State Of Orissa & Other vs The Tltaghur Paper Mills Company Ltd.& ... on 1 March, 1985

Equivalent citations: 1985 AIR 1293, 1985 SCR (3) 26, AIR 1985 SUPREME COURT 1293, 1985 TAX. L. R. 2948, 1985 SCC (TAX) 538, 1985 STI 65, 1985 SCC (SUPP) 280, (1985) 60 STC 213

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Bench: D.P. Madon, V.D. Tulzapurkar, Amarendra Nath Sen

PETITIONER:
STATE OF ORISSA & OTHER

Vs.

RESPONDENT:
THE TlTAGHUR PAPER MILLS COMPANY LTD.& ANR.

DATE OF JUDGMENT01/03/1985

BENCH:
MADON, D.P.
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MADON, D.P.
TULZAPURKAR, V.D.
SEN, AMARENDRA NATH (J)

CITATION:
1985 AIR 1293 1985 SCR (3) 26
1985 SCC Supl. 280 1985 SCALE (2)410
CITATOR INFO :
RF 1986 SC1085 (12)
RF 1988 SC1164 (4)
R 1988 SC1531 (46)
RF 1991 SC 672 (2,3,10)

ACT:
Orissa Sales Tax Act 1947-Sections 3B and 5 (1)-Scope of-Notifications levying purchase tax on bamboos agreed to be served and standing trees agreed to be severed-Whether Ultra vires the Act-Whether create new class of goods not known to law-Whether amount to tax on immovable property - and not on goods-notifications issued in supersession of all previous notifications on the subject-Whether wipe out all tax liability accruing under previous notifications.
"Timber" and "logs"-Whether mean the same thing.
Bamboo contract-Nature of-Whether an easement.

Interpretation-Nature and meaning of a document-Whether can be determined by the end-result-Court-if could go into policy matters.

Constitution of India-Article 141-Conflicting views of the Supreme Court on same point-View of larger Bench to be followed in preference to view of smaller Bench.

HEADNOTE:

Section 3B of the Orissa Sales Tax Act 1917 empowers the State Government to declare from time to time any goods or class of goods to be liable to tax on turnover of purchases. The proviso provides that no tax shall be payable on the sales of such goods or class of goods declared under this section. Section 5(1) prior to its amendment by the Orissa Sales Tax (Amendment) Ordinance, 1977 provides that the tax payable by a dealer under the Orissa Act should be levied on his taxable turnover at such rate not exceeding thirteen percent and subject to such conditions as the State Government might from time to time by notification specify.

On May 23, 1977 the State Government issued two notifications. Notification No. SRO 372/77 was made under section 3B amending the earlier notification dated April 23, 1976. This notification made standing trees and bamboos agreed to be severed liable to tax on the turnover of purchase with effect from
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June 1, 1977. Notification SRO No. 373177 issued under the first proviso to section 5(1) of the Orissa Act amended with effect from June 1, 1977 the second of the two notifications of April 23, 1976 and directed that the tax payable by a dealer under the Orissa Act on account of purchase of bamboos agreed to be severed and standing trees agreed to be severed would be at the rate of 10%.

On December 29, 1977 the Orissa Sales Tax (Amendment) Ordinance, 1977 was promulgated amending the Orissa Act with effect from January, 1978. With effect from the same date two notifications SRO No 900177 and SRO No. 901177 were issued; the first notification which was issued under the provisions of section 3B and in supersession of all previous notifications on the subject, declared that the goods mentioned in Column (2) of the schedule to the notification were liable to be taxed on the turnover of purchase with effect from January 1, 1978. Entries 2 and 17 in the schedule of this notification specified "bamboos agreed to be severed" and "standing trees agreed to be severed" respectively. Notification No. 901/77 issued under section 5 (1) was in supersession of all previous notifications in that regard. The State Government, by this notification, directed that with effect from January l 1978 the tax payable by a dealer under the Orissa Act on account of purchase of goods specified in column (2) of the schedule to

the notification would be at the rate specified against it in column (3) thereof. The rate of purchase tax for bamboos agreed to be severed and standing trees agreed to be severed was prescribed at 10%. The Ordinance was repealed and replaced by Orissa Sales Tax (Amendment) Act of 1978.

A large number of writ petitions were filed before the High Court impugning the notifications dated May 23, 1977 and December 29, 1977. One group of petitioners consisted of those who had entered into agreements with the State for the felling, cutting, obtaining and removing bamboos from forest areas for the manufacture of paper (bamboo contracts), and the other group consisted of those who had entered into agreements for the purchase of standing trees (Timber Contracts).

The bamboo contracts were a grant of exclusive right and license to fell, i cut and remove bamboos from the forest. Under the terms of auction the respondent was bound to pay a minimum royalty irrespective of the quantity of bamboos cut and removed. The Governor of the State was called the "grantor" of the licence. The bamboo contracts were in respect of different areas for periods ranging from 11 to 14 years with an option to renew the agreements for further periods.

The respondent in CA No. 219182 contended before the High Court that the subject matter of the Bamboo contract was not a sale or purchase of goods but was a lease of immovable property or in any went was a creation of an interest in immovable property by way of grant profit a prendre which amounted to an easement under the Indian Easements Act 1882 and that for that reason the royalty payable under the bamboo contracts could not be made exigible to either sales tax or purchase tax and that the impugned provisions of the notifications were ultra vires the Act. It was also contended that the bamboo contract was
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a works contract and for this reason also the transaction was not exigible to sales tax or purchase tax, and since the two notifications of December 29, 1977 were expressed to be made in supersession of all earlier notifications on the subject, the liability to sales tax under the said notifications of May 23, 1977 was wiped out.

In Civil Appeal No. 220/82 the bids of the respondent firm at auctions held by the Government in respect of trees standing in forest areas were accepted and on confirmation of the bids by the competent authority it entered into agreements with the Government for felling and removing such trees. The respondent, in turn, sold the trees felled by it in the form of logs to others- At the relevant time the respondent was successful at five auction sales and on ratification of the bids entered into five separate agreements (timber contracts) for felling and removing the trees standing in the forest areas.

After the issue of the notifications of May 23. 1977

the respondent filed a writ petition in the High Court against the State and the Sales Tax and Forest Authorities contending (I) that the levy of purchase tax on standing timber agreed to be severed was beyond the legislative competence of the State Legislature and (2) the notifications imposed a tax both at the point of sale and at the point of purchase and for this reason were invalid and ultra vires the Act. It was also contended that timber contracts were works contracts and the amounts payable under them were not exigible either to purchase tax or sales tax.

The High Court allowed all the writ petitions and quashed the impugned notifications.

In appeal to the Supreme Court the State contended that the subject matter of the impugned provisions is "goods" within the meaning of the term in the Sales of Goods Act and the Orissa Act, and that what was made exigible to tax under the impugned provisions notifications, was a completed purchase of goods.

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HELD: (I) Notification SRO Nos. 372/77 and 373/77 dated May 23, 1977, (2) entries Nos. 2 and 17 in the schedule to notification No. 900177 and (3) entries Nos. 2 and 17 in the schedule to notification No. 901177 dated December 29, 1977 levying purchase tax at the rate of ten per cent on the purchase of bamboos agreed to be severed and standing trees agreed to be severed, are not ultra vires either Entry 54 List II of the Seventh Schedule to the Constitution of India or the Orissa Sales Tax Act 1947 but are constitutional and valid [145D-F]

(a) The Legislative competence to enact the Orissa Act, which was a pre-constitution enactment, was derived from section 100 (3) of the Government of India Act, 1935 read with Entry 48 in List II in the Seventh Schedule to that Act. While Entry 48 spoke of "taxes on the sale of goods" Entry 54 of List II of the Seventh Schedule of the Constitution speaks of "taxes on the sale or
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purchase of goods." The addition of the word "purchase" in Entry 54 permits the State Legislature to levy a purchase tax and does not confine its taxing power merely to levying sales-tax. [62F; H]

(b) A cantena of decisions of this Court had held that the expression "sale of goods" had been used in the Government of India Act, 1935 in the same sense in which it is used in the Sale of Goods Act, 1930 and that it authorised the imposition of a tax only when there was a completed sale involving transfer of title to the goods. While construing Entry 54 in List II of the Seventh Schedule to the constitution interpretation was adopted and any attempt by the State Legislature to give that expression an artificial meaning or an enlarged meaning or to bring within its scope what would not be comprehended within that expression would be unconstitutional and ultra vires. [63F;

64G-H; 63G]

State of Madras v. Cannon Dunkerley & Co. (Madras) Ltd. [1959] SCR 379; The Sales Tax Officer Pilibhit v. Messrs. Budh Prakash Jai Prakash [955] 1 SCR 243, 247.

Bhopal Sugar Industries Ltd. M.P. & Anr. v. P. Dube Sales Tax Officer Bhopal Region Bhopal & Anr. AIR 1964 SC 1037; K.L. Johar & Co v. Deputy Commercial Tax Officer [1965] 2 SCR 112; Joint Commercial Tax Officer Harbour Div. II Madras v. Young Men's India Association (Reg.) Madras & Anr. [1970] 3 SCR 680; State of Maharashtra & Anr. v. Champalal Kishanlal Mohta [1971] 1 SCR 46, followed.

(c) Although a State is free to impose a tax at one or more points in a series of sales or purchases in respect of the same goods, the Orissa Act has adopted a single point levy by enacting the proviso to section 3 under which no tax is payable on the sale of goods or class of goods declared under that section to be liable to tax on the turnover of purchases. The proviso to section 8 states that "the same goods shall not be taxed at more than one point in the same series of sales or purchases by successive dealers." Therefore, where in a series of sales or purchases tax is levied at a particular point neither sales tax nor purchase tax can be levied at another point in the same series. [65C-E]

(d) Since any attempt on the part of the State to impose by-legislation tax on sales or purchases in respect of what would not be "sale" or a "sale of goods" under The Sale of Goods Act, 1930 is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation, would be equally unconstitutional. Similarly. where any rule or notification travels beyond the ambit of the parent Act, it would be ultra vires the Act. Equally, sales tax authorities purporting to act under the Act or under any rule made or notification issued thereunder cannot travel beyond the scope of such Act, rule or notification. Thus, the sales tax authorities under the Orissa Act cannot assess to sales tax or purchase tax, a transaction which is not a sale or purchase of
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goods or assess to sales tax any goods or class of goods which are liable to purchase tax or assess to tax, whether sales tax or purchase tax, goods at another point in the same series of sales or purchases of those goods by successive dealers who are liable to be taxed at a different point in that series.

[65G-H: 56A-C]

(2) There is no substance in the argument of the respondent that by the impugned provisions a new class of goods. not known to law, had been created. The definition of the expression "goods ' in both the Sale of Goods Act and the Orissa Act which is almost in identical terms, includes "things attached to or forming part of The land which are agreed to be severed before sale or under the contract of

sale." [66E; G-H]

(a) An examination of the definitions of movable property and immovable property given in the General Clauses Act, Registration Act and Transfer of Property Act, show that things attached to the earth are "immovable property." The term "attachment" means "rooted in the earth as in the case of trees and shrubs." Thus, while trees rooted in the earth are immovable property as being things attached to the earth by reason of the definition of the term "immovable property" in various statutes namely the General Clauses Act and the Orissa General Clauses Act and the Registration Act read with the definition of the expression "attached to the earth" given in the Transfer of Property Act, standing timber is "movable property" by reason of its exclusion from the definition of "immovable property" in the Transfer of Property Act and the Registration Act and by being expressly included within the meaning of the term "movable property" given in the Registration Act. [67E; 68F; 68G-H; 69A]

(b) The term "standing timber" has been judicially recognised as "a tree which ii in a state fit for the purposes of being used as wood for buildings, houses, bridges, windows, whether on the tree or cut and seasoned", that is, a tree meant to be converted into timber so shortly that it could already be looked upon as timber for all practical purposes even though it is still standing. Thus, trees which are ready-to be felled would be standing timber and therefore "movable property." While trees (including bamboos) rooted in the earth being things attached to the earth are immovable property and if they are "standing timber", are movable property, trees (including bamboos) rooted in the earth which are agreed to be severed before sale or under the contract of sale are not only movable property but also goods. [o9D-E; 70B-C]

Smt. Shantabai v. State of Bombay & Ors. [1959] SCR, 265, 275-6, followed.

(c) The distinction which existed in English law between fructus naturales (natural growth of soil regarded as part of the soil until severance) and fructus industriales (which are chattels considered as representing the labour and expense of the occupier and thing independent of the land) does not exist in Indian law. In a case of this nature the only question that falls for consideration in Indian law is whether a transaction relates to "goods" or "movable

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property". If it is sale of immovable property, a document of the kind specified in section 17 of the Registration Act is required to be compulsorily registered but a document relating to sale of goods or of movable property is not required to be registered. Secondly under Entry 54 of List 11 of the Seventh Schedule the State cannot levy a tax on the sale or purchase of any property other than goods. [71C-D]

3. The respondent's contention that the impugned provisions levied a purchase tax on immovable property and not on goods and that the State Government has travelled beyond its taxing power has no merit. [71F]

(a) The High Court erred in holding that the impugned provisions amounted to levying a tax on an agreement to sell and not on actual sale or purchase, that standing trees being unascertained goods continued to be the property of the State Government until felled and therefore the title to such trees or bamboos is transferred in favour of the Forest Contractor only when the trees or bamboos were felled and severed in accordance with the terms of the contract. There is a fallacy in the reasoning of the High Court in that the High Court read merely the description of the goods given in the impugned provisions by itself and not in conjunction with their governing words.

[71G-H; 72A-B]

(b) Tax levied under section 3B is not on goods declared under that section but on the turnover of purchases of such goods. A reading of the notification, issued under sections 3B and 5(1) as a whole makes it clear that the taxable event is not an agreement to sever standing trees or bamboos but the purchase of bamboos or standing trees agreed to be severed. [72C-D]

(c) The use of the terms "agreed" in the description of goods showed that there must be an agreement between the buyer and the seller and under this agreement standing trees as also bamboos must be agreed to be severed. According to the definition of "goods" such severance may be either before sale or under the contract of sale, The Sale of Goods Act makes a distinction between sale and agreement to sell and provides that where there is a transfer from the buyer to the seller of property in the goods which are the subject matter of the agreement to sell, the contract of sale is a sale but when the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled it is an agreement to sell which becomes a sale when the time elapses or such conditions are fulfilled. In the first case the contract is "executed contract" while in the second it is "executory."

[72E; 73C-D]

(d) A conspectus of the relevant sections o, the Sale of Goods Act shows that a purchase would be complete when the goods (in the case standing trees or bamboos) are specific goods. If these factors exist, then unless a different intention appears either from the terms of the contract or can be inferred from the conduct of the parties and other circumstances of the case, the property in such goods would pass from the seller to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of

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taking their delivery (of standing trees agreed to be

severed or bamboos agreed to be severed or both) is postponed. If, however, there is an unconditional contract for the sale of unascertained goods then unless a different intention appear-, the property in them would be transferred to the buyer when the goods are ascertained and it would be immaterial whether the time of payment of the price or the time of taking delivery of standing trees agreed to be severed or bamboos agreed to be severed or both is postponed. In either event, the sale and purchase would be completed before severance. Therefore for the impugned provisions to apply the severance of the standing trees or bamboos must not be before sale but under the contract of sale, that is, after the sale thereof is completed. The absence in the impugned provisions of the words "before sale or under the contract of sale" thus made no difference. The subject matter of the impugned provisions was goods and the tax levied thereunder was on the completed purchase of goods. [76F-H; 77A-C]

4. The High Court has confused the question of interpretation of the impugned provisions with the interpretation of Timber Contracts and Bamboo Contracts. The question of the validity of the impugned provisions had nothing to do with the legality of any action taken thereunder to make exigible to tax a particular transaction. If a notification is invalid, all action taken under it would be invalid also. Where on the other hand, a Notification is valid, an action purported to be taken thereunder contrary to the terms of that notification would be bad in law without affecting in any manner the validity of the notification. Were the interpretation placed by the High Court on the Bamboo contracts and the Timber Contracts correct, the transactions covered by them would not be liable to be taxed under the impugned provisions and any attempt or action by the State to do so would be illegal but the validity of the impugned provisions would not be affected thereby. There is no merit in the challenge to the validity of the impugned provisions on the ground of their unconstitutionality. [77D; F-H; 78A]

5. (a) The High Court also erred in its view that bamboos and trees agreed to be severed were the same as bamboos and timber after they were felled and that since bamboos and trees were liable to tax at the sale point, taxation of the same goods at the purchase point amounted to double taxation and that this was contrary to the provisions of the Orissa Act. [78C]

(b) Not only does the Orissa Act expressly forbids double taxation but it also forbids the levying of tax at more than one point in the same series of sales or purchases by successive dealers This is evident from the provisos to sections 3B and 8. Under the proviso to section 3B no tax is payable sales of goods or class of goods declared under that section to be liable to tax on the turnover of purchases. Under the proviso to section 8 the same goods are not to be

taxed at more than one point in the same series of sales or purchases by successive dealers. [78E-F]

(c) The two notifications of December 29, 1977 were issued as a result the Orissa Sales Tax (Amendment) ordinance 1977 which later became the
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Orissa Sales Tax (Amendment) Act, 1978, while the two notifications of May 23, 1977 were issued prior to the amendment. [79A]

(d) Prior to January 1, 1978 under section 5(1) tax was payable by a dealer on his taxable turnover of sales as also purchases at n certain fixed percentage. This rate applied both to sales tax and purchase tax. But the purchase tax was payable only on the turnover of purchases of goods declared B under section 3B. In respect of goods not so declared a dealer was liable to pay only sales tax. Under the proviso to this section, if goods were declared to be liable to purchase tax, no tax was payable on sales of such goods. Under section 5(1) the State Government was required to issue t notification only when it wanted to fix a rate of tax higher or lower than that specified in this section. If no such notification was issued then the tax payable, be it sales tax or purchase tax, was to be at the rate mentioned in section 5(l). Where, however, any goods were declared under section 3B to be liable to tax on the turnover of purchases, the notification prescribing a higher or lower rate of sales tax issued under the first proviso to section 5(1) would thereupon ceases to be observative by reason of the operation of the proviso to section 3B and it was not necessary to repeal expressly that notification. It was also not necessary for the State Government to issue a notification fixing the rate of purchase tax unless it wanted to fix a rate higher or lower than that specified in section 5(1). Where no such notification was issued, the rate of purchase tax would be the one which was mentioned in section 5(1). [79C-H]

(e) After January 1, 1978 no rate of tax was specified in the Orissa Act. Under section 5(1) the State Government is given power to notify from time to time the rate of tax-sales tax or purchase tax by issuing notifications. The notification dated December 29, 1977 issued under section 5(1) does not contain any entry in respect of bamboos, or timber or in respect of bamboos agreed to be severed or standing trees agreed to be severed. If they were liable to sales tax, they would fall under the residuary entry No. 101 and be liable to sales tax at the rate of seven percent. If any goods feeling under the residuary entry or any other entry in that notification are declared under section 3B to be liable to tax on the turnover of purchases, the residuary entry or that particular entry would automatically cease to operate in respect of those goods by reason of the proviso to section 3B without there being any necessity to delete that particular entry or to amend the residuary entry by

excluding those goods therefrom. It would be necessary for the State Government to issue a notification specifying the rate of purchase tax on those goods because unlike what the position was prior to January 1, 1978, on and after that date the new sub-section 5(1) does not specify any rate of tax but leaves it to the State Government to notify it from time to time. The High Court was in error in holding that the impugned provisions were ultra vires the Orissa Act as they amounted to "double taxation." [80A-E]

6. (a) There was no substance in the contention that the two notifications of December 29, 1977 having been made in supersession of all previous notifications issued on the subject their effect was to wipe out all tax liability which accrued under the earlier notifications of May 23, 1977. [80G-H]

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(b) The word "supersession" in the notifications of December 29, 1977 was used in the same sense as the words "repeal and replacement" and, there fore, does not have the effect of wiping out the tax liability under the previous notifications. All that was done by using the words "in supersession of all previous notification" in the Notifications of December 29, 1977, was to repeal and replace the previous notifications and not to wipe out any liability incurred under the previous notifications. [146C-D]

(c) Both sections 3B and 5(1) in express terms conferred power upon the State Government to issue notification from time to time. Under these provisions the State Government can issue a notification and repeal and replace it by another notification. [81C]

(d) The issuance of the notifications became necessary by reason of the change brought about in the scheme of taxation in 1977. With effect from January 1, 1978 unless a notification was issued specifying the rate of tax, no dealer would be liable to pay any tax under the Orissa Act. Under the amended section if the State Government wanted to tax any goods Or class of goods at a higher or lower rate it issued notifications specifications specifying such rate. Since no rate of lax was specified in the new section but was left to the State Government to fix it, it was necessary to issue a notification consolidating all previous notifications on the subject in respect of goods liable to purchase tax which the State Government did. [82E; 83A; C; D]

7. (a) Timber contracts were not works contracts but were agreements to sell standing timber. [146D]

(b) Timber contracts were not transactions of sale or purchase of standing trees agreed to be severed- They were merely agreements to sell such trees. The property in the trees passed to the respondent firm only in the trees which were felled, that is, in timber, after all the conditions of the contract had been complied with and after such timber

was examined and checked and removed from the contract area. The impugned provisions, therefore, did not apply to the transactions covered by the Timber Contracts [98 A-B]

(c) A conspectus of the terms of the Sale Notice, the Special Conditions of Contract, the General Conditions of Contract and the various statutory provisions shows that the heading "sale notice of timber`' as also the use of the words ' timber and other forest products will be sold by public auction" are not determinative of the matter. The other terms and conditions of the contract make it clear that the Timber Contracts were not unconditional contracts for the sale of goods in a deliverable state and the property in the trees specified in Schedule I of the Contract did not pass to the respondent firm when each of the contracts was made. The signing of the Timber Contracts did not result in a concluded contract because each contract was conditional upon the y State Government ratifying the acceptance of the bid, the ratification order did not become an unconditional contract for the sale of specific goods in a deliver able state for the respondent firm had no right to sever the trees and take them
away before complying with the other conditions of the contract, namely, furni
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shing a Coupe Declaration Certificate within the prescribed time, registering the property mark or trade mark, making the security deposit and so on. This apart, the respondent firm was not at liberty to fell trees of his choice nor was he entitled to remove the felled trees by any route which it liked but only by specified routes. [95F-H; 96B-C; 97A-B]

(d) Although under rule 40 of the Orissa Forest Contract Rules 1966, Rules stipulates that the respondent, firm was not entitled to any compensation for loss sustained by reason of fire, tempest, disease, natural calamity or any wrongful act of a third party this only showed that after a Timber Contract was concluded the risk passed to the respondent firm. Under section 26 of the Sale of Goods Act when the property is transferred to the buyer, the goods are at the buyer's risk whether delivery had been made or not; but this section is qualified by the phrase "unless otherwise agreed." The Timber Contracts in this case were subject to contract to the contrary. This is made clear by rule 44 which states that "all forest produce removed from a contract area in accordance with these rules shall be at the absolute disposal of the forest contractor." [97E-H]

8. (a) On the question whether the words "timber" and "logs" mean the same thing in commercial parlance the no material had been produced by the parties. Where a term has not been statutorily defined or judicially interpreted and there is insufficient material on record as to the meaning of the words, the Court must seek to ascertain its meaning in common parlance with such aid as is available to it. The court may take the aid of dictionaries in such cases to

ascertain its meaning in common parlance. In doing so, the Court must bear in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the Court would have to select the particular meaning which would be relevant to the context in which it has to interpret that word. [104E; 105B-C; 146G-H]

(b) The Orissa Act does not define the term "timber" or "logs." The statutory definition of "timber" given in the Orissa Forest Act, 1972 is that timber includes "trees fallen or felled and all wood cut up or sawn." The Madras Forest Act, 1882 and the Indian Forest Act 1927, the two Acts in force in the State of Orissa prior to the enactment of the Orissa Forest Act, 1972 too have not given any exhaustive definition of the term "timber." But what is apparent from these definitions is that the word "timber" is not confined merely to felled trees in the forests- In subsequent Act like the Orissa Forest Produce (Control of Trade) Act, 1981 the concept that timber is not merely felled trees has been emphasised. Therefore. a conspectus of the meanings given to the term "timber" in statutes, different dictionaries and as judicially interpreted by this Court as well as by some High Courts shows that it means "building material, generally wood, used for building of houses, ships etc.- and the word is applied to wood of growing trees capable of being used for structural purposes. Hence, collectively to the trees themselves." A log according to the dictionaries means a bulky mass of wood now usually an unhewn portion of a felled tree or a length cut off for firewood. These logs will be nothing more than wood cut up or

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sawn and would be timber. Similarly, a beam is timber sawn in a particular way. So too ratters would be timber logs put to a particular use. In ordinary parlance a plank would be flattened and smoothed timber.

[105C; F; 106C; 107A-D; F]

Mohanlal Vishram v. Commissioner of Sales Tax, Madhya Pradesh, Indore [1969] 24 STC 101; G. Ramaswamy and others v. The State of Andhra Pradesh and others [1973] 32 STC 309, approved and

Krupasindhu Sahu & Sons v. State of Orissa [1975] 35 STC 270. overruled.

9. (a) Sales of dressed or sized logs having been assessed to sales tax, sales to the respondent Firm of timber by the State Government from which logs were made by the respondent firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers, assuming that the retrospectively substituted definition of "dealer" in clause (c) of section 2 of the Orissa Sales Tax Act, 1947 is valid. [147B-C]

(b) Sales of logs by the respondent firm during the

period June 1, 1977 and December 31, 1977 would be liable to tax at the rate of ten percent. Assuming that the sales had been assessed to tax at the rate of six percent as contended by reason of the period of limitation prescribed by section 12(8) of the Orissa Act, the respondent-firms assessment for the relevant period cannot be re-opened to reassess such sales at ten per cent. [147D-E]

10. (a) The Bamboo Contract is not a lease of the contract area to the respondent company in CA 219182. Nor is it a grant of an easement to the respondent company, as it was not a grant of any right for the beneficial equipment of any of the respondent company. In addition to the right of entry there are other important rights flowing from the contract. It is a grant of a profit a prendre which in Indian law is a benefit to arise out of land and thus creates an interest is immovable property. A profit a prendre is a benefit arising out of land and in view of section 3(26) of the General Clauses Act, it is "immovable property" within the meaning of the Transfer of Property Act. [147F-H]

(b) There are countervailing factors which 80 to show that a Bamboo contract is not a contract of sale of goods. It is a grant of exclusive right and licence to fell, cut, obtain and remove bamboos. The person giving the grant the Governor of the State, is referred to as "grantor"; the consideration payable is "royalty" which is not a term used in legal parlance for the price of goods sold. It is not an agreement to sell bamboos standing in the contract area with the accessory licence to enter upon such area for the purpose of felling and removing bamboos nor is it for a particular felling season only. It is an agreement for a period ranging from fourteen, thirteen and eleven years with the option to renew the contract for further terms of twelves years. The payment of royalty has no relation to the actual quantity of bamboos cut and removed. The respondent company was bound to pay a minimum royalty and the royalty paid was always in excess of the royalty due on the bamboos cut in the contract areas. The Bamboo contract conferred upon the respondent-company a

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benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil coupled with several ancillary rights and was thus a grant of a profit a prendre. Being a profit a prendre or a benefit to arise out of land any attempt on the part of the State Government to tax the amounts payable under the Bamboo Contract would not only be ultra vires the Orissa Act but also unconstitutional as being beyond the State's taxing power under Entry 54 in List II in the Seventh Schedule to the Constitution of India.

[119C; E; 120B-D; 121G-H]

11. The decision of Firm Chhotabhai Jethabhai Patel & Co. v. The State of Madhya Pradesh [1963] SCR 476 on which

the appellant relied is not good law and has been overruled by decisions of larger Benches of this Court. (State of Madhya Pradesh v. Yakinuddin [1963] 3 SCR 13) [148A]

M/s Mohanlal Hargovind of Jubbulpore v. Commissioner of Income Tax C.P. & Berar Nagpur L.R. [1949] 76 I A. 235; ILR 1949 Nagpur 892; AIR 1449 PC 311; Ananda Behra and another v. The State of Orissa and another [1955] 2 SCR 919 and Smt. Shantabai v. State of Bombay & Orissa [1959] SCR 265 275-6 referred to; and

Board of Revenue Etc. v. A.M. Ansari Etc.[1976] 3 SCR 661 held 1 inapplicable.

12. (a) The case of State of M.P. v. Orient Paper Mills Ltd. [1977] 2 SCR 1219 on which the appellant relied is not good law as that decision was given per incurium and had laid down principles of interpretation which are wrong in law. The basic and salient features of the agreement before the Court in Orient Paper Mills' Case were the same as in the case of Mahadeo v. State of Bombay and the Court was not justified in not adverting to that case and the other cases referred to on the ground that these cases dealt with the general law of real property. [142 H; 143A].

(b) The enunciation of law made by the Court in the Orient Paper Milts case that a document should be so construed as t o bring it within the ambit of a particular statute relevant for the purpose of the dispute before the court and that in order to do so, the Court could look at only such of the clauses of the document as also to just one or more, of the consequences flowing from he document which would fit in with the interpretation which the court wanted to put on the document to make that statute applicable, is fraught with considerable danger and mischief as it may expose documents to the personal predilictions and philosophies of individual judges depending upon whether according to them it would be desirable that documents of the type they have to construe should be made subject to a particular statute or not. [139E-G]

(c) Secondly, in observing that the State Government, for reasons best known to it had "left the exploitation of the forest resources in part to the private sector" the court had overlooked that it was a matter of policy for the State to decide whether such transactions should be entered into or not, whether the transactions entered into by the State was for the industrial development of
38
the State and whether the transaction ensured employment for the people of the area and so on.

(d) Thirdly, the nature and meaning of a document cannot be deter mined by its end-result or one of the consequences which flow from it. In look in merely at the end-result of the agreement the court overlooked a firmly established principle that both the agreement and the sale must relate to the same subject matter and therefore, there cannot be an agreement relating to one kind of property and

a sale as regards another. [141C-D]

(e) In coming to the conclusion that the term "royalty" used in the document before it was merely a 'euphimism" for the "price of timber". the court overlooked the fact that the amount of royalty payable by the respondent was consideration for all the rights conferred upon it under the contract though it was to be calculated according to the quantity of bamboos felled.[141H; 142A]

13. Where there are two or more conflicting views of this court on the same point the proper course for the High Court or even for smaller Benches of this court is to find out and follow the views expressed by larger Benches of this court in preference to those expressed by smaller benches- This practice has crystallised into a rule of law declared by this Court. [142E-F]

U.O.I. v. K.S. Subramanian [1977]1 SCR 87, 92, followed.

14. A works contract is a compendious term to describe conveniently a contract for the performance of work or services in which the supply of materials or some other goods is incidental. In the instant case, the timber Contracts being agreements relating to movable property and the Bamboos Contracts being a grant of an interest in immovable property, cannot be works contracts. The payee of the price, namely, the Government has not undertaken to do any work or labour. It was the contractor who had to enter upon the land to fell the trees and remove them. So is the case of Bamboo Contracts.

[144H; 145A]

Commissioner of Sales tax, M.P. v- Purshottam Premji [1970] 26 STC 38, 41 S.C., referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 219 220 of 1982.

From the Judgment and Order dated 19.9.1979 of the High Court of Orissa in D.J C. Nos. 811 & 1048/77.

Anil B. Divan and R. K. Mehta for the Appellants. S.,T. Desai, S.R. Banerjee and Vinoo Bhagat, B.R. Aggarwal, Miss Vijaylakshmi Menon Vinod Bobde for the Respondents.

The Judgment of the Court was delivered by MADON J. These two Appeals by Special Leave granted by this Court are against the judgment and order of the Orissa High Court allowing 209 writ petitions under Article 226 of the Constitution of India filed before it.

Genesis of the Appeals On May 23, 1977, the Government of Orissa in the Finance Department issued two Notifications under the Orissa Sales Tax Act 1947 (Orissa Act XIV of 1947). We will

hereinafter for the sake of brevity refer to this Act as "the Orissa Act". These Notifications were Notification S.R.O. 372/77 and Notification S.R.O No. 373/ 77. Notification S.R.O. No. 372/77 was made in exercise of the powers conferred by section 3-B of the Orissa Act and Notification S.R.O. No. 373/77 was made in exercise of the powers conferred by the first proviso to sub-section (1) of section 5 of the Orissa Act. We will refer to these Notifications in detail in the course of this judgment but for the present suffice it to say that notification S.R.O.No. 372/77 amended notification no. 20209-CTA-14/76-F dated April 23, 1976, and made bamboos agreed to be severed and standing trees agreed to be severed liable to tax on the turnover of purchase with effect from June 1, 1977, while notification S.R.O. No 373/77 amended with effect from June 1, 1977, Notification No. 20212-CTA -14/76-F dated April 23, 1979, and directed that the tax payable by a dealer under the Orissa Act on account of the purchase of bamboos agreed to be severed and standing trees agreed to be severed would be at the rate of ten per cent. After the promulgation on December 29, 1977, of the Orissa Sales Tax (Amendment) Ordinance 1977 (Orissa Ordinance No, 10 of 1977), which amended the Orissa Act, two other notifications were issued on December 29, 1977, by the Government of Orissa in the- Finance Department, namely Notification No. 67178-C.T.A.135/77(Pt.) F(S.R.O. No900/77) and Notification No. 67181-C.T.A. 135/77-F (S.R.O. No. 901/77). The first Notification was expressed to be made in exercise of the powers conferred by section 3-B of the Orissa Act and in supersession of all previous notifications issued on that subject. By the said notification the State Government declared that the goods set out in the Schedule to the said Notification were liable to be taxed on the turnover of purchase with effect from January 1. 1978. Entries Nos. 2 and 17 in the Schedule to the said Notification specified bamboos agreed to be severed and standing trees agreed to be severed respectively. The second Notification was expressed to be made in exercise of the powers conferred by sub- section (1) of section 5 of the Orissa Act and in supersession of all previous notifications in that regard. By the said notification the State Government directed that with effect from January 1, 1978, the tax payable by a dealer under the Orissa Act on account of the purchase of goods specified in column (3) of the Schedule to the said Notification would be at the rate specified against it in column (3) thereof. In the said Schedule the rate of purchase tax for bamboos agreed to be severed and standing trees agreed to be severed was prescribed as ten per cent. The relevant entries in the Schedule in that behalf are Entries Nos. 2 and 17. The Orissa Tax (Amendment) Ordinance, 1977, was repealed and placed by the Orissa Sales Tax (Amendment) Act, 1978 (Orissa Act No. 4 of 1978).

As many as 209 writ petitions under Article 226 of the Constitution of India were filed in the High Court of Orissa challenging the validity of the aforesaid two Notifications dated May 23, 1977, and the said Entries Nos. 9 and 17 in each of the said two notifications dated December 29, 1977 (hereinafter collectively referred to as "the impugned provisions"). The petitioners before the High Court fell into two categories. The first category consisted of those who has entered into agreements with the State of Orissa for the purpose of felling, cutting obtaining and removing bamboos from forest areas "for the purpose of converting the bamboo into paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith". This agreement will be hereinafter referred to as "the Bamboo Contract". The other group consisted of those who had entered into agreements for the purchase of standing trees. We will hereinafter refer to this agreement as "The Timber Contract". All the Bamboo Contracts before the High Court were in the same terms except with respect to the contract area, the period of the agreement and the amount of

royalty payable; and the same was the case with the Timber contracts. By a common judgment delivered on September 19, 1979, reported as The Titaghur Paper Mills Company Ltd. and another v. State of Orissa and other (and other cases)1, the High Court allowed all the (1) (1980) 45 S.T.C. 170.

said writ petitions and qauashed the impugned provisions. The High Court made no order as to the costs of these petitions.

Each of the present two Appeals has been filed by the State of Orissa, the Commissioner of Sales Tax Orissa, and the Sales Tax Officer concerned ill the matter, challenging the correctness of the said judgment of the High Court. The Respondents in Civil Appeal No. 219 of 1982 are the Titaghur Paper Mills Company Limited (hereinafter referred to as 'the Respondent Company") and one Kanak Ghose, a shareholder and director of the Respondent Company. The Respondents in Civil Appeal No. 220 of 1982 are Mangalji Mulji Khara, a partner of the firm of Messrs. M.M. Khara, and the said firm. The Chief Conservator of Forests, Orissa, the Divisional Forest Officer, Rairkhol Division. and the Divisional Forest Officer, Deogarh Division have also been joined as proforma Respondents to the said Appeal.

Facts of C. A. No. 219 of 1985 D The Respondent Company is a public limited company. Its registered office is situated at Calcutta in the state of West Bengal. The Respondent Company carries on inter alia the business of manufacturing paper. For this purpose it owned at the relevant time three paper mills-one at Titaghur in the State of West Bengal, the second at Kankinara also in the State of west Bengal and the third at P. O. Choudwar, Cuttack District, in the State of Orissa. For the purpose of obtaining raw materials for its business of manufacturing paper, the Respondent Company entered into a Bamboo Contract dated January 20, 1974, with the State of Orissa. This agreement was effective for a period of fourteen years from October 1, 1966, in respect of Bonai Main Areas of Bonai Division, for a period of thirteen years of with effect from October 1, 1967, in respect of Kusumdih P. S. Of Bonai Division; and for a period of eleven years with effect from October 1, 1969, in respect of Gurundia Rusinath P. S. Of Bonai Division, with an option to the Respondent Company to renew the agreement for a further period of twelve years from October 1, 1980. For the present it is not necessary to refer to the other terms and conditions of this Bamboo Contract.

After the said two Notification dated May 23, 1977, were issued, the Sales Tax Officer, Dhenkanal Circle, Angul, Ward (the Third Appellant in Civil Appeal No. 219 of 1982) issused to the manager of the Respondent Company's mill at P. O. Choudwar a notice dated August 18, 1977, under Rules 22 and 28(2) of the Orissa Sales Tax Rules, 1947, stating that though the Respondent Company's gross turnover during the year immediately preceding June 1, 1977, had exceeded Rs. 25,000; it had without sufficient cause failed to apply for registration as a dealer under section 9 of the Orissa Act and calling upon him to submit within one month a return in Form IV of the forms appended to the said Rules, showing the particulars of "turnover for the quarter ending 76-77 & 6/77". By the said notice the said manager was required to attend in person or by agent at the Sales Tax Office at Angul on October 30, 1977, and to produce or cause to be produced the accounts and documents specified in the said notice and to show cause why in addition to the amount of tax that might be assessed a penalty not exceeding one and half times that amount should not be imposed under section 12(5) of

the Orissa Act that is, for carrying on business without being registered as a dealer. By its letter dated August 25, 1977 the Respondent Company asked for time to seek legal advice. Thereafter by its letter dated September 27, 1977 addressed to the said Sales Tax Officer, the Respondent Company contended that the said notice was invalid and called upon him to cancel the said notice. A copy of the said letter was also sent to the Commissioner of Sales Tax, Orissa, who is Second Appellant in Civil Appeal No. 219 of 1982 as also to the Chief Secretary to the Government of the State of Orissa. As no reply was received to the said letter, the Respondent company and the said Kanak Ghosh filed writ petition in the High Court of Orissa, being O.J.C No. 811 of 1977, challenging the validity of the said two Notifications dated May 23, 1977, and the said notice. While the said writ petition was part-heard, the said two Notifications were replaced by the said two Notifications dated December 29, 1977. Accordingly, the Respondent Company applied for amendment of the said writ petition. It also filed along with Kanak Ghosh another writ petition, being O.J.C. No. 740 of 1978, challenging the validity not only of the said two Notifications dated May 23, 1977, but also of Entries Nos. 2 and 17 of the said two Notifications dated December 29, 1977, and the said notice dated August 18 1977, on the same grounds as those in the earlier writ petition.

The principal contentions raised in the said writ petitions were that the subject-matter of the Bamboo Contract was not a sale or purchase of goods but was lease of immovable property or in any event was the creation of an interest in immovable property by way of grant of profit a prendre which according to the Respondent Company amounted in Indian law to an easement under the Indian Easements Act, 1882 (Act V of 1882), and that for the said reason the amounts of royalty payable under the Bamboo Contract could not be made exigible to either sales tax or purchase tax in the exercise of the legislative competence of the State, and, therefore, the impugned provisions were unconstitutional and ultra vires the Orissa Act. It was further contended that the Bamboo Contract was a works contract and for the said reason also the transaction covered by it was not exigible to sales tax or purchase tax. It was also contended that as the said Notifications dated December 29, 1977, were expressed to be made in supersession of all earlier notifications on the subject, the liability, if any, under the said Notifications dated May 23, 1977, was wiped out. The said writ petitions prayed for quashing the impugned provisions and for writ of mandamus against the respondents to the said petitions, namely, the State of Orissa, the Commissioner of Sales Tax, Orissa, and the said Sales Tax Officer, restraining them from giving any effect or taking any further steps or proceedings against the Respondent Company on the asis Or the impugned provisions or the said notice.

In addition to the said two writ petitions filed by the Respondent Company and the said Kanak Ghosh, three other writ Petitions were also filed by other parties Who had entered into Bamboo Contracts with the State of Orissa in which similar contention were raised and reliefs claimed. The record is not clear whether any assessment order was made against the Respondent Company in pursuance of the said notice or whether further proceedings in pursuance of the said notice were stayed by the High Court by an interim order. As mentioned earlier, by the said common judgment delivered by the High Court, the said writ petitions were allowed. As a natural corollary of the High Court, quashing the impugned provisions it ought to have also quashed, the said notice dated August 18, 1977, and the assessment order, if any, made in pursuance thereof. The High Court, however, did not do so, perhaps because as it heard and decided all the said 209 writ petitions

together it did not ascertain the facts of each individual petition or the exact consequential reliefs to be given to the petitioner therein.

Messrs. M.M. Khara, Second Respondent to Civil Appeal No. 220 of 1982 (hereinafter referred to as "the Respondent Firm"), is a-partnership firm of which the first Respondent to the said Appeal, Mangalgi Mulji Khara, is a partner. The Respondent Firm carried on business at P. O. Sambalpur in the District of Sambalpur in the State of Orissa and was registered as a dealer both under the Orissa Act and the Central Sales Tax Act, 1956 (Act LXXIV of 1956), with the Sales Tax Officer, Sambalpur I Circle. The business of the Respondent Firm so far as concerns this Appeal consisted of bidding at auction held by the Government of Orissa in respect of trees standing in forest areas and if it was the highest bidder, entering into an agreement with the Government for felling and removing such trees and in its turn selling the trees felled by it in the shape of logs to other. The procedure followed by the State of Orissa in giving forest areas was to publish notices of proposed auction sales of timber and other forest products in particular forest areas. After the auctions were held, ratification orders would be issued by the State Government to the forest contractors who were the highest bidders as also an agreement would be entered into between the State of Orissa through its Governor and the forest contractor in respect of the forest produce governed by the agreement.

During the relevant period, the Respondent Firm was successful at five auction sales held by the State of Orissa. Its bids were ratified by the State Government. The Respondent Firm also entered into five separate agreements (hereinafter referred to as "Timber Contractors") for felling and removing trees standing in such forest areas. Three of the said five Timber Contracts were for the period October 31, 1977, to January 31, 1979, the fourth was for the period October 1, 1977 to December 31, 1978, and the fifth was for the period October 28, 1977 to July 31, 1979.

After the said Notifications dated May 23, 1977 were issued, the Respondent Firm along with its said partner Mangalji Mulji Khara filed a writ petition in the Orissa High Court, being O.J.C. No. 1048 of 1977, against the State of Orissa, Commissioner of Commercial Taxes, Orissa, Sales Tax Officer, Sambalpur Circle, Divisional Forest Officer, Roirkhol Division, and Divisional Forest Officer, Deogarth Division. Two main grounds were taken in the said writ petition, namely, (l) the levy of a purchase tax on standing timber agreed to be severed was beyond the legislative competence of the State Legislature and (2) the said Notifications imposed a tax both at the point of sale and point of purchase and were, therefore, invalid and ultra vires the Orissa Act. It was also contended that the power conferred upon the State Government under section 3-B of the Orissa Act to declare any goods or class of goods to be liable to tax on the turnover of purchase as also the power conferred upon the State Government to specify the rate of tax subject to the conditions that it should not exceed thirteen per cent amounted to excessive delegation of legislative power to the State Government and that too without prescribing any guidelines in respect thereof. It was further contended that the Timber Contracts were works contracts and the amounts payable under them were, therefore, not exigible either to purchase tax or sales tax. The reliefs sought in the said writ petition were for quashing the said two Notifications dated May 23, 1977- D While the said writ petition was pending, the Sales Tax Officer, Sambalpur I Circle, by his assessment order dated November 28, 1978, assessed the Respondent Firm to tax under the Orissa Act for the period April 1, 1977, to March 31, 1978. He held that the Respondent Firm had paid royalty to the Forest

Department in the aggregate sum of Rs. 11,52,175 on which purchase tax at the rate of ten per cent was payable by it. It was further stated in the said assessment order that the Respondent Firm had not shown this amount in its gross turnover. Accordingly, the Sales Tax Officer enhanced the gross turnover to include this amount. The amount of purchase tax assessed on the Respondent Firm amounted to Rs. 1,16,217.50p. Thereupon, the Respondent Firm and its partner amended the said writ petition No. O.J.C. 1048 of 1977 and challenged the validity of the said assessment order and prayed for quashing the same. On an application made by the Respondent Firm and its said partner, by an interim order the High Court stayed the recovery of the amount of purchase tax pending the hearing and final disposal of the said writ .

Apart from the Respondent Firm, 203 other forest contractors who had entered into similar agreements with the State Government also filed writ petitions in the High Court challenging the validity of the impugned provisions. By its judgment under appeal, the High Court allowed the said petition filed by the Respondent Firm. As in the case of the writ petition filed by the Respondent Company and very probably for the same reason, the High Court did not pass any order quashing the said assessment order consequent upon it holding that the impugned provisions were ultra vires the Act. Judgment of the High Court All the said 209 writ petitions were heard by a Division Bench of the Orissa High Court consisting of S.K.Ray, C.J., and N.K. Das, J. The main judgment was delivered by Das. J., while Ray, C.J., delivered a short, concurring judgment. Das, J. rejected the contention that the effect of the word 'supersession' used in the Notifications dated December 29, 1977, was to wipe out the liability under the earlier Notifications dated May 23, 1977. He held that the Notifications dated May 23,1977, remained in force until the Notifications dated December 29, 1977, came into operation. So far as the other points raised before the High Court were concerned, Das, J., summarized the conclusions reached by the court in paragraphs 19 and 2() of his judgment as follows:

> "19. For the reasons stated above, we hold as follows:
>
> (1) That the bamboos all i trees agreed to be severed are nothing but bamboos and timber after those are felled. When admittedly timber and bamboos are liable for taxation at the sale point, taxation of those goods at the purchase point amounts to double taxation and, as such, the notifications arc ultra vires the provisions of the the Act. (2) The impugned notifications amount to taxation on agreements of sale, but not on sale and purchase of goods; and (3) In the case of bamboo exploitation contracts, the impugned notifications amount also to impost of tax on profit-a-prendre and, as such, arc against the provisions of the Orissa Sales Tax Act.
>
> "20. In view of the aforesaid findings, we do not consider it necessary to go into the other questions raised by the petitioners, namely, whether it is a works contract and whether the notifications amount to excessive delegation or whether there has been business of purchase by the petitioners or whether there has been restriction on trade and business"

In his concurring judgment Ray, C. J., agreed with Das, J. and further held that in the series of sales in question the first sale, that is the taxable event, started from the Divisional Forest Officer and that the Divisional Forest Officer was the taxable person who had sold taxable goods, namely, timber, and that as what was sold by the Divisional Forest Officer was purchased by the petitioners before the High Court the identity of goods sold and purchased was the same, and that where such a sale was taxed, the purchase thereof was excluded from the levy of tax by virtue of sections 3-B and 8 of the Orissa Act and consequently the levy of purchase tax by the impugned provisions was bad in law.

In view of its above findings, the High Court allowed all the writ petitions and quashed the impugned provisions. The High Court made no order as to the costs of the writ petitions.

We will set out the submissions advanced at the Bar at the hearing of these Appeals when we deal with the various points which fall to be decided by us. In order, however, to test the correctness of the judgment of the High Court as also of the rival contentions of the parties, it is necessary to see first the relevant provisions of the constitution of India as also of the Orissa Act and of the various notifications issued thereunder. Constitutional provisions The Orissa Act received the assent of the Governor- General of India on April 26, 1947, and was published in the Orissa Gazette on May 14, 1947. Under section 1(13) of the Orissa Act, section 1 was to come into force at once and the rest of the Orissa Act on such date as the Provincial Government may by notification in the Orissa Gazette appoint. The rest of the Orissa Act was brought into force on August l, 1947. The Orissa Act is thus a pre-constitution Act. At the date when it was enacted as also when it came into force? the constitutional law of India was the Government of India Act, 1935, prior to its amendment by the Indian Independence Act, 1947. Under section 100(3) of the Government of India Act 1935, the Legislature of a Province alone had the power to make laws for a province or any part thereof in respect any of the matters enumerated in List 11 in the Seventh Schedule to that Act, namely the Provincial Legislative List. Entry 48 in the provincial Legislative List provided for "Taxes on the sale of goods and on advertisements". Thus, under the Government of India Act, 1935, Sales tax was an exclusively provincial subject and the legislative competence of the Orissa Provincial Legislature to enact the Orissa Act was derived from section 100(3) of the Government of India Act, 1935, read with Entry 48 in the Provincial Legislative List. Under the Constitution of India as originally enacted, the legislative topic "Taxes on the sale or purchase of newspapers and on advertisements published therein" was exclusively a Union subject in respect of which under Article 245(1) read with Article 246(1) parliament alone could make laws for the whole or any part of the territory of [India, this topic being the subject-matter of Entry 92 in List I in the Seventh Schedule to the Constitution (namely, the Union List), while "Taxes on the sale or purchase of goods other than news papers" and "Taxes on advertisements other than advertisements published in newspapers" were exclusively State subjects in respect of which under Article 245(1) read with Article 246(3) of the Constitution of India, the Legislature of a State alone could make laws' for such State or any part thereof, these topics being the subject-matter of Entries 54 and 55 in , List ll in the Seventh schedule to the Constitution, namely, the State List' By the constitution (Sixth Amendment) Act, 1956, a new Entry, namely Entry 92A, was inserted in the Union List and Entry 54 in the State List was substituted by a new Entry. Entry 92A in the Union List reads as follows:

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

The amended Entry 54 in List ll reads as follows:

> "54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I."

We are not concerned in these Appeals with the amendment made in Entry 55 in the State List by the Constitution (Forty second Amendment) Act, 1976. We are not concerned with Entry 92-B inserted in the Union List or with the extended meaning given to the expression "tax on the sale or purchase of goods" by the new clause (29A) inserted in Article 366 of the Constitution whereby that expression inter alia 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, by the Constitution (Forty-sixth Amendment) Act, 1982. We are equally not concerned in these Appeals with the restrictions imposed by Article 286 of the Constitution on a State's power to levy a tax on certain classes of sales and purchases of goods. The Orissa Act In keeping with the legislative history of fiscal measures in general, the Orissa Act has been amended several times. Thus, by the middle of July 1981 it had been amended twenty-eight times. It is needless to refer to all the provisions of the Orissa Act or of the various amendments made therein except such of them as are relevant for the purpose of these Appeals.

The Orissa Act when enacted levied a tax only on the sales of goods taking place in the province of Orissa. By the Orissa Sales tax (Amendment) Act, 1958 (Orissa Act No.28 of 1958), a purchase tax was for the, first time introduced in the State of Orissa with effect from December 1, 1958.

The tax under the Orissa Act is levied not on goods but on sales and purchases of goods or rather on the turnover of sales and turnover of purchases of goods of a dealer. Under section 4(2) of the Orissa Act, a dealer becomes liable to pay tax on sales and purchases with effect from the month immediately following a period not exceeding twelve months during which his gross turnover exceed the limit specified in that sub-section which during the relevant period was Rs. 25,000. Under section 4(3) a dealer who has become liable to pay tax under the Orissa Act continues to be so liable until the expiry of three consecutive years during each of which his gross turnover has failed to exceed the prescribed limit and such further period after the date of The said expiry as may be prescribed by the Orissa Sales Tax Rules and his liability to pay tax ceases only on the expiry of the further period so prescribed. A special liability is created by section 4-A on a casual dealer as defined in clause (bb) of section 2. We are not concerned in these Appeals with any question relating to a casual dealer.

Section 2 is the definition section. Clause (c) of that section defines the term "dealer". The definition as it stood during the relevant period and at the date when the judgment of the High Court was delivered (omitting what is not relevant) read as follows:

"(c) 'Dealer' means any person who carries on the business of purchasing or selling or supplying goods, directly or otherwise, whether for commission, remuneration or other valuable consideration and includes-

(i) ...a company, ... firm or association which carries on such business;

Explanation-The manager or agent of a dealer who resides outside Orissa and who carries on the business of purchasing or selling or supplying goods in Orissa shall, in respect of such business, be deemed(l to l c a dealer for the purposes of this Act".

It was on the basis of the above Explanation to section 2(c) that the notice impugned in Civil Appeal No. 219 of 1982 was issued to the manager of the Respondent Company and he was sought to be made liable to purchase tax under the said Notifications dated May 23, 1977.

Under the aforesaid definition of the term "dealer" before a person can be a dealer, he must be carrying on the business of purchasing or selling or supplying goods. There was no definition of the word "business" in the Orissa Act and the orissa High Court had interpreted it as connoting an activity carried on with the object of making profit. By the Orissa Sales Tax (Amendment) Act 1974 (Orissa Act No. 18 of 1974), a definition of "business" was for he first time inserted as clause (b) in section 2, the original clause (b) which defined the term contract" having been omitted by the Orissa Sales Tax (Amendment) Act, 1959. after the decision of this Court in The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd1. The effect of this definition of the term "business" was to do away with the requirement of profit motive. As a consequence of the decision of the Orissa High Court in Straw Products Limited v. State of Orissa and others2, the above definition of the term "dealer" in clause (c) was substituted with retrospective effect by the Orissa Sales Tax (Amendment) Ordinance, 1979 (Orissa Ordinance No. 11 of 1979), which was replaced by the Orissa Sales Tax (Amendment) Act, 1979 (Orissa Act No. 24 of 1979). In the Straw Product's Case the petitioner company had entered into two agreements with the State of Orissa. From the facts set out in the judgment of the High Court in that case it would appear that these two agreements were similar to the Bamboo Agreement before us. The Divisional Forest Officer, Balliguda Division, called upon the petitioner company to reimburse to him the amount of sales tax to which he had been assessed, stating that he was a registered dealer and had been assessed to tax on the sale of all standing trees including bamboos. The petitioner company thereupon filed two writ petitions in the Orissa High Court challenging this demand. The contention that the transactions covered by the said two agreements were not sales of goods and, therefore, not exigible to sales tax does not appear to have been raised in those writ petitions. The High Court held that the State of Orissa and not the Divisional Forest Officer could be the dealer qua the transactions covered by the said agreements in case they were exigible to sales tax and that the liability under the Orissa Act being a statutory one, it was not open to the State in the discharge of its administrative, business or at its volition to name an employee under it as the person to pay sales tax under the Orissa Act, and. therefore, the Divisional Forest Officer could not have been assessed to sales tax on the transactions in question. The High Court further held that though the requirement of profit motive did not exist any more as an ingredient of the term "business" as defined by the said clause (b) of section 2, whether a person carried on business in a particular commodity depended upon the volume, frequency, continuity and regularity

of transactions of purchase and sales in a class of goods, and as these ingredients were not satisfied in the cases before it, the transactions were not exigible to sales tax. The judgment in that case was delivered on May 3, 1977. The State as also the Commissioner of Sales Tax, (1) [1949] S.C.R. 379.

(2) (1978) 42 S.T.C. 302-(1977)1 C.W.R. 455.

Orissa, have come in appeal by Special Leave in this Court against the said judgment and these appeals are still pending, being Civil Appeals Nos. 1237-1238 of 1979 State of Orissa and others v. Straw Products Limited and others and Civil Appeals Nos. 1420-1421 of 979 Commissioner of Sales Tax, Orissa and another v. Straw Product Limited and others. However, to get over the judgment of the High Court, the State Government issued the two impugned Notifications dated May 23, 1977, which were replaced along with others by the said two Notifications dated December 29, 1977. Further, the Governor of Orissa promulgated the Orissa Sales Tax (Amendment and Validation) Ordinance, 1979 (Orissa Ordinance No. I l of 1979), substituting with retrospective effect from the date of the Orissa Act the definition of "dealer" given in clause (c) of section 2. The said Ordinance was repealed and replaced by the Orissa Sales Tax (Amendment and Validation) Act, 1979 (Orissa Act No. 24 of 1979). This amending and validating Act came into force with effect from July 19, 1979, being the date of the promulgation of the said Ordinance. Section 3 of the said amending Act validated assessments or re-assessments, levy or collection of any tax or imposition of any penalty made or purporting to have been made under the Orissa Act before July 19, 1979, as if all such acts had been done under the Orissa Act as so amended, notwithstanding anything contained in any judgment, decree or order of any court or other authority to the contrary. The substituted definition of "dealer", omitting the portion thereof not relevant for our purpose, reads as follows:

> "(c) 'Dealer' means any person who carries on the business of purchasing, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes-
>
> (i) ... a company, ... firm or association which carries on such business;

X X X X Explanation I-y- and every local branch of a firm registered outside the State or of a company the principal office or headquarters whereof is outside the State, shall be . deemed to be a dealer for the purposes of this Act.

Explanation II-The Central Government or a State Government or any of their employees acting in official capacity on behalf of such Government, who, whether or not in the course of business, purchases, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or for other valuable consideration, shall, except in relation to any sale, supply or distribution of surplus, unserviceable or old stores or materials or waste products, or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of this Act.

What is pertinent to note about the new definition of "dealer" is that in the case, of the Central Government, a State Government or any of their employees acting in official capacity on behalf of such Government, it is not necessary that the purchase, sale, supply or distribution of goods should be in the course of business, while in all other cases for a person to be a dealer he must be carrying on the business of purchasing, selling, supplying or distributing goods. Writ petitions challenging the validity of this amending and validating Ordinance and Act have been filed in this Court under Article 32 of the Constitution of India and are still pending. These writ petitions are Writ Petition Nos. 958 of 1979 Orient Paper Mills and another v. State of Orissa and others and Writ Petition No. 966 of 1979 Straw Products Limited and another v. State of Orissa and others.

We are concerned in these Appeals only with purchases and sales of goods and not with their supply or distribution. The terms "sale" and "purchase" are defined in clause (g) of section 2. Clause (g), omitting the Explanation which is not relevant for our purpose, reads as follows:

> "(g) 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge and the words "buy" and "purchase" shall be construed accordingly;
>
> X X X X X The expressions "goods". "purchase price" and "sale price" are defined in clause (d), (ee) and (h) of section 2 as follows:
>
> " (d) 'Goods' means all kinds of movable property other than actionable claims, stocks, shares or securities and includes all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed, " (ee) 'Purchase Price' means the amount payable by a person as valuable consideration for the purchase or supply of any goods less any sum allowed by the seller as cash discount according to ordinary trade practice, but it shall include any sum charged towards anything done by the seller in respect of the goods at the time of or before deli very of such goods other than the cost of freight or delivery or the cost of installation when such cost is separately charged; "(h) 'Sale Price' means the amount payable to a dealer as consideration for the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before delivery thereof".

As the liability of a dealer to pay tax under the Orissa Act depends upon his gross turnover exceeding the limit prescribed by ` section 4(2), it is necessary to see the definition of the expression "gross turnover". "Gross turnover" is defined by clause (dd) of section 2 as follows

-

> "(dd) 'Gross Turnover' means the total of 'turnover of sales' and 'turnover of purchases". G The expression 'turnover of sales" and "turnover of purchases" are

defined in clauses (i) and (j) of section 2 as follows:

"(i) 'Turnover of sales' means the aggregate of the amounts of sale prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods other than those declared under section 3-B effected or made during a given period;

X X X X "(j) 'Turnover of purchases' means the aggregate of the amounts of purchase prices paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared under section 3-B;

So far as is material for our purpose, section 5(1) provides for the rates at which the tax under the Orissa Act is payable. Sub-section (I) of section 5 and the first proviso thereto as they stood prior to the Orissa Sales Tax (Amendment) Ordinance, 1977, read as follows:

"5. Rate of Tax:-

(1) The tax payable by a dealer under this Act shall be levied at the rate of six per cent on his taxable turnover;

Provided that the State Government may, from time to time, by notification and subject to such conditions as they may impose, fix a higher rate of tax not exceeding thirteen per cent or any lower tax payable under this Act on account of the sale or purchase of any goods or class of goods specified in such notification;

The words "at the rate of six per cent" in the main subsection (I) were substituted for the words "at the rate of five per cent" and the words "not exceeding thirteen per cent" were substituted for the words "not exceeding ten per cent" in the first proviso thereto by the Orissa Sales Tax (Amendment) Act, 1967 (Orissa Act No. 7 of 1976), with effect from May 1, 1976.

Amongst the amendments made by the Orissa Sales Tax (Amendment) Ordinance, 1977, which were re-enacted by the Orissa Sales Tax (Amendment) Act, 1978, was the substitution of sub-section (I) of section 5 and the first proviso thereto by a new sub-section (1). Thus, with effect from January 1, 1978 sub-section (1) reads as follows:

5. Rate of Tax (1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, not exceeding thirteen percent, and subject to such conditions as the State Government may, from time to time, by notification, specify;

X X X X The other proviso to the said sub-section (1) are not relevant for our purpose. Sub-section (2) (A) of section S defines the expression "taxable turnover" as meaning that part of a dealer's gross turnover during any period which remains after deducting therefrom the turnover of sales and purchases specified in that subsection.

Section 3-B confers upon the State Government the power to declare what goods or classes of goods would be liable to tax on the turnover of purchases. Section 3-B reads as follow.

> "3-B. Goods liable to purchase tax The State Government may, from time to time, by notification, declare any goods or class of goods to be liable to tax on turnover of purchases:
>
> Provided that no tax shall be payable on the sales of such goods or class of goods declared under this section "

This section was inserted in the Orissa Act with effect from December 1, 1958, by the Orissa Sales Tax (Amendment) Act, 1958.

As the tax under the Orissa Act is intended to be a single point levy, section 8 confers upon the State Government the power to prescribe points at which goods may be taxed or exempted, Section 8 provides as follows:

> "8. Power of the State Government to prescribe points at which goods may be taxed or exempted Notwithstanding anything to the contrary, in this Act, the State Government may prescribe the points in the series of sales or purchases by successive dealers at which any goods or classes or descriptions of goods may be taxed or exempted from taxation and in doing so may direct that sales to or purchases by a person other than a registered dealer shall be exempted from taxation:
>
> Provided that the same goods shall not be taxed at more than one point in the same series of sales or purchases by successive dealers.
>
> Explanation-Where in a series of sales, tax is prescribed to be levied at the first point, such point, in respect of goods despatched from outside the State of Orissa shall mean and shall always be deemed to have meant the first of such sales effected by a dealer liable under the Act after the goods are actually taken delivery of by him inside the State of Orissa."

Rules 93-A to 93-G of the Orissa Sales Tax Rules, 1947, prescribe the goods on which tax is payable at the first point in a series of sales. The goods so prescribed have no relevance to these Appeals.

Notifications under the Act In exercise of the powers conferred by section 3-B of the Orissa Act the State Government from time to time issued notifications declaring what goods or classes of goods were liable to tax on the turnover of purchases. As a result of the amendments made in the rates specified in sub-section (1) of section 5 and the first proviso to that sub-section by the Orissa Sales Tax, (Amendment) Act 1976, with effect from May 1,1976, all these notification were superseded and a fresh list of goods declared under section 3-B by Notification No. 20209C.T.A.L.-14/76-F, dated April 23,1916. All the notifications issued from time to time under the first proviso to sub-section (1) of section 5 specifying the rates of purchase tax on goods declared under section 3-B were also

superseded and new rates of purchase tax in respect of the goods declared in the said new list were specified with effect from May 1.1976, by Notification No. 20212-C.T.A.-14/76-F, dated April 23,1976. But is these two Notifications which were amended by the impugned Notifica-

tions dated May 23, 1977. The said two impugned Notifications are as follows:

> "Notification S.R..O.No. 372/77 dated the 23rd May 1977 In exercise of the powers conferred by section 3-B Of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), the State Government do hereby declare that standing trees and bamboos agreed to be severed shall be liable to tax on turnover of purchase with effect from the first day of June, 1977 and direct that the following amendment shall be made in the notification of Government of Orissa, Finance Department No. 20209-

CTA-14/76-F., dated 23rd April 1976.

AMENDMENT In the schedule to the said notification after serial numbers 2 and 16, the following new serial and entry shall be inserted under appropriate heading, namely:-

Serial No. Description of goods

---

(1) (2)

2-A	Bamboos agreed to be severed.
16-A	Standing trees agreed to be Severed.

"Notification S.R.O. No; 373/77 dated the 23rd May 1977- In exercise of the powers conferred by the first proviso to sub-section (1) of section 5 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), the State Government do hereby direct that the following amendment shall be made in the notification of the Government of Orissa, Finance Department No. 20212-CTA- 14/76-F., dated the 23rd April 1976 and that the said amendment shall take effect from the first day of June, 1977.

AMENDMENT In the schedule to the said notification after serial numbers 2 and 16, the following new serial and entry shall be inserted under appropriate heading, namely:

Serial No. Description of goods Rate of Tax

---

(1) (2) (3)

16-A	Bamboos agreed to served to be	Ten per cent
2-A	Standing trees agreed to be severed	Ten per cent."

The above two Notifications were struck down by the High Court by its judgment under appeal.

The State Government had also issued from time to time Notifications in exercise of the powers conferred by the first proviso to sub-section (1) of section 5 prescribing a rate of tax different from the rate specified in section 5(1) so far as sales of certain goods were concerned. As a result of the amendments made by the Orissa Sales Tax (Amendment) Act, 1916, all these notifications were superseded and new rates specified with effect from May 1, 1976, by Notification No. 20215-C-T.A.-14/76 F. dated April 23, 1976. By Notification No. S.R.A. 374/77 dated May 23, 1977, made in exercise of the powers conferred by the first proviso to sub-section (1) of section 5, the State Government directed that with effect from June 1, 1977, the said Notification No. 20215-C.T.A. -14/76-F. dated April 23, 1976, should inter alia be amended by inserting a new entry therein as Entry No. 86-A, By this entry the rate of sales tax on timber was enhanced to ten per cent, Tn view of the amendment made in sub-section (1) of section 5 by the Orissa Sales Tax (Amendment) Ordinances 1977 (replaced by the Orissa Sales Tax (Amendment) Act, 1978), the State Government issued three Notifications, (1) declaring the goods liable to purchase tax, (2) specifying the rates of purchase tax on such goods. and (3) specifying the rates of sales tax. The relevant portions of the notification declaring the goods liable to purchase tax read as follows:

"Notification No. 67178-C.T.A. 135/77 (Pt.)- Fdated the 29th December 1977.

S.R.O.No.900/77-In exercise of powers conferred by section 3-B of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), and in supersession of all previous notifications issued on the subject, the State Government do hereby declare that the goods mentioned in column (2) of the schedule given below shall be liable to tax on turnover of purchase, with effect from the first day of January, 1978.

SCHEDULE Serial No. Description of goods

---

(1) (2)

```
X           X          X                    X
    2.                 Bamboos agreed to be severed
X            X         X                    X
    17.                Standing trees agreed to be severed
X            X         X                    X . "
```

The relevant portions of the Notification specifying the rates of purchase tax read as follows:

Notification No.67181-C.T.A. 135/77-F. dated the 29th December 1977 S.R.O. NO. 901/77- In exercise of the powers conferred by sub-section (1) of section 5 of the Orissa Sales Tax Act, 1947(Orissa Act 14 of 1947), as amended by the Orissa Sales Tax (Amendment) Ordinance, 1977 (Orissa Ordinance No. 10 of 1971) and in supersession of all previous notifications in this regard, State Government do hereby direct that with effect from the first day of January, 1978 the tax payable by a dealer under the said Act on account of the purchase of the goods specified in column (2) of the schedule given below, shall be at the rate specified against each in column (3) thereof;

SCHEDULE Serial No. Description of goods1 Rate of Tax

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(1) (2) (3)

```
X            X           X              X
2.          Bamboos agreed to be        Ten per cent
            severed
X           X            X              X
17.         Standing trees agreed to    Ten per cent be
            served
X           X           X               X
```

The relevant portions of the Notification specifying the rates of sales tax read as follows: "Notification No. 67184-C.T.A.-135/77-F., dated the 29th December 1977.

S.R.O. No. 902/77 - In exercise of the powers conferred by sub-section (I) of section 5 of the Orissa Sales Tax Act, 1947 (Orissa Act 14 of 1947), as amended by the Orissa Sales 'Tax (Amendment) Ordinance, 1977 (Orissa Ordinance, No. 10 of 1977) and in supersession or all previous Notifications on the subject, the State Government do hereby direct that with effect from the first day of January, 1978, the rate of tax payable by a dealer under the said Act on account of the sale of goods specified in column (2) of the Schedule given below shall be at the rate specified against each in column (3) thereof.

SCHEDULE Sl.No. Description of goods Rate of Tax

---

(1) (2) (3)

X	X	X
101	All other articles	Seven percent".

Entries Nos. 2 and 17 in the schedule to each of the said Notifications Nos.-67178-C.T.A.-135/17 (Pt.)-F and 67181- C.T.A135/77-F were also struck down by the High Court by its judgment under appeal.

The ambit of the Orissa State's taxing power-

The validity of the impugned provisions is challenged on two grounds: (1) they levy a tax on what is not a sale or purchase of goods and are, therefore, unconstitutional, and (2) assuming the subject-matter of the impugned provisions is a sale or purchase of goods, they levy a tax on the same goods both at the sale point and purchase-point and are therefore, ultra vires the Orissa Act. In order to test the correctness of these challenges, it is necessary to bear in mind the ambit of the Orissa State' s power to levy a tax on the sale or purchase of goods This power is subject to a two fold restriction-one Constitutional; and the other, statutory. The Constitutional restriction on the legislative competence of the Orissa State in this behalf is shared by it in common with all other States, while the statutory restriction is self-imposed and flows from the provisions of the Orissa Act.

We have already set out earlier the relevant provisions of the Government of India Act., 1935, the Constitution of India and the Orissa Act. To recapitulate, the Orissa Act is a pre-Constitution - Act and the legislative competence of the Orissa Provincial Legislature to enact the Orissa Act was derived from section 100(3) of the Government of India act 1935, read with Entry 48 in List II in the Seventh Schedule to that Act. After the coming into force of the Constitution of India the power of the Orissa State Legislature to enact law imposing a tax on the sale or purchase of goods (other than newspapers) is to be found in Articles 245(1) and 246(3) of the Constitution of India read with Entry 54 of the Constitution of India. Thus, Entry 54 in the State List in the Constitution of India is, with certain modifications, the successor entry to Entry 48 in the Provincial Legislative List in the Government of India Act, 1935.

While Entry 48 spoke of "taxes on the sale of goods", Entry 54 speaks of "taxes on the sale or purchase of goods". The addition of the word "purchase" permits the State Legislature to levy a II purchase tax and does not confine its taxing power merely to levying a sales tax. Sale and purchase are merely two ways of looking at the same transaction. Looked at from the point of view of the seller a transaction is a sale, while looked at from the point of view of the buyer the same transaction

is a purchase.

Entry 48 in List II of the Seventh Schedule of the Government of India Act, 1935, came up for interpretation by this Court in The Sales Tax officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash. This Court held in that case that there having existed at that time of the enactment of the Government of India Act, 1935, a well-defined and well- established distinction between a sale and an agreement to sell, it would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorized the imposition of a tax only when there was a completed sale involving transfer of title. In that case the Uttar Pradesh Sales Tax Act, 1948, had been amended so as to include forward contracts in the definition of 'sale' and to provide that forward contracts should be deemed to have been completed on the date originally agreed upon for delivery. These amendments were held by this Court to be ultra vires.

In State of Madras v. Gannon Dunkerly & Co., (Madras) Ltd., another Constitution Bench of this Court held that at the time when the Government Or India Act, 1935, was enacted the expression "sale of goods" was a term of well-recognized import in the general law relating to sale of goods and the legislative practice relating to that topic and, therefore, that expression must be interpreted when used in the said Entry 48 as having the same meaning as in the sale of goods Act, 1930. The Court further held that any attempt, therefore, to give to the expressions "sale", ' goods" or "sale of goods" an artificial meaning or an enlarged meaning or to bring within their scope what would not be comprehended within it would be ultra vires and unconstitutional. The court further observed (at page 413-

4):

> " ... both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be complete (1) [1955] I S.C.R. 243, 246-

by passing of title in those goods. It is of the essence of this concept that 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 got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the 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 property passes-"

> In that case the definition of term "sale" in the Madras General Sales Tax Act, 1939, was enlarged by an amendment so as to include "a transfer of property in goods involved in the execution of a works contract" and the definition of "turnover" was expanded to include within it the amount payable for carrying out a works contract less such portion as may be prescribed. A new definition of "works contract" inserted

in the said amendments included within its meaning inter alia the construction, fitting but, improvement or repair of any building, road, bridge or other immovable property. The Court held these amendments to be void and beyond the legislative competence of the Madras Provincial Legislature on the ground that in the case of a building contract, which was one and indivisible, the agreement between the parties was that the contractor should construct the building according to the specification contained in the agreement and in consideration therefore receive payment as provided therein, and that in such an agreement there was neither a contract to sell the materials used in the construction nor any property passed in such materials as movables.

The same interpretation as was placed on Entry 48 in the Provincial Legislative List in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. was adopted by this Court while construing Entry 54 in the State List and attempts by the State Legislatures to enlarge the meaning of the expressions sale', 'sale of goods' or 'goods' have been held to be beyond their legislative competence: sec, for instance, Bhopal Sugar Industries Ltd. M.P. and another .v. D.P. Dube, Sales Tax Officer, Bhopal Region, Bhopal and another (1) A.I.R. 1964 SC 1037.

K.L. Johar and Company v. Deputy Commercial Tax Officer Joint Commercial Tax Officer. Harbour Div II. Madras v. Young, Men's Indian Association (Reg.) Madras and others ; and State of Maharashtra and another v. Champalal Kishanlal Mohta2.

In Addition to the above Constitutional limitations on the Orissa State's power to tax sales or purchases of goods, there are other restrictions imposed by sections 3-B and 8 of the Orissa Act. A State is free when there is a series of sales in respect of the same goods to tax each one of such sales or purchases in that series or to levy the tax at one or more points in such series of sales or purchases. Legislation of all States in this respect is not uniform. Some States have adopted a single-point levy, others, a two- point levy; and yet others, a multi-point levy. The State of Orissa has adopted a single point levy. It has done this by enacting the provision to section 3-B and the proviso to section 8. Under the proviso to section 3-B no tax is payable on the sales of goods or class of goods declared under that section to be liable to taxes on the turnover of purchase-. The proviso to section 8 states that "the same goods shall not be taxed at more than one point in the same series of sales or purchases by successive dealers". Where, therefore, In a series of sales by successive dealers sales tax or purchase tax is levied at a particular point, neither sales tax nor purchase tax can be levied at another point in the same series ; and similarly can be levied in respect of the same transaction or any other transaction of sale of the same goods.

As any attempt on the part of the State to impose by legislation sales tax or purchase tax in respect of what would not be a sale or a sale of goods or goods under the Sale of Goods Act, 1930, is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation, either by way of a rule or notification would be equally unconstitutional; and so would such an act on the part of the authorities under a Sales Tax Act purporting to be done in the exercise of powers conferred (1) [1965] 2 S.C.R. 112.

(2) [1970] 3 S.C.R. 680.

(3) [1971] 1 S.C.R. 46.

by that Act or any rule made or notification issued thereunder. Similarly where any rule or notification travels beyond the ambit of the parent Act, it would be ultra vires the Act. Equally, sales tax authorities purporting to act under an act or under any rule made or notification issued thereunder cannot travel beyond the scope of such Act, rule or notification. Thus, the sales tax authorities under the Orissa Act cannot assess to sales tax or purchase tax a transaction which is not a sale or purchase of goods or assess to sales tax any goods or class of goods which are liable to purchase tax or assess to tax, whether sales tax or purchase tax, goods at another point in the same series of sales or purchase of those goods by successive dealers when those goods are liable to be taxed at a different point in that series.

Subject-matter of the impugned provisions What now falls to be determined is the subject-matter of the impugned provisions. Relying upon the definition of the term "goods" in the Sale of Goods Act, 1930, and in the Orissa Act, it was submitted on behalf of the Appellant State that the subject-matter of the impugned provisions is goods and that what is made exigible to tax under the impugned provisions is a completed purchase of goods. On behalf of the contesting Respondents it was submitted that by impugned provisions a new class of goods not known to law sought to be created and made exigible to purchase tax and that this attempt on the part of the State Government was unconstitutional as being beyond its legislative competence. The High Court held that the impugned provisions amounted to a tax on an agreement of sale and not on a sale or purchase of goods. It further held that in the case of Bamboo Contracts, the impugned provisions also amounted to levying a tax on a profit a prendre.

The term "goods" is defined in clause (7) of section 2 of the Sale of Goods Act as follows (7) 'goods' mean every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale ;"

> We have already reproduced earlier the definition of "goods" given in clause (d) of section 2 of the, Orissa Act. However for the purposes of ready reference and comparison, we are reproducing the same here again. That definition is as 'follows:
>
> "(d) 'Goods' means all kinds of movable property other than actionable claims, stocks, shares or securities and includes all growing crops, grass and things attached to or forming part of the land which are agreed before sale or under the contract of sale to be severed "

What is pertinent to note, however, is that under both the definitions the term 'goods" mean all kinds of movable property (except the classes of movable property specifically excluded) and includes growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The Transfer of Property Act, 1882 (Act IV of

1882), does not give any definition of the term "movable property", but clauses (36) of section 3 of the General Clauses Act, 1897 (Act X of 1897), clause (27) of the Orissa General Clauses Act, 1937 (Orissa Act I of 1937), and clause (9) of section 2 of the Registration Act, 1908 (Act XVI) of (1908) do. Clause (36) of section 3 of the General Clauses Act provides as follows:

> "(36) 'movable property, shall mean property of every description, except immovable property."

The definition in the Orissa General Clauses Act is in identical terms. The definition in the Registration Act is as follows:

> "(9) 'moveable property' includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property."

The Transfer of Property Act does not give any exhaustive definition of "immovable property." The only definition given therein is in section 3 which states:

> 'immovable property' does not include standing timber, growing crops, or grass."
>
> This is strictly speaking not a definition of the term "immovable property" for it does not tell us what immovable property is but merely tells us what it does not include. We must, therefore, turn to other Acts where that term is defined. Clause (26) of section 3 of the General Clauses Act defines "immovable property" as follows:
>
> "(26) 'immovable property' shall include land, benefit to arise out of land, and things attached to the earth, or permanently fastened to any thing attached to the earth."

The definition of "immovable property" in clause (21) of section 2 of the Orissa General Clauses Act is in the same terms. A more elaborate definition is given in clause (6) of section 2 of the Registration Act which states:

> "(6) 'immovable property' includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything I) which is attached to the earth, but not standing timber, growing crops nor grass."

What is pertinent to note about these definitions is that things attached to the earth are immovable property. The expression "attached to the earth" is defined in section 3 of the Transfer of Property Act as follows:

> " 'attached to the earth, means-
>
> (a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

Thus, while trees rooted in the earth are immovable property as being things attached to the earth by reason of the definition of the term "immovable property" given in the General Clauses Act, the Orissa General Clauses Act and the Registration Act, read with the definition of the expression "attached to the earth" given in the Transfer of Property Act, standing timber is movable property by reason of its being excluded from the definition of "immovable property" in the Transfer of Property Act and the Registration Act and by being expressly included within the meaning of the term "movable property" given in the Registration Act. The distinction between a tree and standing timber has been pointed out by Vivian Bose, J., in his separate but concurring judgment in the case of Shrimati Shantabai v. State of Bombay and others 1 as follows:

"Now, what is the difference between standing timber and a tree? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of 'immovable property and 'attached to the earth'; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of 'standing timber' and not of 'timber trees ' "Timber is well enough known to be-wood suitable for building houses, bridges, ships, etc., whether on the tree or cut and seasoned.' (Webster's Collegiate Dictionary). Therefore, 'standing timber' must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practical purposes even though it is still standing. If not, it is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

"Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live, and that physical fact of life cannot be altered by giving it another name and calling it 'standing timber' But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical commonsense. It grew empirically from instance to instance and decision to decision until a recognisable (1) [1959] S.C.R. 265, 275 6.

and workable pattern emerged; and here, this is the shape it has taken."

Thus, trees which are ready to be felled would be standing timber and, therefore, movable property. What is, however, material for our purpose is that while trees (including bamboos) rooted in the earth being things attached to the earth are immovable property and if they are standing timber are movable property trees (including bamboos) rooted in the earth which are agreed to be severed

before sale or under the contract of sale are not only a movable property but also goods.

In this connection it may be mentioned that in English law there exists (or rather existed) a difference between fructus natwriles and fructus industriales. Fructus naturales are natural growth of the soil, such as, grass. timber and fruit on trees, which were regarded at common law as part of the soil. Fructus industriales are- fruits or crops produced "in the year, by the labour of the year" in sowing and reaping, planting, and gathering e.g. corn and potatoes. Fractus industriales are traditionally chattels being considered the "representative" of the labour and expense of the occupier and thing independent of the land in which they are growing and were not treated as an interest in land. Fructus naturales are regarded until severance as part of the soil and an agreement conferring any right or interest in them upon a buyer before severance was a contract or sale of an interest in land and were, therefore, governed by section 4 of the Statute of Frauds of 1677 (29 Car. II c. 3). If they were severed before sale, section 17 of that Statute applied P (see Benjamin's Sale of Goods, Second Edition, para 90, p. 62) This distinction was, therefore, important in England for the purposes of the formalities required under the Statute of Frauds. Under the definition of goods' given in section 62 (1) of the old English Sale of Goods Act of 1893, "goods" included inter alia all industrial growing crops and things attached to or forming part of the land which were agreed to be severed before sale or under the contract of sale. The formalities required for a contract for the sale of goods of the value of L10 and upwards by section 17 of the Statute of Frauds were re-enacted in section 4 of the Sale of Goods Act, 1893. This section was repealed by the Law Reform (Enforcement of Contracts) Act, 1954. The definition of 'goods' in section 61 (1) of the new Sale of Goods Act, 1979, is the same as in the earlier Sale of Goods Act. Thus, the position now in English law is that crops and other produce whether fructus naturales or fructus industriales (except in the case of a sale without severance on a landlord, incoming tenant or purchaser of the land) will always be "goods" for the purposes of a contract of sale since the agreement between the parties must be that they shall be severed either "before sale" or "under the contract of sale" (see Benjamin's Sale of Goods, Second Edition, para 91, p.63).

As pointed out in Mahadeo v. The State of Bombay the distinction which prevailed in English law between fructus naturales and fructus industriales does not exist in Indian law, and the only question which would fall to be considered in India is whether a transaction concerns "goods" or "movable property" or "immovable property"' The importance of this question is twofold: (I) in the case of immovable property, a document of the kind specified in section 17 of the Registration Act requires to be compulsorily registered and if it is not so registered, the consequences mentioned in sections in sections 49 and 50 of that Act follow, while a document relating to goods or movable property is not required to be registered; and 2) by reason of the interpretation placed on Entry 54 in List II in the Seventh Schedule to the Constitution of India by this Court a State cannot levy a tax on the sale or purchase of any property other than "goods" .

The submission of the Respondent that the impugned provisions levied a purchase tax on immovable property and not on goods and hence travelled beyond the taxing power of the State Government under the said Entry 54 was based upon the omission in the impugned provisions of the words "before sale or under the contract of sale." It was urged that unless these words qualified the phrase "agreed to be severed", standing trees and bamboos would not be "goods" within the

meaning of the definition of that term in the Sale of goods Act and the Orissa Act. The High Court held that the impugned provisions amounted to levying a tax on an agreement of sale and not on actual sale or purchase. According to the High Court, on tax can be imposed unless the taxable event (namely, the transfer of property in the goods from the seller to the buyer) takes place; and standing trees including bamboos) being (1) [1959] Supp. 2 S.C.R. 339. 349- unascertained goods, under the forest contracts entered into by the State Government, they continue to be the property of the State Government until felled and, therefore, the title to such trees or bamboos is transferred in favour of the forest contractor only when the trees or bamboos are felled and severed after complying with the conditions of the forest contract. We find that there is a fallacy under lying the above submissions of the Respondents and in the reasoning of the High Court, the fallacy being to read merely the description of the goods given in the impugned provisions by itself and not in conjunctions with the governing words of the said provision. These impugned provisions declare that standing trees agreed to be severed and bamboos agreed to be severed shall be liable to tax on the turnover of purchases. The tax that is levied under section 3-B is not on goods declared under that section but on the turnover of purchases of such goods. It one reads the Notifications issued under section 3-B and 5 (1) as a whole. it is clear that the taxable event is not an agreement to sever standing trees or bamboos but the purchase of bamboos or standing trees agreed to be severed.

Does the absence of the words "before sale or under the con tract of sale" make any difference to this position ? The answer in our opinion must be in the negative. The very use of the word "agreed" in the description of goods shows that there is to be an agreement between the buyer and the seller and under this agreement standing trees must be agreed to be severed and so also bamboos. According to the definition of "goods" such severance may be either before sale or under the contract of sale. At the first blush, therefore, it would appear that the goods which form the subject matter of the impugned provisions are either bamboos and standing P trees agreed to be severed before sale or bamboos and standing trees agreed to be severed under the contract of sale. The question is "Which one is it ?". The answer to this question depends upon the distinction in law between an agreement to sell and sale. Section 4 of the Sale of Goods Act, 1930, deals with a sale and an agreement to sell and it provides as follows:

> "4. Sale and agreement to sell.
>
> (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional. (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 the 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.
>
> (4) 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."

Thus, where there is a transfer from the buyer to the seller of property in the goods which are the subject-matter of the agreement to sell, the contract of sale, is a sale but when the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, it is an agreement to sell which become a tale when the time elapses or such conditions are fulfilled In the first case the contract is executed, while in the second case it is executory The distinction between an agreement to sell and sale and the legal consequences flowing from each have been succinctly stated in Benjamin's Sale of Goods, paras 25-26 at page 23, as follows:

> "Agreement to sell . .An Agreement to sell is simply a contract, and as such cannot give rise to any rights in the buyer which are based on ownership or possession, but only to claims for breach of contract. In the normal case at least, so long as the property in the goods remains in the seller, they are his to deal with as he chooses (except that he may be in breach of his contract with the buyer); they are liable to seizure in distress or execution as his property; and they pass to the trustee in the event of his bankruptcy.
>
> Sale. The Sale of Goods Act 1979 defines a sale in the following passages: first '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'; and secondly, '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. It is therefore possible for a sale within the statutory meaning to come about ill one of two ways: either by a contract which itself operates to transfer the goods from the ownership of the seller to that of the buyer, the property passing when the contract is made; or by a contract which is initially only an agreement to sell, but is later performed or executed by the transfer of the property. In either case it is clear that the sale involves not only a contract, but also a conveyance of the property in the goods, and so it may confer on the buyer the right to bring a claim in tort for wrongful interference with the goods as well as rights in contract."

The test, therefore, is the transfer of the property in the goods from the seller to the buyer. In order to determine whether for the impugned provisions to apply standing trees or bamboos are to be severed before sale or under the contract of sale, what is required to be ascertained, therefore, is the point of time when the property in the goods is transferred from the seller to the buyer Under section 18 of the Sale of Goods Act, where there is a contract for the sale of unascertained goods, no property in the goods transferred to the buyer unless and until the goods are ascertained. Under section 19, 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 and for the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract, the conduct of the parties and circumstances of the case. Further, unless a different intention appears, the rules contained in sections 20 to 24 are 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. Sections 20 to 23 provide as follows:

"20. Specific goods in a deliverable state. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed."

"21. Specific goods to be put into a deliverable state.

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property goes not pass until such thing is done and the buyer has notice thereof."

"22. Specific goods m a deliverable state, when the seller has to do anything thereto in order to ascertain price. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof."

"23. Sale of unascertained goods and appropriation.

(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or imp-

lied, and may be given either before or after the appropriation is made.

(2) Delivery to the Carrier.

Where in pursuance of the contract, the seller deli- vers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

We are not concerned with section 24 which provides when property in the goods passes to the buyer where goods are delivered to the buyer on approval or "on sale or return" or other similar terms. The terms "deliverable state" and "specific goods" are defined in clauses (3) and (14) of section 2 of the Sale of Goods Act as follows:

"(3) goods are said to be in a 'deliverable state' when they are in such state that the buyer would under the con tract be bound to take delivery of them;"

"(14) 'specific goods' means goods identified and agreed upon at the time a contract of sale is made."

Under the Orissa Act also "sale" is defined as meaning "transfer of property in goods" and the word "purchase" is to be construed accordingly. The language of the impugned provisions, especially the governing words thereof, makes it clear that what is made eligible to tax is not an executory contract of sale but an executed contract of sale or in other words, not an executory con tract of purchase but a completed contract of purchase. Bearing in mind the statutory provisions referred to above, it is further clear that such purchase would be complete when the standing trees or bamboos are specific goods, that is, when they arc identified and agreed upon at the time the contract of sale is made, and the con tract is unconditional and further such standing trees or bamboos arc in a deliverable state, that is, nothing remains to be done except for the buyer to enter upon the land of the seller and to fell and remove the trees Of bamboos, as the case may be, without any let or hindrance. If these factors exist, then unless a different intention appears either from the terms of the contract or can be infer red from the conduct of the parties and other circumstances of the case, the property in such standing trees and bamboos would pass from seller to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of taking delivery of standing trees agreed to be severed or bamboos agreed to be severed or both is postponed. If, however, there is an unconditional contract for the sale of standing trees or bamboos which are unascertained, then unless a different intention appears, the property in them would be transferred to the buyer when the standing trees and bamboos are ascertained and it would be equally immaterial whether the time of payment of the price or the time of taking delivery of standing trees agreed to be severed or bamboos agreed to be severed or both is postponed. In either event, the sale and purchase would be completed before severance as under

> the impugned provisions there has to be a completed purchase of standing trees or bamboos agreed to be severed for the impugned provisions to apply. The severance obviously cannot be before sale because in that case the property would only pass and the sale completed after severance and the impugned provisions would have no application. Therefore, for the impugned provisions to apply the severance of the standing trees or bamboos must not be before sale but under the contract of sale, that is, after the sale thereof is completed. The absence in the impugned provisions of the words "before sale or under the contract of sale" thus makes 'no difference. The subject-matter of the impugned provisions is goods and the tax that is levied thereunder is on the completed purchase of goods.
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> The fallacy underlying the reasoning of the High Court is that it has confused the question of the interpretation of the impugned provisions with the interpretation of Timber Contracts and the Bamboo Contract. On the interpretation it placed upon the Timber Contracts it came to the conclusion that the property in the standing trees passed only after severance and after complying with the conditions of that contract ar d, therefore, the impugned provisions purported to levy a purchase tax on an agreement to sell. In the case of bamboos agreed to be severed, the High Court on an interpretation of the Bamboo Contract held that it was a grant of a profit a prendre

and from that it further held that the impugned provisions were bad in law because they amounted to a levy of purchase tax on a profit a prendre. This approach adopted by the High Court was erroneous in law. The question of the validity of the impugned provisions had nothing to do with the legality of any action taken thereunder to make exigible to tax a particular transaction. If a notification is invalid, all actions taken under it would be invalid also. The converse, however, is not true. Where a notification is valid, an action purported to be taken thereunder contrary to the terms of that notification or going beyond the scope of that notification would be bad in law without affecting in any manner the validity of the notification. Were the interpretation placed by the High Court on the Bamboo Contract and the Timber Contracts correct, the transactions covered by them would not be liable to be taxed under the impugned provisions and any attempt or action by the State to do so would be illegal but the validity of the impugned provisions would not be affected thereby. The challenge to the validity of the impugned provisions on the ground of their unconstitutionality must, therefore, fail. Double taxation Another ground on which the High Court invalidated the impugned provisions was that bamboos agreed to be severed and trees agreed to be severed were the same as bamboos and timber after they are felled and as bamboos and timber were liable to tax at the sale-point, the taxation of the same goods at the purchase point amounted to double taxation and was contrary to the provisions of the Orissa Act. The general rule of construction is that a taxing statute will not be so construed as to result in taxing the same person twice in respect of the same income or transaction. There is, however, nothing to prohibit the legislature from so enacting it. If what the High Court held were correct, it would not be double taxation in the strict sense of the term because the same person is not being taxed twice in respect of the same transaction but the same transaction is being taxed twice though in different hands, that is, the seller in a transaction Or sale is being subjected to sales tax and the purchaser in the same transaction is being subjected to purchase tax. Not only does the Orissa Act expressly forbid this but it also forbids the levying of tax at more than one point in the same series of sales or purchases by successive dealers. The provisions in this behalf are to be found in the proviso to section 3-B and the proviso to section 8. Under the proviso to section 3-B, no tax is to be payable on the sales of goods or class of goods declared under that section to be liable to tax on the turn over of purchases. Under the proviso to section 8, the same goods are not to be taxed at more than one point in the same series of sales or purchases by successive dealers. According to the High Court, under the Orissa Act all goods are liable to sales tax unless exempted from tax by the State Government under section 6, and, therefore, if particular goods are liable to sales tax, no purchase tax is leviable in respect of the same goods unless the State Government issues three notifications, namely, (I) a notification under section 3-B declaring the goods to be taxable at the purchase point, (2) a notification under section 5 prescribing the rate of purchase tax, and (3) a notification deleting the goods from the list of goods taxable at the sale point. The High Court has illustrated this by setting out what was done when fish was made liable to purchase tax instead of sales tax We find that the High Court has misunderstood the scheme of taxation under the

Orissa Act. As the Notifications dated December 29, 1917, were issued as a result of the amendments made by the Orissa Sales Tax (Amendment) Ordinance, 1977, replaced by the Orissa Sales Tax (Amendment) Act, 1978, while the Notifications dated May 23, 1977, were issued prior to these amendments, it is necessary to consider the scheme of taxation under the Orissa Act both prior to and after January 1, 1978, being the date on which the relevant provisions of the said Ordinance came into force.

Prior to January 1, 1978, under section 5 (1) the tax payable by a dealer under the Orissa Act on his taxable turnover was at the rate specified in that sub-section. At the relevant time the rate was six per cent. The rate specified in section 5 (1) was for both sales tax and purchase tax. As under the Orissa Act a dealer is liable to pay tax on his turnover of sales as also on his turnover of purchases and as purchase tax is payable only on the turnover of purchases of those declared under section 3-B, in respect of the goods not so declared a dealer would be liable to pay sales tax. Under the proviso to section 3-B, when any goods are declared to be liable to tax on the turnover of purchases, no tax is payable on the sales Or such goods. Prior to January 1, 1978, a notification was to be issued by the Slate Government under the first proviso to section 5 (1) only when it wanted to fix a rate of tax higher or lower than that specified in section 5(1). If no such notification was issued, then the tax which was payable, whether it was sales tax or purchase tax, was to be at the rate mentioned in section 5 (1). The illustration given by the High Court was in respect of goods for which under the first proviso to section 5(1) the State Government had notified a rate of tax different from that mentioned in section 5(1). Where, however, any goods were declared under section 3-B to be liable to tax on the turnover of purchases, the notification prescribing a higher or lower rate of sales tax issued under the first proviso to section 5(1) would there upon cease to be operative by reason of the operation of the proviso to section 3-B and it was not necessary to repeal expressly that notification. It was also not necessary for the State Government to issue a notification fixing the rate of purchase tax unless it wanted to fix a rate higher or lower than that specified in section 5 (1). Where no such notification was issued, the rate of purchase tax would be the one which was mentioned in section 5(1), After January 1, 1978, the scheme of taxation is that no rate of tax is specified in the Orissa Act but under section 5(1) the State Government is given the power to notify from time to time the rate of tax, whether sales tax or purchase tax, by issuing notifications. The notifications issued under section 5 (1) fixing the rate of sales tax, namely, Notification No. 67184-C.T.A.-135/77-F dated December 29, 1977, does not contain any entry in respect of bamboos or timber or in respect of bamboos agreed to be severed or standing trees agreed to be severed. If they were liable to sales tax, they would fall under the residuary entry No. 101 and be liable to sales tax at the rate of seven per cent. If, however, any goods falling under the residuary entry or any other entry in that notification arc declared under section 3-B to be liable to tax on the turnover of purchases, the residuary entry or that particular entry would automatically cease to operate in respect of those goods by reason of the proviso to

section3- B without there being any necessity to delete that particular entry or to amend the residuary entry by excluding those goods therefrom. It would, however, be necessary for the State Government to issue a notification specifying the rate of purchase tax on those goods because unlike what the position was prior to January 1, 1978, on and after that date the new sub section 5(1) does not specify any rate of tax but leaves it to the State Government to notify it from time to time.

The High Court was, therefore, in error in holding that the impugned provisions were invalid and ultra vires the Orissa Act as they amounted to "double taxation". Effect of "Supersession"

Yet another contention raised by the contesting Respondents with respect to the impugned provisions was that the two Notifications dated December 29, 1977, having been made in "supersession" of all previous Notifications issued on the subject, the effect was to wipe out all tax liability which had accrued under the Notifications dated May 23, 1977. The High Court held that to hold that the liability was so wiped out would amount to giving a retrospective effect to the Notifications dated December 29, 1977, and as the Legislature had not conferred upon the State Government the power to issue notifications having retrospective effect, to so hold would be to render the said Notification void. The High Court referred to a number of decisions on the question of the power to make subordinate legislation having retrospective effect.

We find it unnecessary for the purpose of deciding this point to refer to any of the authorities cited by the High Court. Both the Notifications dated December 29, 1977, are in express terms made with effect from January 1, 1918. They do not at all purport to have any retrospective effect and, therefore, they could not affect the operation of the earlier Notifications dated May 23, 1977, until they came into force on January 1, 1978. Further, both section 3-B and section 5(1) in express terms confer power upon the State Government to issue notifications "from time to time". Section 3-B provides that "the State may, from time to time by notifications, declare... "goods liable to purchase tax. Prior to January 1, 1978, the proviso to sub-section (l) of section 5 provided that "The State Government may, from time to time by notification...fix a higher rate not exceeding thirteen per cent or any lower rate of tax.. " Section S (I) as amended with effect from January, 1978, provides that "The tax shall be levied...at such rate, not exceeding thirteen per cent...as the State Government may, from time to time by notification, specify." Thus, the Power of the State Government to issue notification under these two sections is to be exercised by it "from time to time" and, therefore, the State Government can under section 5(1) issue a notification and repeal and replace it by another notification enhancing or lowering the rate of tax and similarly it can issue a notification under section 3-B declaring particular goods or class of goods to be liable to tax on the turnover of purchases and subsequently by another notification repeal that notification with the result that the particular goods or class of goods will from the date of such repeal be again liable to pay tax on the turnover of sales. In the Notifications dated December 29, 1977, the word

"supersession" is used in the same sense as the word "repeal" or rather the words "repeal and replacement". The Shorter Oxford English Dictionary, Third Edition, at page 2084, defines the word 'supersession' as meaning "The action of superseding or condition of being superseded." Some of the meanings given to the word 'supersede' on the same page in that Dictionary which are relevant for our purpose are "to put a stop to; to render superfluous or unnecessary; to make of no effect; to annul; to take the place of (something set aside or abandoned); to succeed to the place occupied by; to supply the place of a thing". Webster's Third New International Dictionary at page 2296 defines the word "supersession" as "the state of being superseded; removal and replacement". Thus, by using in the Notifications dated December 29, 1977, the expression 'in suerssion of all previous notification' that was done was to repeal and replace the previous notifications by new notifications. By repealing and replacing the previous notifications by other notifications, the result was not to wipe out any liability accrued under the previous notifications. If this contention of the Respondents were to be accepted, the result would be startling. It would mean, for example, that when a notification has been issued under section 5 (13 prescribing a rate of tax, and that notification is later superseded by another notification further enhancing the rate of tax, all tax liability under the earlier notification is wiped out and no tax can be collected by the State Government in respect of any transactions effected during the period when the earlier notification was in force.

The two Notifications dated December 29, 1977, impugned by the Respondents were not the only notifications which were issued on that date. There was another notification issued on that date, namely, Notification No. 67184-C.T.A.- 135/77-F, directing that with effect from January l, 1978, the rate of tax payable by a dealer under the Orissa Act on account of the sale of goods specified in column (2) of the Schedule to the said Notifications would be at the rate specified against each in column (3) thereof. The issuance of these three Notifications became necessary by reason of the change brought about in the scheme of taxation by the Orissa Sales Tax (Amendment) Ordinance, 1977. Prior to that Ordinance, the rate of tax was as specified in sub-section

(l) of section 5 with power conferred upon the State Government by the first proviso to that sub-section to fix by notification issued from time to time a higher rate of tax not exceeding the limit mentioned in the said proviso or to fix from time to time a lower rate of tax on account of the sale or purchase of any goods or class of goods specified in such notification. Thus, if no notification was issued by the State Government enhancing or lowering the rate of tax, the tax, whether sales tax or purchase tax, payable by a dealer would be at the rate specified in sub-

section (1) of section 5 which at the relevant time was six percent. In pursuance of the power conferred by the said proviso, the State Government had from time to time issued notifications enhancing and in some cases lowering the rate of tax payable on account of either sale or purchase of goods. The new section 5(1) did not specify any rate of tax but what was done was to confer upon

the State Government the power by notification to specify from time to time the rate of tax subject to a maximum of thirteen per cent. Therefore, With effect from January 1, 1978, unless a notification was issued specifying the rate of tax, no dealer would be liable to pay any tax under the Orissa Act. It was for this reason that the Notification No. 67184-C.T.A-135/17-F dated December 29, 1977, was issued specifying the rates of sales tax with effect from January 1, 1978. As under section 3-B the State Government had to declare the goods or class of goods which were liable to tax on the turnover of purchases, the State Government had issued from time to time notifications declaring such goods or class of goods. The purchase of such goods or class of goods were liable to purchase tax at the rate specified in the old section 5(1). Where, however, the State Government wanted that the turnover of purchase of particular goods or class of goods should be taxed at a higher or lower rate, it issued notifications specifying such rate. As no rate of tax was specified in the new section 5(1) but it was left to the Government to specify the rate of tax by notification both in respect of sales tax and purchase tax, from the date the amending Ordinance of 1977 came into force, namely from January 1, 1978, it was necessary to issue a notification consolidating all previous notifications on the subject in respect of goods liable to purchase tax which the State Government did by the impugned Notification No. 67178- C.T.A.-135/77-(Pt)-F. dated December 29, 1977, declaring what goods would be liable to tax on the turnover of purchases with effect from January 1, 1978. Unless, however, the rate of purchase tax in respect of these goods was specified under the new section 5(1) the goods though declared to be liable to tax on the turnover of purchase would not be exigible to any tax at all, it, therefore, became necessary for the State Government to issue Notification No. 67181-C.T.A.-135/77-F. dated December 29, 1977, specifying the rates of purchase tax with effect from January 1, 1978.

Exigibility to tax-Preliminary Contention-

The question which now remains to be considered is as regards the exigibility to purchase tax of the amounts payable under the Bamboo Contract and the Timber Contracts. Before we address ourselves to this question, it is necessary to dispose of a preliminary contention raised by the Appellant with respect to this part of the case. It was submitted that the question whether a particular contract is a sale or purchase of goods is a question of fact or a question of interpretation of documents and one to be decided by the assessing authorities and, therefore, if this Court holds that the impugned provisions are valid (as we have now done), it should not go into the question of the exigibility to purchase tax of the transactions in question. This plea was not raised at any stage before the High Court but has been raised for the first time in the Petitions for Special Leave to Appeal, and that too only with respect to the Bamboo Contract though during the course of hearing before us, it was raised with respect to the Timber Contracts also. Before the High Court the matter proceeded on the basis that the question of validity of the impugned provisions and of the exigibility to purchase tax of the transactions covered by the Bamboo Contract and the Timber Contracts were inextricably linked together as if the impugned provisions were issued only in order to levy a purchase tax on the transactions covered by these Contracts. The Appellant can, therefore, hardly raise such a plea for the first time before this Court. It is true that normally it is for assessing authorities to ascertain .

the facts and to interpret the documents in question, if there be any, and to decide whether a particular transaction is exigible to tax. Here, however, the facts are not in dispute and the determinations of this question involves only an interpretation of the documents. The major part of the hearing before the High Court was taken up with the nature of the transactions covered by these Contracts. We have also heard the parties at length on the merits of this question. Even though the judgment of the High Court with respect to the validity of the impugned provisions has been held by us to be erroneous in law, it may well be said that the High Court's finding on the true nature of the Bamboo Contract and the Timber Contracts remains unaffected. If we refuse to decide this question and leave it to the assessing authorities to do so, they may well feel themselves bound by the High Court's findings on this point or on the other hand, they may consider that the whole judgment of the High Court has been reversed, particularly in view of the fact that in their writ petitions the Respondent company had challenged the notice issued to it to file a return and the Respondent Firm had challenged the assessment order made against it and, therefore, feel free to determine the question afresh. In either event the matter would ultimately come back for decision to this Court and that too after the lapse of several years-a consequence not to be contemplated with equanimity by this Court. We, therefore, reject this preliminary contention raised by the Appellant.

Timber Contracts We will first take up the Timber Contracts. The High Court held that standing trees were unascertained goods and continued to be the property of the State Government until felled and, therefore, the title to them was transferred to the forest contractor only when the trees were felled or severed by him after complying with all the conditions of the forest contract and as the impugned provisions applied only to standing trees, that is, to trees before their severance, purchase tax was not attracted and any attempt to levy purchase tax on the amounts payable under the Timber Contracts would amount to taxing an agreement of sale of goods and not a completed sale or purchase of goods. The High Court further held that the trees so severed in which the property passed to the forest contractor were liable to sales tax by reason of the retrospectively amended definition of the term "dealer" in clause (c) of section 2 of the Orissa Act and they could not, therefore, be again made liable to purchase tax. The High Court also rejected the contention of the Appellant State that timber and dressed or sized logs were different commercial commodities and that sales tax could, therefore, be levied on both. According to the High Court they were the same commodity and, therefore, they could not be made liable to sales tax at two points in the same series of sales. The High Court did not decide the question whether the Timber Contracts were works contracts. This point was, however, urged before us "on behalf of the Respondent firm. We will deal with this point separately but for the present suffice it to say that according to us none of the Timber Contracts is a works contract.

On behalf of the Appellant State it was submitted that the Timber Contracts read with the sale notice advertising the auction in respect of the standing trees showed that the standing trees which were the subject matter of the Timber Contracts were goods identified and agreed upon at the time when the contract of sale was made and were thus specific goods and that, therefore, there was an unconditional contract for the sale of specific goods in a deliverable state and the property in the said trees passed to the forest contractor, namely, the Respondent Firm, when the contract was made, and the fact that the time of delivery as also payment of price was postponed was irrelevant. It was the Appellant's submission that for the reason set out above the amounts payable under the

Timber Contract were exigible to purchase tax. It was further submitted that in any event the property in the standing trees passed when the forest contractor was permitted to get into the area as delineated under Rule 12 of the Orissa Forest Contract Rule, 1966 (hereinafter referred to as "The Forest Contract Rules"), to enable the contractor to fell the trees. The same submissions as found favour with the High Court were advanced before us on behalf of the Respondent Firm.

While setting out the facts of Civil Appeal No. 220 of 1982, we have outlined the procedure followed by the State of Orissa in entering into forest contracts. The notice of public auction with which we are concerned was published in the Orissa Gazette and was headed "Sale Notice of Timber and Other Forest Products...." This Sale Notice related to different forest produce and was in three parts. Part I gave "the list of timber and other forest products" for the session 1977-78 which would be "sold by public auction" and the places and dates where such auction sales were to be held. Clause 2 of Part I of the Sale Notice stated that the sale lots were subject to the Special Conditions of Sale as published in Part II of the Sale Notice, the General Conditions of Sale as published in Part III of the Sale Notice so far as they may be applicable and the Conditions mentioned in the sanctioned form of agreement. Clause 3 stated that the successful bidders shall be bound by the Orissa Forest Act. 1972, the Forest Contract Rules, the Orissa Timber and other Forest Produce Transit Rules, and all other relevant rules in force or which might hereinafter come into force and promulgated under the Orissa Forest Act, 1972.

Under condition 1 of the Special Conditions of Sale set out in Part II of the Sale Notice, the contract period of timber coupes was to commence from the date of the ratification of sale by the competent authority and was to include the number of working months mentioned in the sale notice against each lot. Condition 2 stated the time and manner of "payment of purchase price" in full or by instalments. Under condition, the intending bidders were asked to inspect the coupes and lots before bidding in the auction and their act of bidding was to be deemed as sufficient proof of their having inspected the coupes the coupes and satisfied themselves about the correctness of the quality and quantity of the produce and the area of the contract. Condition 9 provided that no extension of time for working any coupe beyond the contract period as published in the Sale Notice and declared in the auction hall would be allowed except under very exceptional circumstances. Under condition 14, the prescriptions contained in the working plan, working schedule and their amendments or the executive instructions of the higher authority and local rules were to be binding on the contractors as regards felling of trees in coupes. Under condition 21, the purchaser was to pay the sales tax as per the Orissa Act over and above the bid amount. In the event of his delay in payment of sales tax, the same was to be adjusted from the earnest money deposit or the security deposit, as the case may be, and the purchaser was bound to replenish the same forthwith. Condition 22 provided that the contractor was to pay sales tax on the amount of each instalment as per the Sales Tax Rules along with the instalment of consideration money and non-payment of sales tax or non submission of appropriate declaration under the Sales Tax Rules was to amount to incomplete payment of instalment and thereupon Rule 9-A of the Forest Contract Rules was to be applicable. a Under condition 1 of the General Conditions of Sale Published in Part III of the Sale Notice, the bid was to be accepted by the Divisional Forest Officer subject to the approval of the competent authority and the right to take contract for exploiting forest produce in the lots advertised in Part I of the Sale Notice was to be granted when the competent authority approved the bid. Under condition 4,

intending bidders were to deposit as earnest money a sum of Rs. 200 . In the case of unsuccessful bidders this amount was to be refunded immediately after the auction was held and in the case of successful bidders the amount was to be adjusted towards the security deposit. Under condition 10, a bidder whose bid was conditionally of finally accepted by the Divisional Forest Officer was to make the security deposit in cash. On payment of the security deposit, the bidder was to sign the necessary agreement but the signing of such agreement was not to confer any right on the bidder unless the sale was ratified by the competent authority and the ratification order was communicated to him. No sale of any lot was to be considered valid or complete unless these conditions had been complied with and in the event of failure to do so, the Divisional Forest Officer was to be at liberty to quash the sale and forfeit the earnest money or the security deposit, as the case may be, and resell the lot and recover from the successful bidder who had failed to comply with the conditions the shortfall on such resale. Condition 12 provided for the payment of purchase price in full or by instalments. Under condition 15 orders of ratification of sale by the competent authority were to be communicated to the successful bidder by the Divisional Forest Officer specifying there in the dates of the payment of instalments in accordance with condition 12 and the period of the contract. Under condition 16, the contractor was not to commence the work in the contract area before the payment of the first instalment or the full consideration money if it was payable in one instalment and before furnishing the coupe declaration certificate or intimation about starting work, as the case may be, as required by Rule 12 of the Forest Contract Rules. Under condition 18, an agreement was to be executed by the competent authority on behalf of the Government and a copy thereof was to be delivered to the contractor as soon as may be.

On its bids being accepted the Respondent Firm entered into five Timber Contracts in the forms prescribed in the Schedule to the Forest Contract Rules. The main heading of each of these Timber Contracts is 'Forest Contract-Agreement Form' and the long heading states that it is "An agreement for the sale and purchase of forest produce". Under clause 1, the forest produce "sold and purchased under" the Timber Contract was to be as specified in Schedule I thereof and the forest area in which it was situated was indicated in Schedule V thereof and was to be referred to as the contract area. Schedule I in each of the Timber Contracts mentioned that the forest produce "sold and purchased under" the Timber Contract consisted of a certain number of sound and unsound trees marked and numbered serially on the blazes, one at the base of the trees and the other about 4-1/2' from the ground level, with the hammer mark of facsimile shown in the Sale Notice. Clause 2 stated that the quantity of the forest produce "sold and purchased under" the Timber Contract was all the said forest produce which then existed or might come into existence in the contract area which the forest contractor might remove from the said area during the period of the contract and it was further provided that the said U forest produce was to be extracted by the forest contractor only during the aforesaid period. That part of clause 2 which spoke of forest produce which might come into existence in the contract area was obviously inapplicable to the Respondent Firms's case inasmuch as the Timber Contracts were in respect of a certain number of existing trees. This provision was there because the Timber Contract was in the form which is the prescribed form of contract in respect of all forest produce and under Rule 33 of the 1 Forest Contract Rules all forest contracts are required to be made in this form. Clause 4 started that the routes by which the said forest produce was to be removed from the contract area and the depots at which it was to be presented for examination were to be those specified in Schedule 111. Under clause 5, it was agreed that the

Timber Contract was to be subject to the Forest Contract Rules and conditions laid down in the Sale Notice except to the extent that the said Rules and conditions were deemed to be modified to the extent prescribed in Schedule IV. Under Schedule 4 to the contract, the Forest Contract Rules were deemed to be modified by the Special Conditions in the Sale Notice. By clause 6 the forest contractor bound himself to perform all acts and duties required and to abstain from performing any act forbidden by or under the Orissa Forest Act, 1972, and the Forest Contract Rules and by the Timber Contract. Schedule II set out the number and amounts of instalments and the dates of payment of the instalments.

The bids given by the Respondent Firm were ratified in due course by the Government of Orissa and the fact of such ratification was communicated to the Respondent Firm by the Divisional Forest Officer. Each of these notification letters specified the number and amounts of the instalments payable by the Respondent Firm and the dates when each instalment was payable. Each of these ratification letters required the Respondent Firm to take delivery of the particular coupe within one and half months from the date of issue of the ratification order and to get the Respondent Firm' s property hammer mark registered in the office of the Divisional Fores' Officer on payment of the appropriate registration fee. Each of these letters required the Respondent Firm not to commence work in the contract area before the payment of the first instalment and before furnishing the Coupe Declaration Certificate or intimating in writing that it intended to commence work from a particular date, as the case may be, as required under Rule 12 Of the Forest Contract Rules. By the said letters the Respondent Firm was also required to submit monthly returns of removal of forest produce from the contract area to the concerned Range Officer. A copy of each of these letters was forwarded to the concerned Range Officer with a direction that he should give delivery of the coupe to the Respondent Firm within one and a half months from the date of the ratification order and allow the Respondent firm to commence work in the contract area after it had furnished the Coupe Declaration Certificate and made payment of the first instalment.

As the Orissa Forest Contract Act, 1972 (Orissa Act 14 of 1972), and the Forest Contract Rules formed part of the agreement between the State of Orissa and the Respondent Firm, it may be convenient at the stage to look at the relevant provisions thereof. Clause (g) of section 2 of the Orissa Forest Contract Act defines "forest produce"' as including inter alia timber, whether found in or brought from a forest or not, and trees when found in or brought from a forest. Clause (n) defines "timber" as including "trees fallen or felled and all wood cut-up or sawn". Clause

(o) of section 2 of the Act defines "trees" as including bamboos. Section 36 of the Orissa Forest Act confers powers upon the State Government to make rules inter alia for the cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest produce, from protected forests Under section 37, any infringement of a rule made under section 36 is an offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to Rs. 2000 or both. Under section 45(1) the control of all rivers and their banks as regards the floating of timber as well as the control of all timber and other forest produce in transit by land or water is vested in the State Government and the State Government is conferred the power to make rules to regulate the transit and possession of all timber and other forest produce, including rules prescribing the routes by which alone timber or other forest produce may

be imported, exported or moved into, from or within the State, and to provide for punishment of imprisonment which may extend to one year or fine which may extend to Rs. 1,000 or both for any breach of such rules.

Under rule 2 of the Forest Contract Rules, all contracts whereby the Government sells forest produce to a purchaser are, subject to the Forest Contract Rules in so far as they are applicable, and the Forest Contract Rules are deemed to be binding on every forest contractor. The Forest Officer executing a forest intricate is, however, given the power to vary the rules by express provision in such intricate. A "forest contract' is defined in clause (1) of Rule 3 as meaning ' a contract whereby Government agrees to sell and purchaser agrees to buy forest produce" and a 'forest contractor' is defined in clause (2) of Rule 3 as meaning "the person who purchases produce under a forest contract". Under Rule 6, a forest contract is to carry with it an accessory licence entitling the forest contractor and his servants and agents to go Upon the land specified in the contract and to do all acts necessary for the proper extraction of the forest produce purchases under the contract. Under Rule 6 where a period is specified in the forest contract for the extraction of the forest produce purchased under the contract, time is deemed to be of the essence of such contract and upon the completion of the specified period the contractor's right under the contract is to cease and any forest produce not removed across the boundaries of the contract area is to become the absolute property of the Government. The Conservator of Forests or the Divisional Forest Officer, as the case may be, is, however, given the right, for special reasons, to grant an extension of time on such terms as may be decided for a total period (inclusive of the original contract period) not exceeding the period for which he is empowered to sanction contracts on payment of a monthly extension fee Of one per cent of the amount of the contract. Under Rule 9, the Divisional Forest Officer or the Range Officer, as the case may be, is given the power to stop extraction of the forest produce where the consideration payable to the Government under a forest contract is payable by instalments and, at any time before the last instalment is paid, he considers that the value of the forest produce removed by the contractor exceeds the amount of instalments already paid. Further removal is to be permitted only after the contractor has paid such further sum as in the opinion of the Divisional Forest Officer or the Range Officer is sufficient to cover such excess. Under Rule 9-A, it is open to the Divisional Forest Officer or the Range Officer of the concerned range to stop extraction if the contractor fail s to pay any instalment due from him within the grace period of ten days beyond the date fixed for payments of the instalment. It is equally open to these officers to stop work in the contract area if the contractor fails to pay two instalments due from him. Under Rule 12, before commencing any work in the contract area the forest contractor is to sign and submit to the Divisional Forest Officer or the-e concerned Range Officer a written declaration to the effect that he or his authorized agent or both have been shown the boundaries and limits of the lot covered by the contract by the Range Officer or by a subordinate deputed by him for the purpose and that the area shown on the ground agrees with the area delineated on the map annexed to the forest contract and until such a declaration has been given, the Divisional Forest Officer or the Range Officer may refuse to allow any work to commence and the contractor is not to be entitled to any compensation for any loss that might be sustained by him by reason of any delay in commencing the work owing to such refusal. Rule 12 further provides that if such declaration is not furnished within one and a half months from the date of issue of the ratification order, the Divisional Forest Officer is to cancel the contract, forfeit the security deposit, resell the contract at the risk of the contractor and recover the shortfall

from him. Condonation of delay in furnishing such intimation or declaration is expressly prohibited. Under Rule 13, a forest contractor is not to remove any forest produce from the contract area unless it is accompanied by a permit signed by the contractor or his authorized agent. Such permits are to be obtained on payment from the Range Officer. Further, the divisional Forest Officer or the Range Officer, as the case may be, has the power to withdraw a permit book, if in his opinion, such permit book has been misused for unlawful gain. In the event of such withdrawal the forest contractor is not entitled to any compensation for any loss that might be sustained by him for any stoppage of his work in or extraction from the contract area. Under Rule 14, the method employed by the forest contractor for extraction of forest produce along forest roads is to be subject to the approval of the Divisional Forest Officer and the forest contractor is not to cart any produce over forest roads between such periods as the Divisional Forest Officer might appoint without the previous permission in writing of the Divisional Forest Officer Further, the Divisional Forest Officer is given the discretion to close forest roads for extraction of forest produce on any rainy days and for three days thereafter during the rest of the year. He may also close roads temporarily for urgent or special repairs should this in his opinion become necessary. Further, the forest contractor is prohibited from extracting forest produce by dragging along forest roads. Under Rule 15, except with the special permission of the Divisional Forest Officer, a forest contractor is not to remove any forest produce from the contract area after sunset or before sunrise. Under Rule 16, a forest contractor is not to remove any forest produce except by routes specified by rules made under the Orissa Forest Act or by the forest contract and is to take all forest produce removed by him to such depots or places as may be similarly prescribed for check and examination. Under Rule 19, the forest contractor is to keep and submit accounts of the amount of the various kinds of forest produce removed by him from the contract area in such form as the Divisional Forest Officer may prescribe or approve, and such accounts are to be open to inspection at any time by the Divisional Forest Officer or by any subordinate duly authorized by him. Rule 20 prescribes the mode of felling standing trees. The Divisional Forest Officer has the power to stop further felling until these provisions are complied with. Under Rule 21, the Divisional Forest Officer is to divide the contract area into such number of sections as he may think fit and has the power to regulate and confine the operations of the forest contractor within these sections in accordance with the provisions set out in the said Rule. Under the said Rule, the work is to be allowed progressively from section to section. When the forest contractor begins his operations under the contract, he is to be allowed to carry out cutting operations in sections Nos. I and 2 E only. As soon as he begins cutting operation in section No. 3 he is deemed to have surrendered all his rights to standing trees in section No. 1. When he begins cutting operations in section No. 4 he is deemed to have surrendered all his rights to the standing trees in section No. 2 and so on, throughout the contract area. Under Rule 22, the forest contractor unless otherwise directed to do so in writing by the Divisional Forest Officer, is to register his property mark or trade mark in the Office of Divisional Forest Officer and get it registered by paying the registration fee in respect thereof. No timber is to be conveyed from the contract area without the impress of the forest contractor's registered property or trade mark, and the Divisional Forest Officer and his subordinates have the right to mark any piece of timber with the Government hammer mark before it is removed from the stump-side beyond the limits of such checking station as the Divisional Forest Officer may appoint in writing. Under Rule 34, if the forest contractor makes default in the payment of the consideration for his contract or any instalment thereof or does not pay the compensation assessed under any of the Forest Contract Rules, the contract is liable to

be terminated by the authority competent to do so. The termination is to be notified to the forest contractor and the contract is deemed to have been terminated unless the contractor pays within one month from the date of receipt of the notice of termination all arrears due to the Government together with interest assessable under Rule 42 and renewal fee not exceeding one per cent of the arrears due and if he fails to do so, all his rights under the contract including all necessary licences are to cease and all the forest produce remaining within the contract area or at the depots and bearing the contractor's registered property or trade mark and the Government hammer mark are to become the absolute property of she Government, Further, the Government becomes entitled to keep all sums already paid by the contractor and to recover as arrears of land revenue any compensation which may be assessed and to resell the contract together with produce at the depots and other produce which has become the property of the Government and to recover the shortfall as arrears of land revenue and to forfeit the security deposit of the contractor. Under Rule 35, if the forest contractor commits any breach of condition of the contract other than those mentioned in Rule 34(1), the contract is liable to be terminated and thereupon all the contractor's rights under the contract including all accessory licences are to cease and all the forest produce remaining within the contract area or at the depots is to become the absolute property of the Government. Under Rule 36, 'if in the opinion of the State Government it is considered necessary to supply any kind of forest produce from any contract area to the people in case of flood, famine, cyclone and other calamities and if the contractor does not supply the materials at the rate fixed by the Government, such contract can be terminated by the Government in writing by a written notice to the contractor and from the date of such termination, the contractor is to forfeit all his rights in the coupes. Under Rule 40, a forest contractor is not to be entitled to any compensation for any loss that may be sustained by reason of fire, tempest, disease, pest, flood, drought or other natural calamity or by reason of any wrongful act committed by any third party or by reason of the unsoundness or breakage of any forest produce purchased by him or for any loss sustained by him through any operation undertaken in the interest of fire conservancy. He is equally not entitled to claim any reduction or refund of the sums payable or paid by him under his contract on the ground that the roads provided by the e Forest Department or any other department are insufficient or in bad order or remain closed under any special order or that the quantity of produce falls short of any quantity specified in the schedule annexed to the contract or in the sale notice or that the area of the contract area differs in any way from that indicated in the schedule attached to the- e contract. Under Rule 44, all forest produce removed from a contract area in accordance with the forest Contract Rules is to be at the absolute disposal of the forest contractor.

Bearing in mind the terms and conditions of the Timber Contracts-not only those expressly set out therein but also those incorporated therein by reference, namely, the terms of the Sale Notice, the Special Conditions of Contract, the General Conditions of Contract and the various statutory provisions-we have now to determine whether the property in the trees which were the subject matter of the Timber Contracts passed to the Respondent Firm while the trees were still standing or after they were severed. In the first case the impugned provisions would apply and the amounts payable under the Timber Contracts would become exigible to purchase tax, while in the second, case the impugned provisions would not apply and no purchase tax would be payable. The above conspectus of these terms and conditions shows that the heading of the Sale Notice, namely, "Sale Notice of Timber"

as also the use of the words "timber and other forest products...will be sold by public auction" are not determinative of the matter. Though clause 1 of the Timber Contracts speaks of "the forest produce sold and purchased", the other terms and conditions of the contract make it clear that the Timber Contracts were not unconditional contracts for the sale of goods in a deliverable state and the property in the trees specified in Schedule I of the Contract, therefore, did not pass to the Respondent Firm when each of the Contracts was made. As mentioned earlier the Timber Contracts are in the prescribed form for all forest produce annexed to the Forest Contract Rules and the provisions of the Orissa Forest Act and the Forest Contract Rules are expressly made applicable thereto. Clause (1) of Rule 3 of the Forest Contract Rules defines a "forest contract" as meaning "a contract whereby Government agrees to sell and purchaser agrees to buy forest produce." That this is also such an agreement is borne out by the long heading of the Timber Contracts which describes these contracts as "an agreement for the sale and purchase of forest produce." In fact, the signing of the Timber Contracts did not result in a concluded contract because each contract was conditional upon the State Government ratifying the acceptance of the bid given by the Respondent Firm. Even after the ratification order was issued by the Government, it did not become an unconditional contract for the sale of specific goods in a deliverable state for the Respondent Firm had no right to severe the trees and take them away before it had complied with the other conditions of the contract set out above. To recapitulate the most important amongst them, under Rule 12 of the Forest Contract Rules the respondent Firm had to furnish a Coupe Declaration Certificate within one and half months of the issue of the ratification order. If it did not do so, the contract would stand cancelled. It had also under Rule 22 of the Forest Contract Rules to register within the same period its property mark or trade mark with the Divisional Forest Officer. Further, the Respondent Firm could not commence any work unless it had given the required security deposit and before paying the first instalment as under the Timber Contracts in the present Appeals the amounts were payable by instalments. That the property in the trees did not pass to the respondent Firm while the trees were standing is also shown by the fact that the Divisional Forest Officer or the concerned Range Officer had the power to stop further removal of the felled trees until the Respondent Firm had paid the amount required to make up the excess of the value Of the felled trees removed over the amount of the installments already paid by it and under Rule 9-A it was further open to the Divisional Forest Officer or the concerned Range Officer to stop further work if there was a default in payment of any instalment or in payment of any two instalments and the contract could also be terminated under Rule 33 for such default. Further work or removal could not be stopped or the contract terminated if the property in the trees had passed to the Respondent Firm because in such event the only remedy open to the seller would be to sue for the balance of the price. It is also pertinent that under Rule 33 the contract could Also be terminated and the Respondent Firm would forfeit its right to all further trees to he severed by it if it committed a breach of any of the other conditions of the contract. The mode of felling the trees was also not of the choice of the Respondent Firm but was one

prescribed by Rule

20. Even after felling the trees the Respondent Firm was not entitled to remove the felled trees by any route which it liked but only by routes which were prescribed and that too only if covered by a permit signed by the Respondent Firm or its duly authorized agent from a permit book obtained from the Range Officer. Further, under Rule 16, after felling the trees the Respondent Firm had to remove them to the prescribed depots or places for check and examination and it was only after the trees felled by it were checked and examined to ascertain that they were felled in the manner prescribed in Rule 20 and were the trees which were the subject matter of the contract that it could take them out of the contract area. Unless the Respondent Firm felled and removed all the trees which were the subject-matter of the contract within the period of the contract, on the expiry of such period it would lose all rights to the trees not so removed.

It is true that under Rule 40 if the trees were destroyed by reason of fire, tempest, disease, pest, flood, drought or other natural calamity or by reason of any wrongful act committed by any third party or by reason of the unsoundness or breakage of any trees which were the subject-matter of the contract, the Respondent Firm was not entitled to any compensation for any loss sustained by it. This would show that after a Timber Contract was concluded, the risk passed to the Respondent Firm. Under section 26 of the Sale of Goods Act, the goods remain at the seller's risk until the property in the goods is transferred to the buyer and when the property is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Section 26 is, however, qualified by the phrase "Unless otherwise agreed." Thus, this section is subject to a contract to the contrary and what we have stated above is sufficient to show that the Timber Contracts were subject to a contract to the contrary and under them the risk passed to the Respondent Firm before the property passed to it. This is made abundantly clear by Rule 44 which states that "All forest produce removed from a contract area in accordance with these rules shall be at the absolute disposal of the forest contractor."

It is, therefore, clear that the Timber Contracts were not transactions of sale or purchase of standing trees agreed to be severed. They were merely agreements to sell such trees. As pointed out above, each stage of the felling and removal operations was governed by the Forest Contract Rules and was under the control and supervision of the Forest Officers. The property passed to the Respondent Firm only in the trees which were felled, that is, in timber, after all the conditions Of contract had been complied with and after such timber was examined and checked and removed from the contract area; The impugned provisions therefore, did not apply to the transactions covered by the Timber Contracts.

It will be useful in the context of the conclusions which we have reached to refer to the decision of this Court in Badri Prasad v. State of Madhya Pradesh & Anr. the question in that case was whether there was a contract of sale of standing timber and whether under the contract the property had

passed to the appellant or whether the property had passed after the trees had been felled and hence the right of the appellant's transferor had vested in the State Government before the trees were felled by reason of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M.P. Act No. I of 1951). The Court held that under the terms of the contract the trees had to be felled before they become the property of the appellant. The Court observed (at pages 390-1) "It will be noticed that under cl. 1 of the contract the plaintiff was entitled to cut teak trees of more than 12 inches girth. It had to be ascertained which trees fell within that description. Till this was ascertained, they were not 'ascertained goods' within s. 19 of the Sale of Goods Act. Clause 5 of the contract contemplated that stumps of trees, after cutting, had to be 3 inches high. In other words, the contract was not to sell tile whole of the trees. In these circumstances property in the cut timber would only pass to the plaintiff under the contract at the earliest when the trees are felled. But before that happened the trees had vested in the state." It is pertinent to note that conditions 16 to 18 of the special Conditions of Sale which form part of the Timber Contracts also (1) [1969] 2 S.C.R. 380.

prescribe the girth of the trees which are to be felled and the height above the ground level at which they are to be felled. Timber and Logs.

On our above finding that the transactions under the Timber Contracts are sales of Timber and not sales of standing trees agreed to be severed the tax which would be attracted would be sales tax and not purchase tax under the impugned provisions. This would, however, be so if the Divisional Forest Officer were a dealer. Under the terms of the Timber Contracts the Respondent Firm is liable to reimburse the Divisional Forest Officer the amount of sales tax he would which be liable to pay. T he question whether the Divisional Forest Officer is a dealer within the meaning of that term as defined in clause (c) of section 2 prior to its being substituted with retrospective effect by the Orissa Sales tax (Amendment and Validation) Act, 1979, which repealed and replaced the Ordinance with the same title, is pending before the Court in Civil Appeals Nos. 1237-1238 of 1979 and 1420-1421 of 1979 Whatever be the position under the old definition, after the substitution of that definition with retrospective effect by the said Amendment and Validation Act, the Divisional Forest Officer ought be a dealer. The validity of this amendment is, however, also under challenge in this Court in Writ Petitions Nos. 958 of 1979 and 966 of 1979. We therefore, express no opinion on either OF these questions. It was, however, submitted on behalf of the Respondent Firm that assuming these challenges fail, it would be called upon to reimburse the Divisional Forest Officer According to the Respondent Firm, the Divisional Forest Officer. would not be entitled to do so because it had made sized and dressed logs from the timbers which it had purchased under the Timber Contracts and had sold such logs and paid sales tax on these sales and, therefore, to tax the sales of timber to them would be to levy the tax at an earlier point in the same series of sales which is not permissible by reason of the prohibition contained in the proviso to section 8. According to them, timber and sized or dressed logs are one and the same commercial commodity. This contention was upheld by the High Court. Though the High Court had so decided in order to consider whether the same transaction could be taxed both at the sale-point as also at the purchase-point, it none the less becomes necessary for us to determine this question in or to prevent needless litigation in the future.

Though under section 8 the State Government has the power to prescribe the points in the series of sales or purchases by successive dealers at which any goods or class or description of goods may be taxed, it has not done so either in the case of timber or logs, though in the case of some of other goods, as pointed out earlier, the State Government has made rules prescribing that the tax would be levied at the first point of sale. Thus, if the contention of the the Respondent Firm were correct, as tax has already been levied at one point in the same series of sales, it would not be now open to the State Government to say that by reason of the substituted definition of the term "dealer", sales tax could also be levied at another point.

We will first see how different High Courts have dealt with this question. In Saw Bros. and Co. v. The State of West Bengal1 all learned Single Judge of the Calcutta High Court held that planks sawed out of logs are different things from logs and timber in its nascent state. No reasons are given in that Judgment for reaching this conclusion, In Bachha Tewari and another v. Divisional Forest Officer, West Midnapore Division, and others2 the same learned Judge held that the the chopping of timber into firewood was a manufacturing process. and, therefore, the imposition of a tax on timber and on firewood manufactured from that timber did not amount to double taxation The question in both those cases was whether sawing of planks and chopping of timber into firewood amounted to manufacture so as to make the assessee liable to pay sales tax on the manufactured goods. This is a different question from that to which we have to address ourselves. We may, however, point out that even where the question is whether a certain process has resulted in a manufacture, the resultant product must be a different commercial commodity and merely because certain articles are known by different names it does not mean that they are different commercial commodities if in fact they are merely different forms of the same commodity. Thus, in Tungabhadra Industries Ltd. Kurnool v. Commercial Tax Officer, Kurnool3, hydrogenated groundnut oil, commonly called 'Vanaspati' was held by this Court to be groundnut oil within the meaning of Rules S (I) (k) and 18 (2) of the Madras General Sales Tax (Turn-

(1) [1963] 14 S.T.C. 878.

(2) [1963] 14 S.T.C. 1067.

(3) [1960] 11 S.T.C. 827; (1961) 2 S.C R 14 Over and Assessment) Rules, 1939. The Court further held that the processing of groundnut oil to render it more acceptable to the customer by improving its quality would not render the oil a commodity other than groundnut oil. Similarly, in the State of Gujarat v. Sakarwala Bros.(l) this Court held that 'pates', `harda' and `alchidana' were sugar in different forms and fell within the definition of sugar in Entry 47 of Schedule to the Bombay Sales Tax Act, 1959.

A decision more relevant to our purpose than the two Calcutta decisions is a decision of a Division Bench of the Madhya Pradesh High Court in Mohanlal Vishram v. Commissioner of` Sales Tax Madhya Pradesh, Indore(2). In that case the Madhya Pradesh High Court held that by felling standing timber trees, cutting them and converting some of them into` ballis', a dealer did not alter their character as timber or used them for manufacture of other goods within the meaning of section 8(1) of the Madhya Pradesh Sales Tax Act, 1958. Another decision equally relevant for our purpose

is that of a Division Bench of the Andhra Pradesh High Court in G. Ramaswamy and others v. The State of Andhra Pradesh and others(3) in which the question was very much the same as the one which we have to decide. The assessees in that case purchased nascent timber, that is, logs of wood, and had swan or cut them into planks, rafters, cut sizes, etc., and sold them for the purpose of construction of buildings and the like. Under section 5(2)(a) of the Andhra Pradesh General Sales Tax Act, 1957, read with Item 63 in the First Schedule to that Act, a dealer in timber was liable to pay sales tax at the rate of three pies in a rupee at the point of first sale. The assessees were, however, sought to be taxed under section 5(1) of that Act on their sales of, planks, rafters, out sizes, etc. treating them as general goods. The contention of assessees was that these goods were timber which was taxable at the first point of sale and the first point of sale was when the Forest Department sold the standing timber trees to them and, therefore, the planks, rafters, cut sizes, etc., sold by them could not again be made liable to sales tax (1) [1967] 19 S. T.C.24 (S.C.) ((2) [1969] 24 S.T.C. 101.

(3) [1973] 32 S.T.C. 309.

treating those goods as different commercial commodities. The Division Bench held that in dealing with matters relating to the general public, statutes are presumed to use words in their popular rather than their narrowly legal or technical sense, and that as the provision levying a tax on timber was directed to deal with a matter affecting people generally, as timber is in common use the word "timber" would have the same meaning attached to it as in the common and ordinary use of language. The Division Bench further held that although dictionaries are not to be taken as authoritative exponents of the meanings of words used in a statute, it was a well-known rule of courts of law that words should be taken to be used in the ordinary sense and courts are, there fore, sent for instruction to the dictionaries in the absence of any legislative or judicial guidance. The Division Bench then referred to the meaning given to the word "timber" in different dictionaries. The Division Bench also considered the meaning in commercial parlance of the term "timber". In that case the assessees in their affidavits had asserted that timber in the commercial field also meant planks, cut sizes, etc. There was no convincing denial by the Government of that assertion. The Division Bench then turned to the "Rules for gradation of cut sizes of timber" prepared and issued in October, 1960, by the Indian Standards Institution which showed the word "timber" was freely used for kinds of standard cut sizes for building purposes. The Division Bench also looked at Indian Airlines Quotation No. 406 of April 26, 1972, in which the words used were "timber teak-wood" setting out the particular sizes thereafter. The Division Bench also referred to the other documentary evidence produced in that case and held that the documents and affidavits before it clearly made out that even the cut sizes of timber were commonly known as timber in commercial field and that, therefore, both in the popular sense and in the commercial sense, the word "timber" had the same meaning. The Division Bench also laid emphasis on the interpretation given to the term "timber" by the sales tax Administration. For all these reasons the Division Bench held that merely because planks, rafters, cut sizes, etc., were sawn or cut from logs of woo(3, they did not alter their character and still continued to be raw materials which by themselves and in the same form could not be directly put to use for construction purposes and the logs of wood purchased by the assessees were merely cut or sawn to sizes for the sake of convenience and to make them acceptable to the customers and that by reason of this process they did not lose their character as timber.

We will now turn to the decisions of the Orissa High Court on this point. In State of Orissa v. Rajani Timber traders(l) a Division Bench of that High Court held that timber logs and sized timber U were different commodities in the commercial sense though sized timbers were brought out only from timber logs by a particular process. The Division Bench further observed that the person who had a need of timber logs would not be satisfied had sized timber been offered to him and similarly a person requiring sized timber would not be satisfied if timber logs were supplied. In Kripasindhu Sahu & Sons v. State of Orissa(2) another Division Bench of the same High Court held that the dictum in the Rajani Timber Traders' case was too widely stated and it did not indicate the meaning of the word "timber" as used in common parlance in commercial circles and it also did not purport to specify the meaning of the expression "sized timber" as used in that judgment. The Division Bench further held that timber in common parlance in Orissa took within its ambit only long and big sized logs of wood ordinarily used in house construction as beams and pillars and that when timber was converted into planks, rafters and other wood products like tables and chairs or cut into various small sizes so as to be unfit for use as beams and pillars and similar such uses they could not be termed as timber in common parlance though they may retain their essential character as wood because the essential characteristic of timber as a commercial commodity was lost after such conversion. The judgment in that case does not indicate any basis for holding that the word "timber" had in common parlance in Orissa the meaning which according to the Division Bench it bore. It is also curious to note that one learned Judge was common to both the Division Benches though in each case the judgment was delivered by the other learned judge-

Having seen how the different High Courts have dealt with this question, we will now ascertain the true position for our-

(1) [1974] 34 S.T.C. 374.

(2) [1975] 35 S.T.C. 270.

selves. In Ganesh Trading Co., Karnal v. State of Haryana and another(l) Hedge, J., speaking for this Count, said: ' This Court has firmly ruled that in finding out the true meaning of the entries in a Sales Tax Act, what is relevant is not the dictionary meaning, but how those entries are understood in common parlance, specially in commercial circles". Applying this principle, the Court held that although rice was produced out of paddy, paddy did not continue to be paddy after dehusking and that when paddy was dehusked and rice produced, there was a change in the identity of the goods and, therefore, rice and paddy were two different things in ordinary parlance.A careful reading

- of the judgment in that case shows that there was no evidence before the court to show how "paddy" and "rice" were understood in commercial circles or what these words meant in commercial or trade parlance and that what the Court did was to refer to various authorities dealing not with rice or paddy but with other goods and the meaning in ordinary parlance of the words "paddy" and ' rice" in order to ascertain the meaning of these words in the sense stated by it above.

So far as the case before us is concerned, there is material on the record to show what the word "timber" and "logs" mean in commercial or trade parlance nor do the pleadings of the parties filed in

the Orissa High Court throw any light on the matter. The averment of the Respondent Firm in this behalf is to be found in paragraph 13 of its writ petition in the High Court and all that is stated therein is that under the impugned provisions it would be required to pay purchase tax on "timber agreed to be severed" and after savering the timber while effecting sales of timber would be liable to pay sales tax on such sales. In the counter affidavit of the Law Officer in the office of the Commissioner of Commercial Taxes, Orissa, filed on behalf of the Commissioner of Commercial Taxes and the Sales Tax Officer, Sambalpur Circle, while replying to the said paragraph 13 all that is stated is that timber commercially does not remain the same after being cut, sized and shaped, and, therefore, there was no legal obstruction to tax an altogether different commercial commodity at sale- point.

(1) [1973] 32 S.T.C. 623, 625 (S.C.) In view of this state of the record we must seek to ascertain the meaning of these two terms in common parlance with such aid as is available to the Court. It is now well settled that the dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common 1 parlance. In doing so the court must bear in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the court, therefore have to select the particular meaning which would be relevant to the context in which it has to interpret that word. The Orissa Act does not define the term "timber" or "logs". Orissa is, however, a State which is rich in natural wealth and mostly all, if not all, forests in the State of Orissa are protected or reserved forests and come within the purview of the Orissa Forest Act, 1972, which was an Act passed to consolidate and amend the laws relating to the protection and management of forests in the State of Orissa. The real object behind the issue of impugned provisions was to levy purchase tax on standing trees agreed to be severed and bamboos agreed to be servered in view of the judgment of the Orissa High Court in Straw Products Ltd, v. State of Orissa in which it was held that a Divisional Forest Officer was not a dealer and, therefore, not liable to pay sales tax and hence could not call upon forest contractors to reimburse him in respect thereof. In view of this background, it would be relevant for our purpose to look at the statutory definition of the term "timber". given in the Orissa Forest' Act, 1972. That term is defined in clause (n) of section 2 of that Act, which reads as follows.

> "(n) 'timber' includes trees fallen or felled and all wood cut-up or sawn."

Prior to the enactment of the Orissa Forest Act, 1972, there were two Forest Acts in force in the State of Orissa, namely, the Madras Forest Act, 1882 (Madras Act V of 1882), and the Indian Forest Act, 1927 (Act XVI of 1927). The Madras Forest Act applied to the districts of Koraput and Ganjam and part of Phulbani District, namely, Baliguda and G. Udaygiri Taluks. The Indian Forest Act applied to the rest of the State. Both these Acts were repealed in their application to the State Of H Orissa by the Orissa Forest Act but as prior to the enactment of the Orissa Forest Act, these were the two Acts which provided for the protection and management of forests in the State of Orissa, we may also refer to the definition of the word "timber" given in those Acts. Section 2 of the Madras Forest Act defines "timber" as including trees when they have fallen or have been fallen, and all wood, whether cut up or fashioned or hollowed out for any purpose or not". Clause (6) of section 2 of the Indian Forest Act defines "timber" in identical terms. Though none of these definitions is an exhaustive one

since each of them uses the word "includes'` and not "means", there is a large and substantial measure of identity in these definitions and it will be apparent from these definitions that the word "timber" is not confined merely to felled trees in forestry in the State of Orissa. In this connection, it would not be out of place to see how this word has been defined in subsequent legislation In August 1981 trade in certain forest produce in Orissa was made a State monopoly and the Orissa Forest Produce (Control of Trade) Act, 1981 (Orissa Act No. 22 of 1981), was passed to achieve that purpose. The list of forest produce set out in the definition of that term given in clause (c) of section 2 of that Act includes timber of any species specified in clause (j) of that section. Clause (j) of section 2 defines "timber " as meaning "marketable wood, round, sawn or fashioned, straight piece of and above two metres in length, standing or felled (excluding fuel) of the following categories, namely:-". The portion of the definition omitted above lists the different species of timber. The definition of "timber given in the Orissa Forest Produce (Control of Trade) Act is an exhaustive definition inasmuch as the object of that Act was to create a State monopoly of trade in specified forest produce and therefore such forest produce had to be particularized. What is, however, pertinent is that even in subsequent legislation the cardinal concept that timber is not merely felled trees has been underlined and emphasized.

On turning to various dictionaries, we find that the dictionary meaning largely coincides with the statutory meaning of the word "timber". While discussing the question of the subject-matter of the impugned provisions we have set out the definition of the word "timber" contained in the Webster Collegiate Dictionary occurring ring in the passage from the judgment of Vivian Bose, J, in Shrimati Shantabai v State of Bombay The relevant meanings of the term "timber" given in the Shorter Oxford Dictionary, Third Edition, are "building material generally; wood used for the building of houses, ships, etc., or for the use of the carpenter, joiner, or other artisan". This definition also states that the word is "applied to the wood of growing trees capable of being used for structural purposes; hence collectively to the trees themselves". Amongst the meanings given in the Concise Oxford Dictionary, Sixth Edition, are "wood prepared for building, carpentry, etc;. trees suitable for this; woods, forests, piece of wood, beam". One of the meanings of the word "timber" given in Webester's Third New International Dictionary, is "wood used for or suitable for building (as a house or boat) for carpentry or joinery".A "log" according to the Shorter Oxford English Dictionary means "a bulky mass of wood; now usually an unhewn portion of a felled tree, or a length cut off for firewood" and according to the Concise Oxford Dictionary it means "unhewn piece of felled tree, or similar rough mass of wood especially cut for firewood". Thus, logs will be nothing more than wood cut up or sawn and would be timber.

A question which remains is whether beams, rafters and planks would also be logs or timber. The Shorters Oxford English Dictionary defines "beam" inter alia as a large piece of squared timber, long in proportional to its breadth and thickness and the Concise Oxford Dictionary defines it as a ' long piece of squared timber supported at both ends, used in houses, ships, etc." and according to Webester's Third New International Dictionary, it means "a long piece of heavy often squared timber suitable for use in house construction." A beam is thus timber sawn in a particular way. "Rafter" as shown by the Shorter Oxford English Dictionary is nothing but "one of the beams which give shape and form to a roof, and bear the outer covering of slates, tiles, thatch, etc." The Concise Oxford Dictionary and Webster's New International Dictionary define "rafter" in very much the

same way; the first defines it as "one of the sloping beams forming framework of a roof" and the seconds as "one of the often sloping beams that sup- port a roof." Rafter would also, therefore, be timber or log put to a particular use.A "plank" is defined in Shorter Oxford English Dictionary as "a long flat piece of smoothed timber, thicker than a board, specially a length of timber sawn to a thickness of from two to six inches, a width of nine inches or more, and eight feet or H upwards in length." According to the Concise Oxford Dictionary it is a "long wide piece of timber, a few inches thick" and according to Webster's Third New International Dictionary, it is "a heavy thick board that in technical specifications usually has a thickness of 2 to 4 inches and a width of at least 8 inches." The exact thickness and width of a plank may be of importance in technical specifications but in ordinary parlance planks would be flattened and smoothed timber. Such flatness and smoothness can only be achieved by using a saw and other implements required for that purpose. The same would be the case when timber is rounded or shaped. The statutory definitions of timber extracted above read along with the meaning of the word "timber" given in different dictionaries would show that the conclusion reached by the Madhya Pradesh High Court in Mohanlal Vishram v. Commissioner of Sales Tax, Madhya Pradesh, Indore, and by the Andhra Pradesh High Court in G. Ramaswamy and others v. The State of Andhra Pradesh and others is more germane to our purpose than the two Orissa cases neither of which has referred to the statutory definition of the word "timber" in the relevant statutes. The observations of the Orissa High Court in the case of Krupasindhu Sahu & Sons v. State of Orissa that timber in common parlance in Orissa takes within its ambit only long and big sized logs of wood ordinarily used in house construction as beams and pillars but not when timber is converted into planks, rafters and other wood products like tables and chairs cannot, therefore, be said to be correct so far as planks and rafters are concerned. In our opinion, planks and rafters would also be timber.

The result is that sales of dressed or sized logs by the Respondent Firm having already been assessed to sales tax, the sales to the First Respondent Firm of timber by the State Government from which logs were made by the Respondent Firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers assuming without deciding that the retrospectively substituted definition of "dealer" in clause

(c) of section 2 of Orissa Sales Tax Act, 1947, is valid.

Yet another aspect of this question now arises for our consideration. During the period from June 1, 1977, to December 31, 3 1977, by reason of Notification No. S.R.O. 374/77 dated May 23, 1977, the rate of sales tax on timber was fixed at ten per cent by the State Government. Since it was the contention of the State Government that logs are commercially a different commodity, the tax could not have been assessed on the sales of logs by the Respondent Firm during this period at the rate of ten per cent but would have been assessed at the general rate of six per cent specified in section 5(1) of the Orissa Act. If such was the case, on the findings given by us above, the Respondent Firm would be liable to pay sales tax not at the rate of six per cent but at the rate of ten per cent and it might be argued that the Respondent Firm has been under-assessed or part of its turnover of sales of logs has escaped assessment. The assessment order made on the Respondent Firm referred to earlier includes both the amount of purchase tax and sales tax but this is not a composite assessment order but a severable one because the turn over of sales as also the turnover of

purchases have been shown separately and the amount of sales tax and purchase tax have equally been shown separately. Thus, though as a result of our holding that the amounts paid by the Respondent Firm under the Timber Contracts are not eligible to purchase tax, the assessment order would require to be modified and corrected, such modification and correction would not affect the rest of the assessment order. The question then is "Whether the sales tax authorities can reopen the assessment of the Respondent Firm so far as the turnover of sales of logs is concerned?" Under sub-section (8) of section 12 of the Orissa Act, the Commissioner of Sales Tax or those sales tax authorities to whom such power is delegated have the power to reopen an assessment but under section 12(8) the exercise of this power is subject to a period of limitation, namely, thirty six months from the expiry of the year to which that period for which the assessment is to be reopened relates. Since three years have long since expired from the year to which the period in question relates, it would not now be open to the sales tax authorities assuming it was a case for re- opening the assessment, to reopen the Respondent Firm's assessment and tax the turnover of sales of dressed or sized logs at the rate of ten per cent instead of six per cent. This question, of course, would not arise for any period on or after January 1, 1978, on which date the substituted sub- section (1) of section 5 came into force, as under the notification issued under the substituted sub-section (1), no separate rate of tax is specified either for timber or logs or any of the other goods which we have been considering above and all of them would fall for the purpose of payment of sales tax under the residuary Entry No. 101 of the Notification No. 67184-C.T.A. 135/77/1- ; dated December 29, 1977, and would be liable to sales tax at the rate of seven percent and there would thus be no under-assessment or escapement of assessment. Bamboo Contract We will now ascertain the nature of the Bamboo Contract. Unlike the Timber Contracts, the Bamboo Contract is not in a prescribed statutory form but it appears from the judgment of the High Court that all the Bamboo Contracts before it contained identical terms and conditions except with respect to the contract area, the period of the contract and the amount of royalty. The parties to the Bamboo Contract were the Governor Or the State of Orissa referred to in the said Contract as "the Grantor" and the Respondent Company. The Bamboo Contract is headed "Agreement of Bamboo Areas in Bonai Forest Division to the Titaghur Paper Mills Company Limited." The second and the third recitals of the Bamboo Contract are as follows:

> "AND WHERAER the Company is desirous of obtaining grant from the Grantor of exclusive right and licence to fell, cut, obtain and remove bamboos from all felling series of Bamboos Working Circle in the Bonai Forest Division in the State of Orissa for the purpose of converting the bamboos into paper pulp or for purposes connected with the manufacture of paper or in any connection incidental therewith.
>
> AND WHEREAS the Grantor has agreed to grant the said licence to the Company subject to the restrictions, terms and conditions hereinafter appearing."

Clause T of the Bamboo Contract is headed "Arc a over which the grant operates". Sub-clause (a) of clause I sets out the dates of commencement of the Bamboo Contract in respect of different contract areas. Under Sub-clause (b) of clause l, the forest produce "sold and purchased" is stated to be as specified in Schedule I and to be situated in the areas indicated in Schedule V. Under the said subclause, the grantor understood to render at all times to the Respondent Company all possible

facilities to enable it to extract II and obtain its requirements of bamboos upto the limit imposed by the Bamboo Contract. Under clause II, the quantity of forest A produce "sold and purchased" is stated to be "all the said forest produce which now exist or may come into existence in the contract area which the Company may fell, cut, obtain and remove from the said area in accordance with the time- table given in Schedule V during the period... " and then the periods in respect of different areas, already mentioned while reciting the facts of Civil Appeal No. 219 of 1982, have been set out. Clause III provides that the Bamboo Contract can be terminated in accordance with the provisions in that behalf contained in the Forest Contract Rules subject to the right of the Respondent Company to appeal to the State Government in which case the Respondent Company could with the previous permission of the State Government, on such conditions as the Government might think fit to impose, be entitled "to carry on its business in terms of the agreement" until the final decision by the Government. Under clause IV, the Respondent Company is given an option to renew the Bamboo Contract for a further term of twelve years. Under clause V, the Respondent Company was to perform all acts and duties and to refrain from doing any act forbidden by the Orissa Forest Act, 1972, and to give a sum of Rs. 58,190 as security for the due performance and observance by it of the terms of the Bamboo Contract, which sum was to be returned to it on the expiry of six months after the termination or expiry of the Bamboo Contract. The Grantor was to be entitled to forfeit the said deposit and to appropriate the whole or part thereof in the event of the Respondent Company committing a breach of the terms of the Bamboo Contract such as would entitle the Grantor to terminate the Bamboo Contract. Clause VI provided that "this licence shall be subject to the Orissa Forest Contract Rules as modified from time to time" subject to the amendments thereto set out in the said clause which are not material for our purpose. Clause VIII stated that "the forest produce sold and purchased under this Agreement consists of all Salia and Daba bamboos subject to the cutting rules in the annual coupe of the felling series" Clauses IX to XIII deal with the payment of royalty. What is pertinent to note about these clauses is that under clause XIII, the Respondent Company was to pay an annual minimum royalty in the sums mentioned therein and was not to be entitled to the refund of the whole or any part of such minimum royalty should it fail to cut the minimum quantity of bamboos in any year except on the ground that the yield of the area fell below the quantity required to make up the minimum royalty payable for the year owing to gregarious or sporadic flowering of bamboos in the contract areas or from any cause whatsoever not being due to the negligence on the part of the Respondent Company or failure on its part to extract the minimum number of bamboos. The amount of royalty was to be calculated on all bamboos which the Respondent Company would cut from the contract area, whether such bamboos were removed or not, to be ascertained as provided in clauses XI and XII. Under clause XI, for ascertaining the quantity of the bamboos so cut, the Respondent Company was to remove the bamboos through such river ghats, railway, motor and other transport depots as may be agreed upon between the parties from time to time and under clause XII, the royalty was to be paid in advance in such manner that it would always be in excess of the royalty actually due. Under clause XIV, for the purpose of checking the felling and keeping an account of all bamboos to be cut by the Respondent Company, the Forest Department had the right to employ such staff as it might deem necessary and was to have free access to the contract area and to the books and other records of the Respondent Company. Further, the Respondent Company was to submit to the Divisional Forest Officer a yearly account of bamboos cut and removed from the contract area and under clause XV the company was to issue to the carter of each cart or the driver of each truck on its leaving the forest a machine numbered pass

of a pattern to be approved by the Chief Conservator of Forests, Orissa. Such pass was to state the number of bamboos which each cart or truck would carry. Clause XVI prescribed the routes by which the bamboos were to be removed as also the depots at which they were to be presented for examination, Under clause XVII, at every naka the checking staff was to check each cart or truck with the pass referred to in clause XV before such cart or truck left the depot. Clause XVIII gave to the Respondent Company, subject to such restrictions as might be imposed from time to time by the Divisional Forest Officer, Bonai Division, the right during the continuance of the Bamboo Contract to use any lands, roads or streams outside the licensed areas which belonged to or were under the control of the Grantor for the purposes of having free ingrees to or egrees from the contract areas and also to such lands, roads or streams within the contract areas. Under clause X[X, the Respondent Company was bound to meet the local demands of bamboos in which event the royalty on such bamboos was not to be paid by the Respondent Company but was to be paid by the local people. Under clause XX, subject to obtaining prior written consent of the Grantor, the Respondent Company was to be at liberty to make dams across streams, cut canals, make water courses, irrigation works, roads, bridges, buildings, tramways and any other work useful or necessary "for the purpose of the said business" in or upon the licensed areas and also with the like consent to widen or deepen existing streams, channels or waterways "for the purpose of the said business"

> and all timber and other forest produce required for this purpose was to be paid for by the Respondent Company at current schedule of rates. All such dams, canals, irrigation works, roads, bridges, building and other works which were not removed by the Respondent Company within six months from the expiry of or earlier termination of a the contract were to become the property of the Grantor. Clause XXI prohibited the Respondent Company from interfering with the surface of the land except in so far as it might be necessary for immediate purpose of "carrying on the necessary operations in connection with the said business". Clause XXII expressly reserved and excepted to the Grantor in regard to the contract area granted to the Respondent Company (l) the possession and beneficial ownership in the soil and all mines and minerals upon, in or under the contract area and the right to make such use of the soil, to erect such buildings or structures and install such plant upon it and subject it to such operations for the purpose of extraction of minerals or otherwise as the Grantor might deem proper, (2) the surface of the licensed areas and all. grazing, cultivating and other surface E rights other than those expressly granted to the Respondent Company by the Bamboo Contract, (3) the right to all trees other than trees made over to the Respondent Company and the natural products of the soil other than bamboos, (4) the right of the Grantor to destroy bamboos in any portion of the contract areas for silvicultural purposes Including the raising of plantations subject in each case to the minimum area limit of 500 acres per annum and further subject to giving in place of such area equal facilities for bamboos extraction in other convenient areas, and (5) the right to extract bamboos from any portion in the contract areas for departmental works in Bonai Forest Division subject to a limit of 5,000 bamboos yearly. Clause XXIII prescribed cutting rules for bamboos.

Clause XXIV conferred upon the Respondent Company the right to extract fuel from areas allotted for that purpose in order to meet the fuel requirements of domestic consumption in the houses and offices of H the persons employed by it in "connection with its business in the contract areas" subject to the payment of a fixed royalty per tonne. Under that clause, the Respondent Company had the right to cut and collect such poles of unreserved species and creepers as might be necessary for construction of rafts on obtaining a permit in that behalf and on payment of royalty according to the schedule of rates. Under clause XXV, the Grantor, if so required by the Respondent Company, was to lease to it a suitable site or sites to be selected by it out of such sites as were at the disposal of the Grantor within the licensed areas for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature bonafide required by it "for the purposes of the business connected with" the Bamboo Contract rent free for the term of such contract. Under clause XVI, in the event of the Grantor setting fire to the forest for silvicultural purposes, it was to give to the Respondent Company as long a notice as possible of the commencement of such operations and it was the Respondent Company which was to be responsible for safeguarding the forest produce which was the subject matter of the Bamboo Contract. Under clause XXIX, the contract areas were to be worked on four years cutting cycle for Salia and twelve years cutting cycle for Daba and were to comprise the areas stated in the said clause.

It was submitted on behalf of the Appellant that the Bamboo Contract was a composite contract of sale, in that it was an agreement to sell existing goods" namely, bamboos standing in the contract areas at the date of the Bamboo Contract, coupled with an agreement to sell future goods, namely, bamboos to come into existence in the future. According to the Appellant the property in the existing bamboos would pass after they were ripe for cutting and under Rule 12 of the Forest Contract Rules the Divisional Forest Officer had delineated the boundaries and limits of the annual coupe from which bamboos were to be cut for the Respondent Company to take delivery of them in as much as the bamboos then became ascertained goods. In the alternative it was submitted that the property passed when the Respondent Company started the work of cutting bamboos. According to the Appellant, in either event property passed before the bamboos were severed. So far as the bamboos which were not in existence at the date of the Bamboo Contract but were to come into existence thereafter were concerned, it was submitted that as they were future goods once they came into existence and became ripe for cutting, the property in them passed to the Respondent Company in the same way as in the case of bamboos in existence at the date of the Bamboo Contract.

While discussing the subject-matter of the impugned provisions we have already held that they apply where there is a completed con- tract of purchase and the property in the goods which are the subject-matter of the contract passes from the seller to the buyer when the contract is made. In other words, the purchase would be complete when the standing trees or bamboos are specific goods, that is, when v' they are identified agreed upon at the time the contract of sale is made, and the contract is unconditional and further such standing trees or bamboos are in a deliverable state that is, nothing remains to be done except for buyer to enter upon the land of the seller and to fell and remove the trees or bamboos, as the case may be, without any let or hindrance. The very submission of the Appellant with respect to when the property passes to the Respondent Company in the case of the Bamboo Contract are sufficient to show that the impugned provisions cannot have any application to the case. The Bamboo Contract like the Timber Contract is also made subject to

the Forest Contract Rules and while with Timber Contract we have pointed out that by reason of the operation of those Rules property in the trees passed to the forest contractor after the trees were felled and taken to the inspection points and there checked and examined and thereafter removed from the contract area. The same position would apply to the case of the Bamboo Contract assuming for the sake of argument that it is a contract of sale of goods.

In this view of the matter, the impugned provisions would have no application and the amounts payable under the Bamboo Contract would not be exigible to purchase tax. By reason, however, of the substitution of the definition of the term "dealer" in clause (c of section 2 of the Orissa Act with retrospective effect, it may be argued that if the Bamboo Contract was a contract of sale of goods, then on the sale taking place to the Respondent Company, sales tax would become payable and the Respondent Company would be bound to reimburse to the Forest Department the amount payable by it as sales tax. In order to avoid future legal controversy and particularly in view of the fact that the High Court has held the Bamboo Contract to be a grant of a profit a prendre it becomes necessary to determine whether the Bamboo Contract is at all a contract of sale of goods. According to the Respondent Company the High Court was right in holding that Bamboo Contract was not a contract of sale of goods but was a grant of a profit a prendre.

The meaning and nature of a profit a prendre have been thus described in Halsbury's Laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

> "240. Meaning of 'profit a prendre' A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right The term 'profit a prendre' is used in contradistinction to the term 'profit a prendre', which signified a benefit which had' to be rendered by the possessor of land after it had come into his possession.A profit a prendre is a servitude.
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> "241. Profit a prendre as an interest in land. A profit a prendre is an interest in land and for this reason any disposition of it must be in writing.A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce. . .
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> "242. What may be taken as a profit a prendre. The subject matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore A and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore.

> The right to take animals ferae naturae while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit a prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth."

A profit a prendre is a servitude for it burdens the land or rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the thing itself (see Jowitt's Dictionary of English Law, Second Edition, Volume 2, page 1640. under the heading "Servitude"). "Servitude" is a wider term and includes both easements and profits a prendre (see Halsbury's Laws of England, Fourth Edition, Volume 14, paragraph 3, page 4). The distinction between a profit a prendre and an easement has been thus stated in Halsbury's Laws of England, Fourth Edition, paragraph 43 at pages 21 to 22:

> "The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some part of its natural produce or the animals ferae naturae existing upon it. What is taken must be capable of ownership, for otherwise the right amounts to a mere easement".

In Indian law an easement is defined by section 4 of the Indian Easement Act, 1882 (Act No. V of 1882) as being ' a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own".A profit a prendre when granted in favour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore, be an easement but it would not be so if the grant was not for the beneficial enjoyment of the grantee's heritage.

Clause (26) of section 3 of the General Clauses Act, 1897, defines "immovable property" as including inter alia "benefit to arise out of land". The definition of "immovable property" in clause (f) of section 2 of the Registration Act 1908, illustrates a benefit to arise out of land by stating that immovable property "includes...rights to ways, lights ferries, fisheries or any other benefit lo arise out of land". As we have seen earlier, the Transfer of Property Act, 1882, does not give any definition of "immovable property" except negatively by stating that immovable property does not include standing timber, growing crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act, However, by section 4 of the General Clauses Act, the definitions of certain words and expressions, including "immovable property" and "movable property", given in section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to all Central Acts made after January 3 1968, and the definitions of these two terms, therefore, apply when they occur in the Transfer of Property Act. In Ananda Behra and another v. The State of Orissa and another (1) this Court has held that a profit a prendre is a benefit arising out land and that in view of clause (26) of section 3 of the General Clauses Act, it is immovable property within the meaning of the Transfer of Property Act.

The earlier decisions showing what constitutes benefits arising out of land have been summarized in Mulla on The Transfer of Property Act, 1882", and it would be pertinent to reproduce the whole of that passage. That passage (at pages 16-17 of the Fifth Edition) is as follows:

> "A 'benefit to arise out of land' is an interest in land and therefore immovable property. The first Indian Law Commissioners in their report of 1879 said that they had 'abstained from the almost impracticable task of defining the various kinds of interests in immovable things which are considered immovable property. The Registration Act, however, expressly includes as immovable property benefits to arise out of land, here diary allowances, rights of way lights, ferries and fisheries'. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable (1) 11955] 2 S. C. R. 919 property:-varashasan or annual allowance charged on land; a right to collect dues at a fair held on a plot of land; a hat or market; a right to possession and management of a saranjam; a malikana; a right to collect rent or jana: a life interest in the income of immovable property; a right of way; a ferry; and a fishery; a lease of land". B Having seen what the distinctive features of a profit a prendre are, we will now turn to the Bamboo Contract to ascertain whether it can be described as a grant of a profit a prendre and thereafter to examine the authorities cited at the Bar in this connection. Though both the Bamboo Contract in some of its clauses and the Timber Contracts speak of "the forest produce sold and purchased under this Agreement", there are strong countervailing factors which go to show that the Bamboo Contract is not a contract of sale of goods. While each of the Timber Contracts is described in its body as "an agreement for the sale and purchase of forest produce", the Bamboo Contract is in express terms described as "a grant of exclusive right and licence to fell, cut, obtain and remove bamboos...for the purpose of converting the bamboos into paper pulp or for purposes connected with the manufacture of paper...." Further, throughout the Bamboo Contract, the person who is giving the grant, namely, the Governor of the State of Orissa, is referred to as the "Grantor." While the Timber Contracts speak of the consideration payable by the forest contractor, the Bamboo Contract provides for payment of royalty.
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> "Royalty" is not a term used in legal parlance for the price of goods sold. "Royalty" is defined in Jowitt's Dictionary of English Law, Fifth Edition, Volume 2, page 1595, as follows.
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> "Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right.
>
> Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent." We are not concerned with the second

meaning of the word H "royalty" given in Jowitt. Unlike the Timber Contracts, the Bamboo Contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas / for the purpose of felling and removing the bamboos nor is it, unlike the Timber Contracts, in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different con tract areas with an option to the Respondent Company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the Bamboo Contract has no relation to the actual quantity of bamboos cut and removed. Further, the Respondent Company is bound to pay a minimum royalty and the amount of royalty to be paid by it is always to be in excess of the royalty due on the bamboos cut in the contract areas.

We may pause here to note what the Judicial Committee of the Privy Council had to say in the case of Raja Bahadur Kamkashya Narain Singh of Ramgarh v. Commissioner of Income- tax, Bihar and Orissa about the payment of minimum royalty under a coal mining lease. The question in that case was whether the annual amounts payable by way of minimum royalty to the lessor were in his hands capital receipt cr revenue receipt. The Judicial Committee held that it was an income flowing from the covenant in the lease. While discussing this question, the Judicial Committee said (at pages 522-3):

"These are periodical payments, to be made by the lessee under his covenants in consideration of the benefits which he is granted by the lessor. What these benefits may be is shown by the extract from the lease quoted above, which illustrates how inadequate and fallacious it is to envisage the royalties as merely the price of the actual tons of coal. The tonnage royalty is indeed only payable when the coal or coke is gotton and despatched: but that is merely the last stage. As preliminary and ancillary to that culminating act, liberties are granted to enter on the land and search, to dig and sink pits, to erect engines an (1) (1943)11 I.T.R. 513 P.C. machinery, coke ovens, furnaces and form railways and , roads. All these and the like liberties show how fallacious it is to treat the lease as merely one for the acquisition of a certain number of tons of coal, or the agreed item of royalty as merely the price of each ton of coal."

Though the case before the Judicial Committee was of a lease of a coal mine and we have before us the case a grant for the purpose of felling, cutting and removing bamboos with various other rights and licences ancillary thereto, the above observations of the Judicial Committee are very pertinent and apposite to what we have to decide.

Under the Bamboo Contract, the Respondent Company has the right to use all lands, roads and streams within as also outside the contract areas for the purpose of free ingress to and egress from the contract areas. It is also given the right to make dams across streams, cut canals, make water

courses, irrigation works, roads, bridges, buildings, tramways and other work useful or necessary for the purpose of its business of felling, cutting, and removing bamboos for the purpose of converting the same into paper pulp or for purposes connected with the manufacture of paper. For this purpose it has also the right to use timber and other forest produce to be paid for at the current schedule of rates. The Respondent Company has the right to attract fuel from areas allotted for that purpose in order to meet the fuel requirements of the domestic consumption in the houses and offices of the persons employed by it and to pay a fixed royalty for this purpose. Further, the Government was bound, if required by the Respondent Company, to lease to it a suitable site or sites selected by it for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature.

We have highlighted above only the important terms and conditions which go to show that the bamboo Contract is not and cannot be a contract of sale of goods. It confers upon the Respondent Company a benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil couple with several ancillary rights and is thus a grant of a profit a prendre. It is equally not possible to view it as a composite contract one, an agreement relating to standing bamboos agreed to be severed H and the other, an agreement relating to bamboos to come into existence in the future. The terms of the Bamboo Contract make it clear that it is one, integral and indivisible contract which is not capable of being severed in the manner canvassed on behalf of the Appellant. It is not a lease of the contract areas to the Respondent Company for its terms clearly show that there is no demise by the State Government of any area to the Respondent Company. The Respondent dent Company has also no right to the exclusive possession of the contract areas but has only a right to enter upon the land to take a part of the produce thereof for its own benefit. Further, it is also pertinent that while this right to enter upon the contract areas is described as a "licence", under clause XXV of the Bamboo Contract the Respondent (company has the right to take on lease a suitable site or sites of its choice within the contract areas for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of alike nature required fourth purpose of its business. The terms and conditions of the Bamboo Contract leave no doubt that it confers upon the Respondent Company a benefit to arise out of land and it would thus be an interest in immovable property. As the grant is of the value exceeding Rs. 100, the Bamboo Contract is compulsorily registrable. It is, in fact, not registered. This is, however, immaterial because it is a grant b the Government of an interest in land and under section Registration Act it is exempt from registration. The High Court was, therefore, right in holding that the Bamboo Contract was a grant of a profit prendre, though the grant of such right not being for the beneficial enjoyment of any land of the Respondent Company it would not be an easement. Being a profit a prendre or a benefit to arise out of land any attempt on the part of the State Government to tax the amounts payable under the Bamboo Contract would not only be ultra vires the Orissa Act but also unconstitutional as being beyond the State's taxing power under Entry 54 in List II in the Seventh Schedule to the Constitution of India.

We will now turn to the authorities cited at the Bar. The cases which have come before the courts on this point have mainly involved the question whether the document before the court required registration. After the coming into force of the Constitution of India and the introduction of land reforms with consequent abolition of 'Zamindari' and other proprietary into rests in land, the

question whether a particular document was a grant of a proprietary interest in land has also fallen for determination by various courts. It is unnecessary to refer to all the decisions which were cited before us and we propose to confine ourselves to considering only such of them as are directly relevant to the question which we have to decide. Of the High Court decisions the one most in point is that of a Full Bench OF the Madras High Court in Seeni Chettiar v. Santhanathan Chettiar and others.(l) The question in that case was whether a document which granted to the defendant a right to enjoy the produce of all the trees on the bank and bed of a tank as also the grass and the reeds and further to cut and remove the trees for a period exceeding four years required registration. The court held that the document was not a lease because it did not transfer to the defendant exclusive possession of the tank but conferred upon him merely a right of access to the place for the reasonable enjoyment of what he was entitled to under the contract The court, however, came to the conclusion that the document required registration as it transferred an interest in immovable property, and that it was not a sale of mere standing timber but it was contemplated by the document, as shown by the fact that a comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees, that "the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land". The above words quoted in the judgment in that case were those of Sir Edward Vaughan Williams in the following passage cited with approval by Lord Coleridge, C.J., in Marshall v. Green 2):-

> "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the par ties agree that the thing sold shall be immediately with drawn from the land, the land is to be considered as a (1) I.L.R. (18971 20 Mad. 58 F.B. (2) [1875] 1 C.P.D. 35, 39. H mere warehouse of the thing sold, and the contract is for goods."

So far as the decisions of this Court are concerned, the one which requires consideration first is Firm Chhotabhai Jethabai Patel & Co. (and other cases) v. The State of Madhya Pradesh. This was one of the two cases strongly relied upon by the Appellant, the other being State of Madhya Pradesh & Ors. v, Orient Paper Mills Ltd2. The facts in Chhotabhai's Case were that the petitioners had entered into contracts with the proprietors of certain estates and mahals in the State of Madhya Pradesh under which they acquired the right to pluck, collect and carry away tendu leaves; to cultivate, culture and acquire lac; and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos. On January 26, 1951, the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951), came into force and on the very next day a notification was issued under the said Act putting an end to all proprietary rights in estates, mahals and alienated villages and vesting the same in the State for the purposes of the State free of all encumbrances with effect from March 31, 1952. The petitioners therupon approached this Court under Article 32 of the Constitution of India praying for a writ prohibiting the State of Madhya Pradesh from interfering with the rights which they had acquired under the contracts with the former proprietors. It was averred in the petitions that not only had the

petitioners paid the consideration under the said contracts but had also spent large sums of money in the exercise of their rights under the said contracts. This Court held that the contracts appeared to be in essence and effect licenses granted to the petitioners to cut, gather and carry away the produce in the shape tendu leaves, lac, timber or wood and did not create any interest either in the land or in the trees or plants. In arriving at this conclusion the Court relied upon a decision of the Judicial Committee of the Privy Council in Messrs Mohanlal Hargovind of Jubbulpore v. Commissioner of income-tax, C.P. & Berar, Nagpur3. In that case the assesses carried on (1) [19531 S.C.R. 476.

(2) [1977] 2 S.C.R. 149. (

3) L.R. [1949] 76 I.A. 235; ILR 1949 Nag. 892; A.l.R. 1949 P.C. 311.

business as manufacturers and vendors of bidis composed of tobacco contained or rolled in tendu leaves. The contracts entered into by the assesees were short term contracts under which in consideration of a sum payable by instalments the assessees' were granted the exclusive right to collect and remove tendu leaves from specified areas. Some of the contracts also granted to the assessees a small ancillary right of cultivation. The Judicial Committee held that the amounts paid by the assessees under the said contracts constituted expenditure in order to secure raw materials for their business and, therefore, such expenditure was allowable as being on revenue account. In Chhotabhai's Case this Court took the view that the contracts before it were similar to the contracts before the Judicial committee and quoted with approval the following passage from the judgment in Messrs Mohanlal Hargovind's Case (at page 241):

> "The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which, of course, implies the right to appropriate them as their own property. The small right of cultivation given in the first of the two contracts is me rely ancillary and is of no more significance than would be, e.g., a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short term contracts. The, picking of the leaves under them has to start at once or practically at once and to proceed continuously."

According to this Court, the contracts entered into by the petitioners before it related to goods which had a potential existence and there was sale of a right to such goods as soon as they came into existence, the question whether the title passed on the date of the contract itself or later depending upon the intention of the parties. This Court, therefore, came to the conclusion that the State had no right to interfere with the petitioners' rights under the said contracts.

As we will later point out, the authority of the decision in Chhotabhai's Case has been considerably shaken, if not wholly eroded, by subsequent pronouncements of this Court. For the present it will be sufficient for us to point out that the reliance placed in Chhotabhai's Case on the decision of the Judicial Committee in Messrs Mohanlal Hargovind's Case does not appear to be justified for the contracts before the Judicial Committee and before this Court were different in their contents and

this Court appears to have fallen into an error in assuming that they were similar. For instance, the contracts before the Privy Council were short term contracts while those before the Court in Chhotabhai's Case were for different periods including terms of five to even fifteen years. Apart from this, we have pointed out above the features which go to make the Bamboo Contract a benefit to arise out of land. These features were conspicuously absent in the contracts before the court in Caotabhai's Case.

The decision next in point of time on this aspect of the case is Ananda Behare and another v. The State of Orissa and another. The petitioners in that case had obtained oral licenses for catching and appropriating fish from specified sections of the Chilka Lake from its proprietor, the Raja of Parikud, on payment of large sums of money prior to the enactment of the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952). Under the said Act, the estates of the Raja of Parikud vested in the State of Orissa and the State refused to recognize the rights of the petitioners and was seeking to re-auction the rights of fishery in the said lake. The petitioners, contending that the State had infringed or was about to infringe their fundamental rights under Articles 19 (1) (f) and 3 (1) of the Constitution of India, filed petitions in this Court under Article 32 of the Constitiution. In their petition, the petitioners claimed that the ; transactions entered into by the were sales of future goods, namely, fish in the sections of the lake covered by the licences and that a s fish was movable property, the sai Act was not attracted because it was confined to immovable property. The Court observed that if this contention of the petitioners was correct, then their petition under Article 32 was misconceived because until any fish was actually caught, the petitioners would not acquire any property in it. The Court held that what was sold to the petitioners was the right to catch and carry away fish in specific sections of the lake for a specified future period and that this amounted to a licence to enter on the land coupled with a grant to catch and carry away the fish which right was a profit and in England it would be regarded as an interest in land because it was a right to take some profit of the soil for the use of the owner of the right in and India it would be regarded as a benefit arising out of the land and as such would be immovable property. The Court then pointed out that fish did not come under the category of property excluded from the definition of "immovable property". The Court further held that if a profit a prendre is regarded as tangible immovable property, then the 'property' being over Rs. 100 in value, the document creating such right would repuire to be registered, and if it was intangible immovable property, then a registered instrument would be necessary whatever the value; but as in the case before the Court the sales were all oral and therefore, there being neither writing nor registration, the transactions passed no title or interest and accordingly the petitioners had no fundamental rights which they could enforce, Ananda Behera's Case was the first decision in which Chhotabhai's Case was distinguished. The relevant passage in the judgment (at pages 9234) is as follows:

> "It is necessary to advert to Firm Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh and explain it because it was held there that a right to pluck, collect and carry away' tendu leaves does not give the owner of the right any proprietary interest in the land and so that sort of right was not an 'encumbrance' within the meaning of the Madhya Pradesh Abolition of Proprietary Rights Act. But the contract there was to 'pluck, collect and carry away, the leaves. The only kind of leaves that can be 'plucked' are those that are growing on trees and it is evident that there must

> be a fresh drop of leaves at periodic intervals. That would make it a growing crop and a growing crop is expressly exempted from the definition of 'immovable property' in the Transfer of Property Act. That case is distinguishable and does not apply here".

The next decision which was cited and on which a considerable debate took place at the Bar was Shrimati Shantabhai v. State of Bombay & Others. The faces in that case were that by an unregistered document the petitioner's husband had granted to her in consideration of a sum of Rs. 20,000 the right to take and appropriate all kinds of wood from certain forests in his Zamindari. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, all proprietary rights in land vested in the State of Madhya Pradesh and the petitioner could no longer cut any wood. She thereupon applied to the Deputy Commissioner and obtained from him an order permitting her to work the forest and started cutting the trees. The Divisional Forest Officer took action against her and passed an order directing that the cut materials be forfeited. She made representations to the Government and they proving fruitless, she filed in this Court a petition under Article 32 of the Constitution of India alleging breach of her fundamental rights under Article 19 (1) (f) and (g) of the Constitution. Four of the five learned Judges who heard the case pointed out that the foundation of the petitioner's claim was an unregistered document and that it was not necessary to determine the true meaning and effect thereof for whatever construction be put on it, the petitioner could not complain of breach of any of her fundamental rights. The majority of the learned Judges held that if the document were considered as conveying to the petitioner any part or share in her husband's proprietary right, no such part or share was conveyed to her as the document was not registered and assuming that any such part or share was conveyed, it had become vested in the State under section 3 of the said Act; if the document were considered as a licence coupled with a grant, then the right acquired by the petitioner would be either in the nature of a profit a prendre which being an interest in land was immovable property and would require registration and as the document was not registered, it did not operate to transmit to her any such profit a prendre as held in Ananda Behera's Case; and if the document were construed as conferring a purely personal right under a contract, assuming without deciding that a contract was property" within the meaning of Article 19(1)(f) and 31(1) of the Constitution, she could not complain as the State had not acquired or taken possession of the contract which remained her property and as the State was not a party to the contract and claimed no benefit under it, the petitioner was free to sue the grantor upon that contract and recover damages by way of compensation; and assuming the State was also bound by the contract, she could only seek to enforce the contract in the ordinary way and sue the State if so advised and claim whatever damages or compensation she might be entitled to for the alleged breach of it. After so holding the majority of the learned Judges observed (at page 269):

> "This aspect of the matter does not appear to have been brought to the notice of this when it decided the case of Chhotobhai Jethabai Patel and Co. v. The State of Madhya Pradesh and had it been so done, we have, no doubt that case would not have been decided in the way it was done."

Unlike the majority of the Judges, Vivian Bose, J,. in his separate judgment considered in detail the nature of the document in that case. Vivian Bose, J,. pointed out the distinction between standing

timber and a tree. We have earlier extracted those passages from the learned Judge's judgment. The learned Judge then pointed out that the duration of the grant was for a period of twelve years and that it was evident that trees which would be fit for cutting twelve years later would not be fit for felling immediately and; therefore, the document was not a mere sale of trees as wood. Vivian Bose, J,. held that the transaction was not just a right to cut a tree but also to derive a profit from the soil itself; in the shape of the nourishment in the soil that went into the tree and made it to grow till it was of a size and age fit for felling as timber and if already of that size, in order to enable it to continue to live till the petitioner chose to fell it The learned judge, therefore, held that though such trees as can be regarded as standing timber at the date of the document, both because of their size and girth and also because of the intention to fall at an early date would be movable property for the purposes of the Transfer of Property Act and the Registration Act, the remaining trees that were covered by the grant would be immovable property, and as the total value was Rs. 26,000, the deed required registration and being unregistered, it did not pass any title or interest and, therefore, as in Ananda Behera's Case the petitioner had no fundamental right which she could enforce.

According to learned Counsel for the Appellant, the judgment of Vivian Bose, J,. in that case was not the judgment of the Court since the other learned Judges expressly refrained from expressing any opinion as to the actual nature of the transaction under the document in question. Learned Counsel submitted that what the Court really held in that case was that there was no breach of any fundamental right of the petitioner which would entitle her to approach this Court under Article 32 of the Constitution, and this decision was, therefore, not an authority for the proposition that a document of the type before the Court was a grant of a profit a prendre as held by Vivian Bose. J It is true as contended by learned Counsel that the majority expressly refrained from deciding the nature of the document because, as it pointed out, in any view of the matter, the petition would fail and it would, therefore, be difficult to say that what Vivian Bose, J,. held was that the decision of the Court as such. However, the judgment of Vivian Base, J., is a closely reasoned one which carries instant conviction and cannot, therefore, be lightly brushed aside as learned Counsel has attempted to do. It is also pertinent to note that the majority in that case pointed out the principal errors into which the Court had fallen in Chhotabhai's Case and disapproved of what was decided in that case.

The decision to which we must now advert is Mahadeo v. The State of Bombay (and connected petitions). The facts in that case were that some proprietors of Zamindaris situate in territories, then belonging to the State of Madhya Pradesh and on the reorganization of States transferred to the erstwhile State of Bombay, granted to the petitioners right to take forest produce, mainly tendu leaves, from forests included in their Zamindaris. The agreements conveyed to the petitioners in addition to the tendu leaves other forest produce like timber, bamboos, etc., the soil for making bricks, and the right to build on and occupy land for the purpose of their business. In a number of cases, these rights were spread over many years. Some of the agreements were registered and the others unregistered. After the coming into force of the Madhya Pradesh Abolition of Proprietary Right's (Estates, Mahals, Alienated Lands) Act, 1950, the Government disclaimed the agreements and auctioned the rights afresh, acting under section 3 of the said Act. The petitioners thereupon filed petitions under Article 32 of the Constitution of India challenging the legality of the action taken by the Government on the ground that it was an invasion of their fundamental rights. The main contention of the petitioners was that the agreements were in essence and effect licenses

granted to them to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber or wood, and did not grant to them any "interest in land" or 'benefit to arise out of land' and the object of the agreements could, therefore, only be described as sale of goods as defined in the Indian Sale of Goods Act. In support of that contention, the petitioners relied upon the decision in Chhotabhai's case. The Court examined the terms of the agreements in question and concluded that under none of them was there a naked right to take leaves of tendu trees together with a right of ingress and of regress from the land but there were further benefits including the right to accupy the land, to erect buildings and to take other forest produce not necessarily standing timber, growing crop or grass. The Court further held that whether the right to the leaves could be regarded as a right to a growing crop had to be examined with reference to all the terms of the documents and all the rights conveyed thereunder and that if the right conveyed comprised more than the leaves of the trees, it would not be correct to refer to it as being in respect of growing crops simpliciter. On an examination of the terms of the documents and the rights conveyed thereunder the Court came to the conclusion that what was granted to the petitioners was an interest in immovable property which was a proprietary right within the meaning of the said act and, therefore, it vested in the State. With reference to Chhotabhai Case relied upon by the petitioners. Hidayatullah, J., as he then was , speaking for the court, said (at page 346):

> " It is clear from the foregoing analysis of the decision in Chhotabhai's Case that on a construction of the documents there under consideration an adopting a principle enunciated by the privy Council in Mohanlal Hargovind of Jubbalpure v. Commissioner of Income tax Central Provinces and Berar and relying upon a passage each in Benjamin on Sale and the well-known treatise of Baden-Powell, the Bench came to the conclusion that the documents there under consideration did not create any interest in land and did not constitute any grant of any proprietary interest in the estate but were merely contracts or licenses given to the petitioners to cut, gather and carry away the produce in the shape of tendu leaves, or lac, or timber or wood'. But then, it necessarily followed that the Act did not purport to affect the petitioners' rights under the contracts or licences. But what was the nature of those rights of the petitioners? It is plain, that if they were merely contracual rights, then as pointed out in the two later decisions, in Ananda Behera v. The State of Orissa, Shantabai's case, the State has not acquired or taken possession of those rights but has only declined to be bound by the agreements to which they were not a party. If, on the other hand, the petitioners were mere licensees, then also, as pointed out in the second of the two cases cited, the licences came to T-l an end on the extinction of the title of the licensors. In either case there was no question of the breach Or any fundamental right of the petitioners which could support the petitions which were presented under Art. 32 of the Constituion. It is this aspect of the matter which was not brought to the notice of the Court, and the resulting omission to advert to it has seriously impaired, if not completely nullified, the effect and weight of the decision in Chhotabhai's case as a precedent."

We may also usefully reproduce the following passages (at page 354) from the concluded portion of the judgment:

"From this, it is quite clear that forests and trees be longed to the proprietors, and they were items of proprietary rights. .. "

"If then the forest and the trees belonged to the proprietors as items in their 'proprietary rights', it is quite clear that these items of proprietary rights have been transferred to the petitioners...Being a 'proprietary right', it vests in the State under ss. 3 and 4 of the Act. The decision in Chhotabhai's case treated these rights as bare licences, and it was apparently given perincuriam and cannot; therefore; be followed." (Emphasis supplied) Faced with this decision, learned Counsel for the Appellant sought to distinguish it on the ground that the terms of the agreements in that case were different from the terms of the Bamboo Contract. We are unable to accept this submission. It is unnecessary to set out in detail the terms of the agreements in Mahadeo's Case. The differences sought to be pointed out by learned Counsel for the Appellant are unsubstantial and make no difference. The essential and basic features are the same and the same interpretation as was placed upon the agreements in Mahadeo's Case must, there fore, apply to the Bamboo Contract.

In State of Madhya Pradesh v. Yakinuddin(1) the respondents had entered into agreements with the former proprietors of certain estates in the State of Madhya Pradesh acquiring the right to pro pagate lac, collect tendu leaves and gather fruits and flowers of Mahua leaves. Some of these documents were registered and others (1) [1963] 3 S.C.R. 13.

unregistered. On the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the State of Madhya Pradesh took possession of all the villages comprised in the respective estates of the proprietors who had granted the aforesaid rights to the respondents and refused to recognize the respondents' rights. The respondents thereupon filed petitions under Article 226 of the Constitution in the High Court of Madhya Pradesh and the High Court relying upon the decision in Chhotabhai's Case, granted to the respondents the reliefs claimed by them.A Bench of five Judges of this Court allowed the appeals filed by the State of Madhya Pradesh. In its judgment, this Court considered its earlier decisions in Shantabai v. State of Bombay and others and Mahadeo v. the State of Bombay and observed as follows (at page 21):

"In view of these considerations, it must be held that these cases are equally governed by the decisions aforesaid of this Court, which have overruled the earliest decision in the case of Chhotabhai Jethabai Patel and Co. v. The State of Madhya Pradesh.

In Board of Revenue Etc. v. A.M. Ansari Etc.(1) the respondents were the highest bidders at an auction of forest produce, namely, timber, fuel, bamboos, minor forest produce, bidi leaves, tanning barks, parks, mohwa, etc., held by the Forest Department of the Government of Andhra Pradesh. They were called upon to pay in terms of the conditions of sale stamp duty on the agreements to be executed by then as if these documents were leases of immovable property. The respondents there upon filed petitions under Article 226 of the Constitution in the High Court of

Andhra Pradesh. In the said petitions, the State contended that under the agreements, the respondents had acquired an interest in immovable property. The High Court held in favour of the respondents. The State went in appeal to this court. On consideration of the terms of the agreements, this Court held that the agreements were licences and not leases. The Court laid emphasis upon three salient features of those agreements for reaching its conclusion, namely, (l) that these were agreements of short duration of nine lo ten months, (2) that they did not create any estate or interest in the (1) (1976] 3 S.C.R 661. H land, and (3) that they did not grant exclusive possession and control of the land to the respondents but merely granted to them the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the date of the agreement or which might have come into existence during the short period of the currency of the agreements, and that the right of the respondents to go on the land was only ancillary to the real purpose of the contract. The Court observed as follows (at page 667):

"...Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturales, we are clearly of the view that the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31(c) of the Stamp Act".

"The conclusion arrived at by us gains strength from the judgment of this Court in Firm Chhotabhai jethabai Patel and Co. & Ors. V. The State of Madhya Pradesh where contracts and agreements entered into by person with the previous proprietors of certain estates and mahals in the State under which they acquired the rights to pluck, collect and carry away tendu leaves, to cultivate, culture, and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos were held in essence and effect to be licences."

"There is, of course, a Judgment of this Court in Mahadeo v. State of Bombay where seemingly a somewhat different view was expressed but the facts of that course were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years."

We fail to see how this authority in any way supports the case of the Appellant before us or resuscitates the authority of Chhotabhai's Case. In Ansari's Case the Court seems to have assumed that Chhotabhai's Case dealt with short term contracts while, as we have seen above, most of the contracts in Chhotabhai's Case were of far greater duration extending even to fifteen years, nor was the Court's attention drawn to the case of State Or Madhya Pradesh v. Yakinuddin. While the agreement in Ansari's Case was a mere right to enter upon the land and take away tendu leaves, etc., the right under the Bamboo Contract is of a wholly different nature. Further, the question whether the agreements were a grant of a profit a prendre or a benefit to arise out of land was not raised and, therefore, not considered in Ansari's Case and the only point which fell for decision by the Court was

whether the agreements were licences or leases. In fact, another question which arose in that case was whether the respondents were liable to pay the amounts demanded from them as reimbursement of sales tax. Affirming the decision of the High Court on this point, the Court held that the Forest Department did not carry on any business s by holding auctions of forest produce and was, therefore, not a dealer within the meaning of that term as defined in the Andhra Pradesh General Sales Tax Act, 1957. The question whether the agreements were contracts of sale of goods was, however, not considered in that case-

We now come to the case of State of Madhya Pradesh and others v. Orient Paper Mills Ltd., the second of the two cases on which learned Counsel for the Appellant relied so strongly in support of his submission that the Bamboo Contract was a contract of sale of goods. The facts in that case as appearing from the judgment of the High Court reported as Orient Paper Mills Ltd. v. State of Madhya Pradesh and Others(l) were that the President of Indicating on behalf of the former Part State of Vindhya Pradesh had entered into an agreement with the respondent. The said agreement was a registered instrument and was styled as a lease and under it the respondent acpuired the right for a period of twenty years with an option of renewal for a further period of twenty years to enter upon "the leased area" to fell, cut or extract bamboos and salai wood and to remove, store and utilize the same for meeting the fuel requirement of its paper mill.A copy of the said agreement has been produced before us. Some of the terms of the said agreement were the same as those contained in the Bamboo Contracts as also in the case of Mahadeo v. The State of Bombay. The said agreement provided for payment of royalty including a minimum royalty. It also conferred upon the respondent the right to take on lease such (1) [1972] 28 S.T.C. 532.

suitable site or sites as were at the disposal of the State Government within "the leased area" for the erection of store houses, sheds, depots, bungalows, staff offices, agencies and other buildings of a like nature bonafide required for the purposes of its business connected with the said agreement as also a right to make dams across reams, cut canals, make water-course, irrigation works, construct roads, railways and tramways and do any other work useful or necessary for the purposes of its business connected with the said agreement in or upon "the leased area" in terms very similar to those in the Bamboo Contract. After the States Reorganization Act, 1956, came into force, the territories comprised in the State of Vindhya Pradesh became part of the new State of Madhya Pradesh. At the date when the said agreement was entered into the . P. and Berar Sales Tax Act, 1947, was in force in the State of Vindhya Pradesh and the definition of "goods" contained in clause (g) of section 2 of that Act as modified and in force in that State excluded from the purview of the said Act foresr contracts that gave a right to collect timber or wood to forest produce. The C. P. and Berar Sales Tax Act was repealed by the Madhya Pradesh General Sales Tax Act, 1958, with effect from April 1, 1959, and the new Act did not contain any exclusion of forest contracts from the definitions of ' goods". Further, the term "dealer" as defined in the 1958 Act included the Central Government and the State Government or any of its departments. The Forest Department of the State Government was, however, exempted from the payment of sales tax for the period April 1, 1959, to November 2, 1962. After the period of the said exemption expired, the Forest Department got itself registered as a dealer and the Divisional Forest Officer called upon the respondent to reimburse to him the amount which, according to him, he was liable to pay as sales tax in respect of the transaction covered by the said agreement. Challenging his right to do so, the respondent filed in

the High Court of Madhya Pradesh a writ petition under Article 226 of the Constitution. In the said writ petition the respondent contended that the transaction covered by the said agreement was not a sale of goods and accordingly, no sales tax was payable in respect of bamboos and salai wood extracted by the respondent thereunder, that the said agreement did not provide for the recovery of the amount of sales tax from the respondent, and that neither the State Government nor the Forest Department of that Government was a "dealer" and that even if the sales tax was payable, it was not recoverable as arrears of land revenue. The High Court held that the transaction was one of sale of goods and that if sales tax was payable it would be recoverable under section 64A of the Sale of Goods Act, 1939, but the State Government or the Forest Department could not merely by selling the forest produce grown on its own land be regarded as carrying on any business of buying, selling, supplying or distributing goods and, therefore, in respect of mere sales of forest produce neither the State Government nor the Forest Department was a "dealer" within the meaning of that term as defined in the 1958 Act. In coming to the conclusion that the said agreement was a contract of sale of goods, the High Court proceeded upon the basis that what it had to consider was "the stage when bamboo and salai wood have already been felled and appropriated". By reason of the judgment of the High Court, the definition of the term "dealer" was amended with retrospective effect by the Madhya Pradesh General Sales Tax (Amendment and Validation) Act, 1971, so as to nullify the finding of the High Court that neither the State Government nor its Forest department was a "dealer". The State of Madhya Pradesh as also the respondent came in appeal to the Supreme Court. The appeals were heard in the Court by a Division Bench of two learned Judges. At the hearing of the appeals, the respondent desired to challenge the vires of the amending Act, but in view of the Presidential Proclamation suspending the operation of Article 14, it could not do so and the court held that after the proclamation lapsed, it was open to the respondent to take up the point but so far E the appeals were concerned that challenge was not available and the appeals must be decided on the basis that the amendment was valid and constitutional. The main point before this Court, therefore, was whether the said agreement was a lease as it was styled or a simple sale of standing timber coupled with a licence to enter and do certain things on another's land. The Court held that the label given to a document was not conclusive of its real nature and that under the said agreement, possession of the land was not given to the respondent as it would have been had the said agreement been a lease and that as the terms of the said agreement showed, it conferred in substance a right to cut and carry away timber of specified species G and till the trees were cut, they remained the property of the owner, namely, the State, and that once the trees were severed, the property in them passed to the respondent. The Court further observed that the term used in the said agreement, namely, "royalty", was "a feudalistic euphemism for the 'price' of the timber".

We are unable to agree with the interpretation placed by the Court on the document in the Orient Paper Mill*' Case. We find that in that case this Court as also the High Court adopted a wrong approach in construing the said document. It is a well-settled rule of interpretation that a document must be construed as a whole. This rule is stated in Halsbury's Laws of England, Fourth Edition, Volume 12, paragraph 1469 at page 602, as follows:

> "Instrument construed as whole.

> It is a rule of construction applicable to all written instruments that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the cleaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree. Effect must as far as possible, be given to every word and every clause".

In Mahadeo v. State of Bombay a five-Judge Bench of this Court categorically held (at page 349) that "Whether the right to the leaves can be regarded as a right to a growing crop has, however, to be examined with reference to all the terms of the documents and all the right. conveyed thereunder". In spite of this clear and unequivocal pronouncement by a five-Judge Bench of this Court, the learned Judges of the High Court who decided the Orient Paper Mills' Case held (at page 538) that "we have to consider the stage when bamboos and salai wood have already been felled and appropriated", while a two-Judge Bench of this Court evolved for itself in the appeal from that judgment a rule of interpretation which was thus stated (at page 152) by Krishna Iyer, J., who spoke for the Court:

> "The meat of the matter is the judicial determination of the true character of the transaction of 'lease' from the angle of the MPGST Act and the Sale of Goods Act whose combined operation is pressed into service for making the tax exigible from the Forest Department and, in turn, from the respondent mills. It is the part of judicial prudence to decide an issue arising under the specific statute by confining the focus to that statuary compass as far as possible. Diffusion into wider jurisprudential areas is fraught with unwitting conflict or confusion. We, therefore, warn ourselves against venturing into the general law of real property except for minimal illumination thrown by rulings cited. In a large sense, there are no absolutes in legal propositions and human problems and so, in the jural cosmos of relativity, our observations here may not be good currency beyond the factual-legal boundaries of sales-tax situations under a specific statute."

A little later the learned Judge stated (at page 157) as follows: -

> "We may also observe that the question before us is not so much as to what nomenclature would aptly describe the deed but as to whether the deed results in sale of trees after they are cut. The answer to that question, as would appear from the above has to be in the affirmative".

The above rule enunciated by this Court in that case falls into two parts, namely, (I) a document should be so interpreted as to bring it within the ambit of a particular statute relevant for the purpose of the dispute before the Court, and (2) in order to do so, the court can look at only such of the clauses of the document as also to just one or more of the consequences flowing from the document which would fit in with the interpretation which the court wants to put on the document to make that statute applicable. The above principle of interpretation cannot be accepted as correct

in law. It is fraught with considerable danger and mischief as it may expose documents to the personal predilections and philosophies of individual judges depending upon whether according to them it would be desirable that documents of the type they have to construe should be made subject to a particular statute or not. The result would be that a document can be construed as amounting to a grant of a benefit to arise out of land when the question before the Court is whether proprietary rights and interests in estates have been abolished and the same document or a document having the same tenor could be construed as a contract of sale of goods when the question Is whether the amounts payable thereunder are exigible to sales tax or purchase tax, making the interpretation of the document dependent upon the personal views of the judges with respect to the legislation in question. In the very case which we are considering, namely, the Orient Paper Mill's Case as shown by the very first sentence in the judgment, this Court obliquely expressed its disapproval of the transactions of the type represent by the document before it. That sentence is as follows (at page 150) .

> "The State of Madhya Pradesh, blessed with abundant forest wealth, whose exploitation, for reasons best known to that government, was left in part to the private sector. viz., the respondent, Orient Paper Mills-"

We may point out here that in making this observation the Court overlooked three important aspects of the matter, namely, (I) it was a matter of policy for the State to decide whether such transactions should be entered into or not, (2) the transaction was entered into by the State so that a paper mill could be started in the State as shown by the various terms of the said agreement and thus was an encouragement to setting up of industries in the State, and (3) the transaction ensured employment for the people of the area because the said agreement expressly provided that the respondent was to engage minim m 50 per cent of the labour for the working of the contract area from the local source if available.

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 consequences which flow from it. If the second part of the above rule were correct, the result would be startling. There would be almost no agreement relating to immovable property which cannot be construed as a contract of sale of goods. Two instances would suffice to show this. If a man were to sell his building to another and the deed of sale were to provide that the building should be demolished and reconstructed and the price should be paid to the vendor partly in money and partly by giving him accommodation in the new building, according to this rule of interpretation adopted by the Court in the Orient Paper Mills Case it would for the purpose of sales tax be a sale of goods because the old building when demolished would result in movable property, namely, debris, doors, windows, water pipes:

> drainage pipes, water tanks, etc., which would be sold by the purchaser as movables. Similarly, if a man were to give a lease of his orchard or field, the lessee would be entitled to the fruits already in existence as also to the fruits which would come into existence in the future and equally in the case of a field the same would be the case wlth respect to the crop growing in the field as also the crops to grow thereafter. The

fruits and crop, whether existing or future, when plucked or harvested, would be movable property and would be sold as such by the lessee; but on the second part of the rule of interpretation laid down the Orient Paper Mills' Case, the document, indisputably a lease of immovable property, would for the purposes of sales tax law be a sale of goods. In looking merely at the end-result of the agreement before it, namely, that the bamboos would be cut and then would be goods in the hands of the respondent and holding therefrom that the transaction was exigible to sales tax, the Court overlooked what had been firmly established by the decision of the five-Judge Bench of this Court in State of Madras v. Gannon Dunkerly Co. (Madras) Ltd. that both the agreement and the sale must relate to the same subject-matter and, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. This principle has been consistently followed and applied by this Court (see, for instance. Commissioner of Sales Tax. M. P. v. Purshottam Premji).(1) Incidentally, we may also point out that in the Orient Paper Mills Case this Court itself had reservations as regards what it was deciding as is shown 'by its statement that "in the journal cosmos of relativity, our observations here may not be good currency beyond the factual legal boundaries of sales-tax situations under a specific statute." We are constrained to observe that they are not "good currency" so far as even those situations are concerned.

It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to 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 as the Court did in the Orient Paper Mills' Case.

Thus, in coming to the conclusion that the term "royalty" used in the document before it was merely "a feudalistic euphemism for the 'price' of the timber", the Court overlooked the fact that the amount of royalty payable by the respondent was consideration for all the rights conferred upon the respondent under the contract though it was to be calculated according to the quantity (1) [1970] 26 S.T.C. 38, 41 S.C. of the bamboos felled, and the Court also overlooked the fact that this was made further clear by the provision for payment of a minimum royalty.

It is also true that an interpretation placed by the court on a document is not binding upon it when another document comes to be interpreted by it but that is so where the two documents are of different tenors and not where they have the same tenor. On the ground that they dealt with the general law of real property, the Court in Orient Paper Mils' case did not advert to the earlier decisions of this Court relating to documents with similar tenor even though those cases referred to in the judgment of the Madhya Pradesh High Court under appeal before it. In view of this, the Orissa High Court in the judgment under appeal before us held that the Orient Paper Mill 's Case was decided by this Court per in curium because it did not take into consideration decisions of larger Benches of this Court. In Union of India and another v. K. S.) Subramanian(1) this Court held as

follows:

> "But, we do not think that the High Court acted correctly in skirting the views expressed by larger benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized in to rule of law declared by this Court."

Had the Court looked at these decisions of larger Benches, it would have appreciated that the only question before it could not be whether the document was a lease or a contract of sale of goods and that even though the document was not a lease it could be a grant of a profit a prendre and that where there is a grant of a profit a prendre that is, a benefit to arise out of land, it is immaterial whether the possession of the land is given to the grantee or whether the grantee is given only a licence to enter upon the land to receive the benefit. The bacic and salient features of the agreement before the Court in the Orient Paper Mills.' Case were the same as in the case of Mahadeo state of Bombay and this Court was not (1) (1977) I S.C.R. 87, 92, justified in not adverting to that case and the other cases referred to by us earlier on the ground that these cases dealt with the general law of real property.

A chameleon may change its surroundings but document is not a chameleon to change its meaning according to the purpose of the statute with reference to which it falls to be interpreted and if documents having the same tenor are not to be construed by courts in the same way, it would make for great uncertainty and would introduce confusion, leaving people bewildered as to how they should manage their affairs so as to make their transactions valid and legal in eye of the law.

The authorities discussed above show that the case of Firm Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh is not good law and has been overruled by decisions of larger Benches of this Court. They equally show that the case of State of Madhya Pradesh v. Orient Paper Mills Ltd., is also not good law and that this decision was given per incurium and laid down principles of interpretation which are wrong in law and cannot be assented to. The discussion of the above authorities also confirm us in our opinion that the Bamboo Contract is not a contract of sale of goods but is a grant of a Profit a prendre, that is, of a benefit to arise out of land and that it is not possible to bifurcate the Bamboo Contract into two: one for the sale of bamboos existing at the date of the contract and the other for the sale of future goods, that is, of bamboos to come into existence in the future. In order to ascertain the true nature and meaning of the Bamboo Contract, we have to examine the said contract as a whole with reference to all its terms and all the rights conferred by it and not with reference to only a few terms or with just one of the rights flowing therefrom. On a proper interpretation, the Bamboo Contract dose not confer upon the Respondent Company merely a right to enter upon the land and cut bamboos and take them away. In addition to the right to enter upon the land for the above purpose, there are other important rights flowing from the Bamboo Contract it which we have already summarized earlier and which make in clear that what the Bamboo Contract granted was a benefit to arise out of land which is an interest in immovable property. The attemp on the part of the State Government and the officer of its Sales Tax

Department to bring to tax the amounts payable under the Bmboo Contract was, therefore, not only unconstitutional but ultra vires the Orissa Act.

Works Contract The only point which now remains to be considered is the one canvassed by the contesting Respondents namely, that the Bamboo Contract as also the Timber Contracts arc works contracts and the amounts payable thereunder cannot, therefore, be made exigible to any tax under the Orissa Act.A works contract is a compendious term to describe conveniently a contract for the performance of work or services in which the supply of materials or some other goods is incidental. The simplest example of this type of contract would be where an order is given to a tailor to make a suit from suiting supplied by the customer. This would be a contract of work or servies in which the suyply of materials, namely, thread, lining, and buttons used in making the suit, would be mrely incidental. Similarly, if an artist is commissioned to paint a portrait, it would be a contract of work and services in which the canvass on which the portrait is painted and the paint used in painting the portrait would be merely incidental. In Commissioner of Sale Tax, M.P. v. Pershottam Premji, this Court pointed out the distinction between a works contract and a contract for the sale of goods as follows (at page 41):

> "The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price "

As pointed out above the Timber Contracts are agreements relating to movables while the Bamboo Contract is a grant of an interest in immovable property. The question, therefore, whether there is a works contract or a contract of sale of goods can arise only with respect to the Timber Contracts. but the very meaning of a works contract would show that the Timber Contracts cannot be works contracts. The payee of the price, namely, the Government has not undertaken to do any work or labour. The work or labour under the Timber Contracts is to be done by the payer of the price, namely, the forest contractor, that is, the Respondent Firm. It is the Respondent Firm which has to enter upon the land and to fell the standing trees and to remove them. Assuming for the sake of argument that the Bamboo Contract were a contract relating to movables, the same position would apply to it. This contention of the Respondents is, therefore, without any substance.

Conclusions To summarize our conclusions -

(1) The impugned provisions, namely, (1) Notification S.R.O. No. 372177 dated May 23, 1977, (2) Notification S.R.O. No. 373177_ dated May 23, 1977, (3) Entries Nos. 2 and 17 in the Schedule to Notification No. 67178 - C.T.A. 135177 (Pt.) - F (S.R.O. No.900/77) dated December 29, 1977, and (4) Entries Nos. 2 and 17 in the Schedule to Notification No. 67181 - C.T.A. 135/77-F (S.R.O. No.901/77) dated December 29, 1977, levying purchase tax at the rate of ten per cent on the

purchase of , bamboos agreed to be severed and standing trees agreed to ` be severed, are not ultra vires either Entry 54 in List II in the Seventh Schedule to the Constitution of India or the 'Orissa Sales Tax Act, 1947, but are constitutional and valid.

(2) Under the impugned provisions the taxable event is not an agreement to sever standing trees or bamboos but the purchase of standing trees or bamboos agreed to be severed.

(3) The absence in the impugned provisions of the words "before sale or under the contract of sale" is immaterial for the impugned provisions read as a whole clearly show that the severance of standing trees or bamboos has to be under the contract of sale and before the purchase thereof has been completed and not before sale of such trees or bamboos.

(4) The subject-matter of the impugned provisions is goods and the tax that is levied thereunder is on a completed purchase of goods.

(5) When under section 3-B of the Orissa Sales Tax Act, 1947, any goods are declared to be liable to tax on the turnover of purchases, such goods automatically cease to be liable to sales tax by reason of the proviso to that section.

(6) The word "supersession" in the Notifications dated December 29, 1977, is used in the same sense as the words "repeal and replacement" and, therefore, does not have the effect of wiping out the tax liability under the previous notifications. All that was done by using the words "in supersession of all previous notifications" in the Notifications dated December 29, 1977, was to repeal and replace previous notifications and not to wipe out any I) liability incurred under the previous notifications.

The Timber Contracts are not works contracts but are agreements to sell standing timber.

Under the Timber Contracts the property in the trees which were the subject-matter of the contracts passed to the Respondent Firm, Messrs M.M. Khara, only in the trees which were felled, that is, in timber, after all the Conditions of the contract had been complied with and after such timber was examined and checked and removed from the contract area. The impugned provisions, therefore, did not apply to the transactions covered by the Timber Contracts. (9) The dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance, bearing in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word, and the court has, therefore, to select particular meaning which is relevant to the content in which it has to interpret that word (10) Timber and sized or dressed logs are one and the same commercial commodity. Beams, rafters and planks would also be timber.

(11) As the sales of dressed or sized logs by the Respondent Firm have already been assessed to sales tax, the sales to the First Respondent Firm of timber by the State Government from which logs were made by the Respondent Firm cannot be made liable to sales tax as it would amount to levying tax at two points in the same series of sales by successive dealers, assuming without deciding that the

retrospectively substituted definition of "dealer" in clause (c) of section 2 of the Orissa Sales Tax Act, 1947, is valid.

(12) During the period June 1, 1977, to December 31, 1977, the sales of logs by the Respondent Firm would be liable to tax at the rate of ten per cent. Assuming that these sale s have been assessed to tax at the rate of ten per cent, by reason of the period of limitation prescribed by section 12(8) of the Orissa Sales Tax Act, 1947, the Respondent Firm's assessment for the relevant period cannot now be reopened to reassess such sales at ten Per cent.

(13) The Bamboo Contract is not a lease of the contract ' areas to the Respondent Company, The Titaghur Paper Mills (Company Limited.

(14) The Bamboo Contract is also not a grant of an easement to the Respondent Company.

(15) The Bamboo contract is a grant of a profit a prendre which in Indian law is a benefit to arise out of land and thus creates an interest in immovable property.

(16) Being a benefit to arise out of land, any attempt on the Part of the State Government to tax the amounts payable under the Bamboo Contract would be not only ultra vires the Orissa Act but also unconstitutional as being beyond the State's taxing power under Entry 54 in List II in the seventh Schedule to the Constitution of India.

(17) The case of Firm Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh is not good law and has been overruled by decisions of larger Benches of this Court as pointed out by this Court in State of Madhya Pradesh v.

Yakinuddin.

(18) The case of State of Madhya Pradesh & Ors v. Orient Paper Mills Ltd. is also not good law as that decision was given per incurium and laid down principles of interpretation which are wrong in law. (19) The real nature of a document and the transaction thereunder have to be determined with reference to all the terms and clauses of that document and all the rights and results flowing therefrom. On the above conclusions reached by us the judgment of the High Court in so far as it hold the impugned provisions to be unconstitutional and ultra vires the Orissa Sales Tax Act 1947, requires to be reversed. This, however, does not mean that the writ petitions filed by the Respondent Company and the Respondent Firm in the High Court should be dismissed because in its writ petitions the Respondent Company had played for quashing the notice dated August 18, 1977, issued against it under Rules 22 and 28(2) of the Orissa Sales Tax Rules, 1947, and the Respondent Firm in its writ petition had prayed for setting aside the assessment order dated November 28, 1978, for the priod April 1, 1977, to March 31, 1978. On the findings given by us the said notice must be quashed. So far the said assessment order is concerned, as we have pointed out earlier, it is severable and does not require to be set aside in toto but only so far as it imposed purchase tax on the amounts paid by the Respondent Firm under the Timber Contract. Though the High Court did not give these consequential reliefs in view of its findings that the impugned provisions were invalid, it becomes

necessary for us to do so in order to do complete justice between the parties as we are entitled to do under Article 142 of the Constitution of India.

In the result, we reverse the judgment of the High Court in so for as it holds (1) Notification S.R.O. No. 372/77 dated May 23. 1977, issued under section 3-B of the Orissa Sales Tax Act, 1947, (2) Notification S.R.O. No. 373/77 dated May 23, 1977, issued under the first proviso to sub-section (1) of section 5 of the said Act prior to the amendment of the said sub-section by the Orissa Sale Tax (Amendment) Act, 1978, which repealed and replaced the Orissa Sales Tax (Amendment) Ordinance, 1977, (3) Entries 2 and 17 in the Schedule to Notification No. 67178 - C.T.A 135/77 (Pt.) - F (S.R.O). No. 900/77) dated December 29, 1977, issued under the said section 3-B and (4) Enteries No. 2 and 17 in the Schedule to Notification No. 67181 - C.T.A. 135/77-F (S.R.O. No. 901/77) dated December 29, 1977, issued under sub-section (1) of the said section S after its amendment by the Orissa Sales Tax (Amendment) Act, 1978, to be unconstitutional as being ultra vires Entry 54 in List II in the Seventh Schedule to the Constitution of India and as being ultra vires the Orissa Sales Tax Act, 1947, and we declare these provisions to be constitutional and valid. In Civil Appeal No. 219 of 1982, we further quash and set aside the notice dated August 18, 1977, under Rules 22 and 28(2) of the Orissa Sales Tax Rules 1947, issued against the Respondent Company, The Titaghur Paper Mills Company Limited, and the assessment order, if any, made in pursuance thereof. In Civil Appeal No. 220 of 1982, we further modify the assessment order dated November 28, 1978, for the period April 1, 1977, to March 31, 1978, made against Respondent Firm; Messrs M.M. Khara, by deleting therefrom the item of purchase tax on the amounts paid by the Respondent Firm under the Timber Contracts entered into by it with the State of Orissa and direct consequential modifications to be made therein.

As the real object of the State Government in making the mpugned provisions was to make exigible to purchase tax the amounts payable under the Bamboo Contracts and the Timber Contracts in which object it has failed, in our opinion, a fair order for costs would be that the parties should bear and pay their own costs of these Appeals and we direct accordingly.

P.B.R.