of the Apex Court in **Imagic Creative Pvt. Ltd., v. Commissioner of Commercial Taxes and others, (2008) 12 VST 371 (SC)**. That was a case where the Apex Court was considering the composite contract for advertisement services by creating original concept and design advertisement material for its clients and design brochures, namely, reports etc., and held that they are not works contract. However, in the present case, the printing ink, even after execution of the printing, is

visible and tangible. As has been held by the Apex Court in **Tata Consultancy Services case (supra)**, even in cases of intangible goods as well, as the printing ink that is used in the execution of works contract is tangible and is not a consumable, the necessary conclusion would be that by such use of printing ink, the goods are transferred in job contract and therefore is liable to be taxed under Section 3-B of the TNGST Act. The conditions for admitting deduction under Section 3-B of the TNGST Act basically are (i) that the contractor should have purchased the goods from a registered dealer liable to pay tax under the Act and (ii) that the goods should have been used in the execution of the works in the same form in which they were purchased. In this case, though the assessee had purchased raw materials locally and from other States, those raw materials had not suffered any tax. That apart, after the printing ink is manufactured by the assessee, as it is used on printing materials it does not amount to sale and the goods are not subjected to tax. Equally the raw materials purchased by the assessee are not used as such in the execution of the works contract, but the raw materials undergo a different form, namely, printing ink



which alone is used in the execution of the works. **In that view, the levy of tax under Section 3-B cannot be found fault with.** Accordingly, the tax revision case stands dismissed and the issue is answered in favour of the revenue, but against the assessee."

(Emphasis supplied)

42. In **Tax Case (Revision) Nos.69 of 2009, 80 and 81 of 2011, The State of Tamil Nadu, rep. by the Deputy Commissioner (Commercial Taxes), Salem Division, Salem, Vs. Tvl.S.S.M.Processing Mills**, decided on 23.08.2013, which was also relied on by the learned Single Judge, a Division Bench of this Court had agreed with the decision of the Full Bench of the Kerala High Court and held as follows:-

"The fact that the chemicals used for bleaching is washed away in the process, by itself, would not be a justifiable ground to accept the case of the assessee that there was no transfer of property of any goods. **The very fact of the yarn being bleached by a chemical process, by applying the chemical, will clearly point out that there is transfer of property of the chemical**, hence, bleaching contract attracts sales tax as in the case of dyeing contract, when the chemicals are purchased from outside the state."

(Emphasis supplied)

43. The learned counsels for the appellant had however relied on the judgment of the Division Bench of this Court in **State of Tamil Nadu Vs. Premier Litho Works and another**, WA.(MD).No.79 of 2009, decided on 31.07.2009. The issue in that Writ Appeal was as follows:-

"... whether a particular transaction is an inter-state sale or a works contract, is the issue raised by the Revenue in the present appeals."

44. That is not the issue before the Court now. The parties herein agree that the appellant is involved in works contract. The issue before this Court is whether there can be a tax on the transfer of property in goods involved in the execution of the works contract.

45. The issue in **Premier Litho Works (referred supra)**, was raised consequent to the assessment by the Commercial Tax Officer, granting exemption on inter-state printing cooly receipts, but disallowing the claim for exemption in respect of printing works for the single user and also rejecting the claim for concessional rate of tax in respect of inter-state sales against 'C' Form. The assessee filed an appeal before the Appellate Assistant Commissioner. That appeal was dismissed. Thereafter, the assessee filed a Second Appeal in MTA No.469 of 2001, before the Additional Bench of the Tamil Nadu Sales Tax Appellate Tribunal. The Tribunal



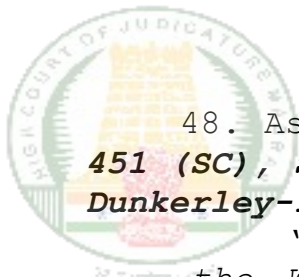
allowed the appeal by an order dated 31.07.2001 and held that the printed materials supplied by the assessee to the customers

constituted a works contract and not an outright inter-state sale. The State then filed Writ Petition No.3770 of 2004, which was dismissed by the learned Single Judge by an order dated 08.06.2007. As against the said judgment, the State filed the Writ Appeal before the Division Bench. As seen the issue was whether a particular transaction was an inter-state sale or a works contract. As a matter of fact, the counsels before the Division Bench had not referred to any judgment of the Hon'ble Supreme Court or the Full Bench of the Bombay High Court, which directly dealt with the 46th amendment to the Constitution. There was also no reference to Section 3B of the Tamil Nadu General Sales Tax Act. The said judgment had been delivered on a different context itself. With due respects to the Division Bench, it must be stated that the said judgment is not directly germane or applicable to the facts of this particular case. It is seen that against the judgment of the Division Bench, the State had filed a Special Leave Petition which had been rejected by the Hon'ble Supreme Court and therefore, on the issue of whether a particular transaction is an inter-state sale or a works contract, the issue has become final.

IX) Necessity for reference:-

46. In *State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Mahalakshmi Process, Sivakasi, (2019) SCC Online Mad.997*, a Division Bench of this Court had relied on *Tvl.R.M.D.C.Press Private Limited, (referred supra)*, which had been declared as *per incuriam*, in *Matushree Textiles Ltd, (referred supra)*.

47. Even though, the Division Bench in *Tvl.Mahalakshmi Process, Sivakasi, (referred supra)*, was concerned with an order of remand and had ultimately dismissed the appeal by confirming the order of remand, the Division Bench had extracted the relevant portion in the order of remand, wherein, the First Appellate Authority had relied on *Tvl.R.M.D.C.Press Private Limited, (referred supra)*, and had held that no property can be said to pass in the execution of a contract of printing, either as ink or in any other form. Holding as above, the First Appellate Authority had therefore remanded the matter back to the Assessing Officer to rework the assessment. It was however, unfortunately not pointed out to the Division Bench that the judgment in *Tvl.R.M.D.C.Press Private Limited, (referred supra)*, had been held to be *per incuriam* by a coordinate Bench by the Bombay High Court itself. Therefore, the Division Bench in *Tvl.Mahalakshmi Process, Sivakasi, (referred supra)*, had unfortunately, indirectly, upheld the law as stated by *Tvl.R.M.D.C.Press Private Limited, (referred supra)*, which is no longer good law.



48. As stated above, the Hon'ble Supreme Court in **(2015) 78 VST 451 (SC), State of Karnataka Vs Pro Lab & Ors**, relying on **Gannon and Dunkerley-II, (1993) 88 STC 204**, had held that,

"...after insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", **thereby making goods component of the contract exigible to sales tax**. Further, while going into this exercise of divisibility, dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows, as a sequitur, that by virtue of clause 29-A of Article 366, **the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales tax thereupon**. It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject."

(Emphasis Supplied)

49. This is the law of the land. It is to be reiterated that by virtue of Clause 29-A of Article 366, the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales tax thereupon. This vital aspect was not brought to the notice of the Division Bench in **Tvl.Mahalakshmi Process, Sivakasi, (referred supra)**.

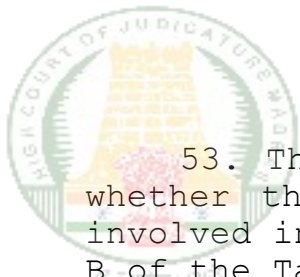
50. In **Tax Case (MD).No.202 of 2012, State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process, Kovilpatti**, and in **(Tax Case (Revision) No.687 of 2006), State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process**, again attention of the Division Bench was not drawn to

the judgment of the Hon'ble Supreme Court, with respect to the issue of assessment made on the supply of printing materials under Section 3B of the Tamil Nadu General Sales Tax Act, and the Division Bench had therefore, answered the issue against the Revenue.

51. In **Tvl.Vibgyor Process, Kovilpatti, (referred above)**, the Division Bench had relied on **Premier Litho Works and another, (referred above)**.

52. To reiterate, the issue in **Premier Litho Works**, was as follows:-

"... whether a particular transaction is an inter-state sale or a works contract, is the issue raised by the Revenue in the present appeals."



53. The issue before this Court is not the above. The issue is whether there can be a tax on the transfer of property in goods involved in the execution of a works contract in terms of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959.

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54. The appellant also relied on a very recent judgment of a Division Bench of this Court in **WP.No.35213 of 2003, The State of Tamil Nadu, rep. by. The Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Subramanian Offset Printers**, wherein, the Division Bench again relied on **Premier Litho Works and another, (referred above)** and yet another judgment dated 08.01.2020, in **M/s.NPT Offset (P) Ltd. Vs. The Joint Commissioner II and another [WP.No.20324 of 1999]**. Again the pronouncements of the Hon'ble Supreme Court were not brought to the knowledge of the Division Bench and the Division Bench had unfortunately again answered the issue against the Revenue.

55. The attention of the Division Benches in **Tvl.Mahalakshmi Process, Sivakasi, Tvl.Vibgyor Process, Kovilpatti, Tvl.Subramanian Offset Printers**, and **M/s.NPT Offset (P) Ltd**, were unfortunately not drawn to the authoritative pronouncements of the Hon'ble Supreme Court and the Full Bench of the Bombay High Court and the Full Bench of Kerala High Court and also to the earlier pronouncements of the Division Benches of this Court.

56. The learned Single Judge whose order is under appeal before us has applied the correct position of law by relying on **Tvl.S.S.M.Processing Mills, (referred supra)**, and on the Full Bench of the Kerala High Court in **Enviro Chemicals Vs. State of Kerala. (referred supra)**.

X) The Reference Answered:-

57. The reference is therefore answered as follows:-

Question:-

Whether the purchase of ink for printing polythene rolls is taxable in terms of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959.

Answer:-

The purchase of ink for printing **is exigible to tax in terms of Section 3-B of the Tamil Nadu General Sales Tax Act, 1959. The reference is answered in favour of the Revenue.**

XI) Conclusion:-

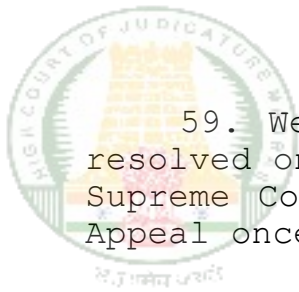
58. **We therefore hold as follows:-**

1. The judgment in **State of Tamil Nadu Vs. Premier Litho Works and another**, reported in **(2009) 26 VST 205 (Madras)**, examined the question whether a particular transaction is an inter-state sale or a works contract. In the instant case, there is no



quarrel that the appellants are involved in works contract. The judgment is distinguishable on facts and on law and reliance placed by the appellant on the said judgment is totally misconceived. The 46th Amendment to the Constitution of India and the insertion of Clause 29-A in Article 366 and Section 3-B (2)(e) of the Tamil Nadu General Sales Tax, 1959, were not brought to the attention of the Division Bench, since the issue involved was entirely different.

2. The attention of the Division Benches of this Court in **Tax Case (MD).No.202 of 2012, State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process, Kovilpatti, (Tax Case (Revision) No.687 of 2006), State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Vibgyor Process, (2019) SCC Online Mad. 997, [WP.No.35213 of 2003], State of Tamil Nadu, rep. By the Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Mahalakshmi Process, Sivakasi, The State of Tamil Nadu, rep. by. The Deputy Commissioner (CT), Tirunelveli Division, Tirunelveli Vs. Tvl.Subramanian Offset Printers, and [WP.No.20324 of 1999], M/s.NPT Offset (P) Ltd. Vs. The Joint Commissioner II and another**, were not drawn to the correct position of law as repeatedly and consistently pointed out by the Hon'ble Supreme Court and are accordingly over ruled.
3. The correct position of law as repeatedly and consistently pointed out by the Hon'ble Supreme Court, finally in **(2015) 78 VST 451 (SC), State of Karnataka Vs Pro Lab & Ors**, is "to sum up, it follows from the reading of the aforesaid judgment that **after insertion of clause 29-A in Article 366, the Works Contract which was indivisible one by legal fiction, altered into a contract, is permitted to be bifurcated into two: one for "sale of goods" and other for "services", thereby making goods component of the contract exigible to sales tax. Further, while going into this exercise of divisibility, dominant intention** behind such a contract, namely, whether it was for sale of goods or for services, **is rendered otiose or immaterial**. It follows, as a sequitur, that by virtue of clause 29-A of Article 366, **the State Legislature is now empowered to segregate the goods part of the Works Contract and impose sales tax thereupon**. It may be noted that Entry 54, List II of the Constitution of India empowers the State Legislature to enact a law taxing sale of goods. Sales tax, being a subject-matter into the State List, the State Legislature has the competency to legislate over the subject."



59. We therefore hold that since the question of law has been resolved on the basis of authoritative pronouncements of the Hon'ble Supreme Court, it would be a fruitless exercise to refer the Writ Appeal once again to the Division Bench.

60. The Writ Appeal has no merits and it is **accordingly dismissed**. There shall be no order as to costs.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To

Commercial Tax Officer - 1,
Commercial Taxes Building,
Madurai Road, Viruthunagar.

Judgment made in

W.A. (MD) .No.649 of 2014

12.06.2020

VB (17.06.2020) 32P 2C