

State Of A.P vs National Thermal Power Corpn. Ltd. & Ors on 22 April, 2002

Equivalent citations: AIR 2002 SUPREME COURT 1895, 2002 AIR SCW 1956, 2002 (1) JT (SUPP) 254, 2002 (2) LRI 786, 2002 (4) SCALE 7, 2002 (5) SCC 203, 2002 (6) SRJ 33, 2002 (3) SLT 394, (2002) 127 STC 280, (2002) 3 SCJ 486, (2002) 3 SUPREME 400, (2002) 4 SCALE 7

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Bench: Chief Justice, R.C.Lahoti, N. Santosh Hegde, Ruma Pal, Arijit Pasayat

CASE NO.:

Appeal (civil) 3112 of 1990

Transfer Case (civil) 3 of 1998

PETITIONER:

STATE OF A.P.

Vs.

RESPONDENT:

NATIONAL THERMAL POWER CORPN. LTD. & ORS.

DATE OF JUDGMENT: 22/04/2002

BENCH:

CJI, R.C.Lahoti, N. Santosh Hegde, Ruma Pal & Arijit Pasayat

JUDGMENT:

R.C. Lahoti, J.

The High Court of Andhra Pradesh at Hyderabad has, by its impugned judgment dated April 11, 1990, allowed the writ petition filed by the respondent National Thermal Power Corporation Ltd. (hereinafter 'NTPCL', for short) and declared that the levy of duty by the State of Andhra Pradesh on the sales of electrical energy generated by the Corporation-respondent No.1 at its thermal power station set up at Ramagundam, within the State of Andhra Pradesh, and sold to the Electricity Boards of Karnataka, Kerala, Tamil Nadu and the State of Goa in pursuance of contracts of sales occasioning inter-State movement of electricity is incompetent and outside the power of State Legislature. Consequently, the tax levied and collected has also been held to be without authority of

law, hence liable to be refunded in accordance with law. On a prayer made by the learned Advocate General on behalf of the State of Andhra Pradesh, the High Court certified that the case involves a substantial question of law as to the interpretation of Constitution under Article 132. The appeal has been filed pursuant to the certificate so granted by the High Court. On 4.10.1991, a bench of two learned Judges directed the appeal to be placed for hearing before a Constitution Bench, as required by Clause (3) of Article 145 of the Constitution.

At a point of time when this Court was seized of the appeal filed by the state of Andhra Pradesh, NTPCL moved a petition under Article 139A of the Constitution seeking withdrawal of Writ Petition No.1941 of 1996 NTPCL Vs. State of Madhya Pradesh & Others pending in the High Court of Madhya Pradesh at Jabalpur to this Court. The prayer was allowed vide order dated 13.10.1997 and on receipt of the records from High Court of Madhya Pradesh the same has been registered here as T-C-3/1998.

The State of Madhya Pradesh and newly formed State of Chhattisgarh with effect from 1.11.2000, during the pendency of the petition were noticed and the parties thereto have been heard analogously with the hearing in C.A.No.3112/1990. However, for convenience sake we will refer to States of Madhya Pradesh and Chhattisgarh as State of M.P. only as admittedly until the formation of new State the two power stations in question were situated therein only.

Andhra Pradesh Electricity Duty Act, 1939 provides for levy of duty on certain sales and consumption of electricity by licensees in the State of Andhra Pradesh. The definition of the term 'licensee' specifically includes the National Thermal Power Corporation (respondent No.1) or any other Corporation engaged in the business of supplying energy. Section 3 of the Act is the charging section, the relevant part whereof reads as under:-

"3. Levy of a duty in certain sales of electrical energy.____ (1) Save as otherwise provided in sub- section (2), every licensee in the State of Andhra Pradesh shall pay every month to the State Government in the prescribed manner, a duty calculated at the rate of four paise per unit of energy, on and in respect of all sales of energy, except sales to the Government of India for consumption by that Government or sales to the Government of India or a railway company operating any railway for consumption in the construction, maintenance or operation of that railway effected by the licensee during the previous month, at a price of more than twelve paise per unit and on and in respect of all energy which was consumed by the licensee during the previous month for purposes other than those connected with the construction, maintenance and operation of his electrical undertaking and which, if sold to a private consumer under like conditions, would have fetched a price of more than twelve paise per unit.

Provided that no duty under this sub-section shall be payable on and in respect of sale of energy effected:-

(a) by the Andhra Pradesh State Electricity Board to any other licensee;

(b) by the National Thermal Power Corporation to the Andhra Pradesh State Electricity Board."

A bare reading of the provision shows that duty is leviable at the prescribed rate on 'all sales of energy' effected by the licensee during the previous month at a price of more than 12 paise per unit. Duty is also leviable on all energy consumed by the licensee. There are certain categories of sales and consumption saved and excluded from what would otherwise have been dutiable. However, in the present case, we are not concerned with those exclusions, nor with levy of duty on consumption. The limited question arising for our consideration is ___ whether sales of energy by NTPCL, the respondent No.1, to several Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa, attract the incidence of taxation under Section 3 of the Act.

According to the facts found by the High Court, NTPCL, a Government Company, wholly owned by the Government of India, has set up several super thermal power stations in different parts of the country normally located near coal-pit heads. One such super thermal power station is set up in Ramagundam in Karimnagar District of the State of Andhra Pradesh. There are various transmission lines and sub-stations through which the power generated at Ramagundam station is transmitted to the purchasers. The power generated is fed into the southern grid and is made available to the several State Electricity Boards and the State of Goa. These facts are not in controversy and sufficient to be taken note of for the purpose of this appeal. During the course of hearing, by reference to certain documents, it was sought to be pointed out where the meters are located ___ within the State of M.P. or within the territories of buyer states or at both the places, by reference to reading whereof the quantum of energy sold, exported or imported is fixed and the price calculated. We do not propose to state the facts and contending submissions in that regard in details as it is unnecessary.

The controversy centres mainly around the question as to under which entry Andhra Pradesh Electricity Duty Act, 1939 is covered and whether the sales of electricity by NTPCL, the respondent No.1, to the Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa, can be construed as inter-State sale or intra- State sale.

Facts in T-C-3/98 The relevant facts of this writ petition are briefly set out in what follows. The erstwhile Central Provinces and Berar Legislative Assembly enacted the CP and Berar Electricity Duty Act, 1949 which having been adapted in the State of Madhya Pradesh has come to be known as M.P. Electricity Duty Act, 1949 and extends to the whole of Madhya Pradesh. The Preamble to the Act, as amended by Madhya Pradesh Legislature, provides that it is an Act for the levy of duty on sale or consumption of electrical energy. The expression "distributor of electrical energy" is defined in Clause (b) of Section 2 to specifically include therein the National Thermal Power Corporation. Section 3 provides that every distributor of electrical energy and every producer shall, subject to certain exceptions, pay every month to the State Government a duty calculated at the rates specified in the table appended thereto on the units of electrical energy sold or supplied to a consumer or consumed by himself for his own purposes or for purposes of his township or colony during the preceding month. The table appended to Section 3 prescribes different rates of duty depending on the purpose for which electrical energy is sold, supplied or consumed, the details whereof are not

relevant for our purpose. There is yet another legislation, namely, the Madhya Pradesh Upkar Adhiniyam 1981 (No.1 of 1982) which provides for levy of certain cesses. Sub-section (1) of Section 3 thereof provides that every distributor of electrical energy shall pay to the State Government an energy development cess at the rate of certain paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month. NTPCL has two power projects located in the State of Madhya Pradesh (i) Korba Super Thermal Power Station at Pragati Nagar, District Bilaspur, known as Korba Station (presently in the State of Chhattisgarh) and (ii) Vindhya Super Thermal Power Station situated at Vindhya Nagar, District Sidhi of Madhya Pradesh known as Vindhya Station. The electricity generated by it at these two stations, is fed into Northern grid and supplied to several States outside the State of Madhya Pradesh pursuant to contracts entered into between the parties, that is, the seller and the buyers. On 30.11.1994, the Chief Engineer (Electricity Duty) and Chief Electrical Inspector, Government of Madhya Pradesh issued a letter annexed by a tabulated statement raising a demand of Rs.2,74,01,59,535/28 paise for the period commencing October, 1984 and expiring March, 1996. The demand is on account of electricity duty at the rate of 2 paise per unit and cess at the rate of 1 paise per unit calculated on the units sold to Electricity Boards of other States.

In the counter-affidavit on behalf of the States of Madhya Pradesh and Chhattisgarh reliance has been placed on the definition of 'consumer' engrafted into the M.P. Electricity Duty Act, 1949 by M.P. Act No.46 of 1984 with effect from 1.10.1984 which reads as under:-

"Consumer" means any person who receives electrical energy sold or supplied by a distributor of electrical energy or a producer and includes a person receiving electrical energy in bulk for onward distribution.

By the same amendment "distributor of electrical energy" was defined so as to include therein NTPCL, as already stated. It is admitted by the States of M.P. and Chhattisgarh that the power generated at the two power stations is sold and supplied to various electricity boards/electricity departments situated in other States but as the generating stations are located in the State of Madhya Pradesh the sale is not an inter-State sale. The situs of sale is within the State of M.P. Transaction of sale is complete in the State of M.P. and the buyers carry the electricity to their respective States when property in electricity sold has already passed to them. Reliance has been placed on the several clauses of the bulk power supply agreement entered into between NTPCL and buyers, one of which entered into between NTPCL and Western Region Electricity Board (WREB) having its office at Andheri East, Bombay, has been filed and quoted in the counter affidavit, according to which (a) Metering is within the State of M.P.; (b) Transmission loss from Madhya Pradesh to the Home State of the buyer is to the account of the buyer; (c) Wheeling loss from Madhya Pradesh to the Home State of the buyer to the account of the buyer; (d) Transmission charges for transmission from Madhya Pradesh to the Home State of the buyer to the account of the buyer; (e) Wheeling charges from Madhya Pradesh to the Home State of the buyer to the account of the buyer; (f) Delivery of WREB in Madhya Pradesh; (g) NTPCL ceases to have control over the electrical energy once it is delivered to WREB

within State of M.P.; (h) Payment made by the Bulk Beneficiaries is in respect of quantum of electrical energy supplied/delivered at metering point in State of M.P. Similar are the agreements entered into with other outside-State buyers.

It is not disputed that the power generated at the abovesaid two stations is fed into transmission system of Power Grid Corporation of India Limited and the transmission systems of other bulk power beneficiaries wherefrom the buyers draw the power purchased by them. Great emphasis was laid on the fact that the points for metering are installed within the State of Madhya Pradesh. It was submitted that the transaction under scrutiny in the case of State of M.P. is different from the one under scrutiny in the case of State of Andhra Pradesh.

Relevant Provisions We proceed to notice the relevant provisions of the Constitution and other statutory provisions.

Changes of far reaching implications were made in the Constitution by the Constitution (Sixth Amendment) Act, 1956 with effect from September 11, 1956. To enable a convenient comparative reading, we set out the provisions as under:-

"246. Subject-matter of laws made by Parliament and by the Legislatures of States.____

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Seventh Schedule List I Union List xxx xxx xxx xxx 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.

(inserted by Sixth Amendment) List II - State List Entry 52 Taxes on the entry of goods into a local area for consumption, use or sale therein.

Entry 53 Taxes on the consumption or sale of electricity.

Entry 54 :

(Before Sixth Amendment)

54. Taxes on the sale or purchase of goods other than newspapers (After Sixth Amendment)

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. Before 11.9.56 After 11.9.56

269. The following duties and taxes shall be levied and collected Taxes levied and by the Government of collected by the India but shall be assign-

Union but assign- ned to the States in the ned to the States. manner provided in clause (2), namely :-

(a) duties in respect of succession to property other than agricultural land;

(b) estate duty in respect of property other than agricultural land;

(c) terminal taxes on goods or pass-

ngers carried by railway, sea or air.

(d) taxes on railway fares and freights;

(e) taxes other than stamp duties on transactions in stock-exchanges and future markets;

(f) taxes on the sale or purchase of newspapers and on advertise-

ments published therein.

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the first Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

269.(1) The following duties and taxes shall be levied and collected Taxes levied and by the Government of collected by the India but shall be assign-

Union but assign- ned to the States in the ned to the States. manner provided in clause (2), namely :-

- (a) duties in respect of succession to property other than agricultural land;
- (b) estate duty in respect of property other than agricultural land;
- (c) terminal taxes on goods or passengers carried by railway, sea or air;
- (d) taxes on railway fares and freights;
- (e) taxes other than stamp duties on transactions in stock-exchanges and future markets;
- (f) taxes on the sale or purchase of newspapers and on advertisements published therein.
- (g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
- (h) taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-

State trade or commerce;

(2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Union territories shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

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

Before 11.9.56.

After 11.9.56.

286. (1) No law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place___

(a)

(b) (a) outside the State; or

(b) (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation ____ For the purposes of sub-

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

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

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

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

286. (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place ____

(a)

(b) (a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

* * * * * (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorizes the imposition of,. ____

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

(b) (b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may be law specify.

Out of the several changes introduced by the Constitution (Sixth Amendment) Act, only a few are relevant and material for our purpose. In Article 269, Sub-Clause (g) was added in clause (1) and a new Clause (3) was added. The Forty-Sixth Amendment substituted the words 'sale or purchase of, or consignment of, goods' in place of 'sale or purchase of goods' as was occurring in Clause (3) inserted by Sixth Amendment. Such Forty Sixth Amendment has no relevance for the present controversy. In Article 286 subsequent to the Sixth Amendment, Clause (3) has been brought in the present form by Forty

-Sixth Amendment which again is not relevant for the present controversy. What is relevant for our purpose is the deleting of former explanation appended to Clause (1) and substitution of Clause (2) in the present form in Article 286 by Sixth Amendment.

As to the several relevant entries quoted hereinabove, it may be noted that Entry 92A in List-I of Seventh Schedule was added by Sixth Amendment. Entry 54 in List-II in the present form was substituted by Sixth Amendment. Entries 52 and 53 in List-II remain unaffected by Sixth Amendment.

The Central Sales Tax Act, 1956 was enacted to formulate principles for determining ___ when a sale or purchase of goods takes place in the course of inter-state trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sale of goods in the course of inter-State trade or commerce etc., as the Preamble to the Act states. Clause (d) of Section 2 defines 'goods' (unless the context otherwise requires) to include all materials, articles, commodities and all other kinds of moveable properties, but not including newspapers, actionable claims, stocks, shares and securities. Section 3 of the Act, placed in Chapter II thereof, provides as under:-

"CHAPTER II FORMULATION OF PRINCIPLES FOR DETERMINING WHEN A SALE OR PURCHASE OF GOODS TAKES PLACE IN THE COURSE OF INTER-STATE TRADE OR COMMERCE OR OUTSIDE A STATE OR IN THE COURSE OF IMPORT OR EXPORT

3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce. ___ A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase ___

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1. ___ Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. ___ Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

At this juncture it would be appropriate to have a view of the legislative history. Explanation to clause (1) of Article 286 generated some controversy which led to the constitution of a larger Bench (7- judge strength) in *The Bengal Immunity Company Limited Vs. The State of Bihar and Ors.* - 1955 (2) SCR 603. The larger bench ruled by majority that an inter-State sale or purchase continues to be so irrespective of the State where the sale can be held to be located under the general law or by the fiction created by the explanation appended to clause (1) of Article 286. The situs of a sale or purchase is wholly irrelevant so far as its inter-State character is concerned. The larger bench further ruled that until Parliament by law made in exercise of the powers vested in it by clause (2) of Article 286 provides otherwise, no State can impose or authorize the imposition of any tax on sale or purchases of goods when any sales or purchases take place in the course of inter-State trade or commerce. To put in other words, it was held that explanation to Article 286(1) as it existed prior to the Sixth Amendment could not be applied for the purpose of interpreting clause (2) of Article 286.

The issue attracted the attention of Taxation Enquiry Commission 1953-54 (TEC, for short). In its report, Volume III, Chapter 4, vide para 30, the Commission observed, inter alia, that Clause (1) of Article 286 links the sales-tax to one of the two parties, viz., the consumer and lays down that no State shall levy tax on a sale which results in delivery for consumption in another State. While making recommendations for consideration of future policy regarding sales tax, it opined that the system should contain provisions whereby certain constitutional restrictions on the States and certain powers of levy and control by the Union are introduced. The TEC observed that the Constitution, in effect, divides sales of goods in India into (a) goods delivered for consumption in particular States and (b) other sales, which dichotomy is imperfect from the point of view of tax administration. It suggested division, both useful and effective, of all sales of goods into two, namely (a) those in the course of inter-State trade and commerce, and (b) those not in the course of such trade and commerce; while the former should be the sphere of the Union and the latter in the sphere of the States. It appears that so far as the electricity duty is concerned, though the subject was separately dealt with by the report, in the then circumstances the TEC did not comprehend inter-State sale of electricity and, therefore, did not make any recommendation specifically in that regard. However, that does not make any difference.

Pursuant to the recommendations made by the Taxation Enquiry Commission the Parliament incorporated certain amendments in the Constitution by enacting the Constitution (Sixth Amendment) Act, 1956 which we have already noticed briefly.

We have very briefly stated the legislative history for it has been noticed in details in a recent Constitution Bench decision of this Court in *20th Century Finance Corporation Ltd. & Anr. Vs. State*

of Maharashtra (2000) 6 SCC 12 and earlier in Shiv Dutt Rai Fateh Chand etc. Vs. Union of India & Anr. (1983) 3 SCC 529, and therefore, we have deemed it not necessary to repeat or re-state the same in details. The Central Sales Tax Act, 1956 was enacted by the Parliament as authorized by the Constitution. We have already reproduced Section 3 of the CST Act hereinabove. By Section 6 of the Act the Central Government was empowered to levy tax on all sales of goods effected by a dealer in the course of inter-State trade or commerce. However, by the Central Sales Tax (Amendment) Act, 1972, which came into force with effect from 1.4.1973, the language of Section 6 was suitably amended so as to confine the levy of tax under Section 6 on all sales "of goods other than electrical energy". The Statement of Objects and Reasons for this amendment was so stated "Exemption from Central sales-tax Act on inter-State sales of electrical energy is now dependent on the exemption from tax by a State Government on local sales of electrical energy. It is now proposed to provide specifically that inter-State sale of electrical energy would not be liable to Central sales tax." (see Gazette of India Extraordinary Part II, at page 522). The purpose behind referring to this amendment and the SOR is that in the understanding of the Parliament also the inter-State sale of electrical energy was liable to central sales-tax under Section 6 of the Act and but for the amendment such tax was capable of being levied by the Central Government.

Electricity, what it is Before we deal with the constitutional aspects let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court in Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur- 1969 (2) SCR 939 that electricity is goods. The definition of goods as given in Article 366 (12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which "goods" means all kinds of moveable property. The term "moveable property" when considered with reference to "goods" as defined for the purpose of sales-tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be moveable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly is punishable under Section 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other moveable object, this Court held that there was no difficulty in holding that electric energy was intended to be covered by the definition of "goods". However, A.N. Grover, J. speaking for three-Judge Bench of this Court went on to observe that electric energy "can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other moveable property". In this observation we agree with Grover, J. on all other characteristics of electric energy except that it can be 'stored' and to the extent that electric energy can be 'stored', the observation must be held to be erroneous or by oversight. The science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.

Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar's Law Lexicon (Second Edition, 2000) — 'Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood. Imperial Dict. (quoted in Spensley v. Lancashire Ins. Co., 54 Wis. 433, 442, 11 NW 894, where the court, quoting from the same authority, said, "We are totally ignorant of the nature of this cause

whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another.' This characteristic quality of electric energy was judicially noticed in Indian Aluminium Co.etc.etc. Vs. State of Kerala & Ors. (1996) 7 SCC 637. Vide para 25 this Court has noted, "Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place." "as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place." These properties of electricity as goods are of immense relevance as we would state hereafter.

List II, Entries 53 and 54, how to be read:

We now come to the question on the interpretation of Entry 53 in List II of Seventh Schedule. It provides for taxes on the consumption or sale of electricity. The word 'sale' as occurring in Entry 52 came up for the consideration of this Court in *Burmah Shell Oil Storage & Distributing Co.India Ltd. Vs. The Belgaum Borough Municipality* 1963 Supp.(2) SCR 216. It was held that the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being "use or consumption". We feel that the same meaning should be assigned to the word 'sale' in Entry 53. This is for a fortiorari reason in the context of electricity as there can be no sale of electricity excepting by its consumption, for it can neither be preserved nor stored. It is this property of electricity which persuaded this Court in *Indian Aluminium Co. etc's case* (supra) to hold that in the context of electricity, the word 'supply' should be interpreted to include sale or consumption of electricity. Entry 53 should therefore be read as 'taxes on the consumption or sale for consumption of electricity'.

With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if

electricity was not includible in the meaning of term 'goods'. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise, as held by Constitution Bench in *Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh* 1962 Supp.(1) SCR 282. A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92A of List I. This, in our opinion, is the best way of reading the two entries. In *C.P. Motor Spirit Act re.*, AIR 1939 FC 131, it was held that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible the overriding power of Union Legislature operates and prevails. Gwyer, C.J. observed "A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act." And again he said, "an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If needed such a reconciliation should prove impossible, then and only then, will the non-obstante clause operate and the federal power prevail." In *Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors.*, 1962 Supp (3) SCR 1, the Constitution Bench has held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list.

What is inter-State sale?

It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients:

(i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale; the sale being the proximate cause

of movement; and

(iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element.

Precedents are legion; we may briefly refer to some of them. In *English Electric Company of India Ltd. Vs. Deputy Commercial Tax Officer*, 1977 (1) SCR 631, this Court held that when the movement of the goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In *Union of India Vs. K.G. Khosla and Co. Ltd.*, (1979) 2 SCC 242, it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in *M/s. Sahney Steel and Press Works Ltd. and Anr. Vs. Commercial Tax Officer and Others* (1985) 4 SCC 173. In *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales-tax, Jabalpur* 1976 (4) SCC 124, after referring to *Balabhagas Hulaschand Vs. State of Orissa*, (1976) 2 SCC 44, it was observed that so far as Section 3 (a) of the C.S.T. Act is concerned there is no distinction between unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence.

Effect of Entry-53, List-II, having remained unamended Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53, List II, having been left unamended by Sixth Amendment from another angle. Sixth Amendment did not touch Entry 53 in List-II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92 A of List I and arguments were advanced, with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter such a plea cannot be countenanced.

The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in Seventh Schedule. After the decision of larger Bench in *Bengal Immunity Company Limited* (supra) and Constitution Bench decision in *Ram Narain Sons Ltd. & Ors. Vs. Asst.*

Commissioner of Sales Tax & Ors., 1955 (2) SCR 483, there is no manner of doubt that the bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State legislature can impose tax on transactions of sale or purchase of goods. Needless to say, such ban would operate by its own force and irrespective of the language in which an Entry in List-II of Seventh Schedule has been couched. The dimension given to field of legislation by the language of an Entry in List-II Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of State legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations : one, arising out of the entry itself; and the other, flowing from the restriction embodied in the Constitution. It was held in *Tata Iron and Steel Co. Ltd. Bombay Vs. S.R. Sarkar and Ors.* - 1961 (1) SCR 379 (at pages 387 and 388) that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In *20th Century Finance Corporation Limited (supra)* the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax, 1956 all that has to be seen is whether the sale or purchase (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. If the transaction of sale satisfies any one of the two requirements it shall be deemed to be a sale or purchase of goods in the course of inter-State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibition is spelled out by the description of a legislative entry in Seventh Schedule or not.

It is well settled, and hardly needs any authority to support the proposition, that several entries in the three lists of Seventh Schedule are legislative heads or fields of legislation and not the source of legislative empowerment. [To wit, see *The Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors.* (supra)]. Competence to legislate has to be traced to the Constitution. The division of powers between Parliament and the State Legislatures to legislate by reference to territorial limits is defined by Article 245. The subject-matters with respect to which those powers can be exercised are enumerated in the several entries divided into three groups as three Lists of Seventh Schedule. Residuary powers of legislation are also vested by Article 248 in the Parliament with respect to any matter not enumerated in any of the lists in Seventh Schedule. This residuary power finds reflected in Entry 97 of List I. If an Entry does not spell out an exclusion from field of legislation discernible on its apparent reading, the absence of exclusion cannot be read as enabling power to legislate in the field not specifically excluded, more so, when there is available a specific provision in the Constitution prohibiting such legislation.

It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In *Burmah Shell Oil Storage & Distributing Co. India Ltd.* (supra), which we have noticed, it was held that sale for use or consumption would mean the

goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, 'sale for consumption' (the meaning which we have placed on the word 'sale') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extra territorial operation of State legislation.

In 20th Century Finance Corporation's case, the Constitution Bench by reference to the definition of "tax on the sale or purchase of goods" (which too has been inserted as clause (29-A) in Article 366 by Sixth Amendment) opined that the situs of sale can be fixed either by the appropriate legislature or by Judge made law and no settled principles for determining situs of sale can be laid down. Further, the State legislature cannot by law, treat sales outside the State and sales in the course of import as "sales within the State" by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature, i.e. Parliament to fix the location of sale by creating legal fiction or otherwise. The, majority has clearly opined that the State where the goods are delivered in the transaction of inter-State sale, cannot levy a tax on the basis that one of the events in the chain has taken place within the State; so also where the goods are in existence and available for the transfer of right to use, there also that State cannot exercise power to tax merely because the goods are located in that State. Then it was observed that in case where goods are not in existence or where there is an oral or implied transfer of the right to use the goods, such transactions may be effected by the delivery of the goods in which case the taxable event would be on the delivery of goods. However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and is consumed simultaneously; the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption. In such a case when the generation takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of C.S.T. Act.

Sale of electricity by NTPCL In both the cases before us, contracts have been entered into between parties to the transaction, that is, the sellers and the buyers (in other States) prior to the generation of electricity. The NTPCL generates electricity and pursuant to these contracts supplies the same from its power stations situated in the States of A.P. or M.P. to the buyers in other States where it is received and consumed. There is no hiatus between generation, sale, supply, transmission, delivery and consumption. The inter-State movement of electricity is pursuant to contracts of sale. Such sales can be held only as inter-State sales.

Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge made law as held by the majority opinion in 20th Century Finance Corporation case, we would like to clarify that none of the two can artificially appoint a situs of sale so as to create

territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-State sale in breach of Section 3 of the CST Act read with Articles 286 (2) and 269(1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate central legislation. But this is exactly what the definition of 'consumer' in Clause (2)(a) of the M.P. Electricity Duty Act, 1949 has done. The definition of consumer has been artificially extended to include any person who receives electrical energy (without regard to its consumption) and also to include a person who, receiving the electrical energy in bulk, forwards it onwards for distribution, (without regard to the fact whether it transmitted outside the State and whether the electricity is or is not consumed within the State). The same definition has been adopted in M.P. Upkar Adhiniyam, 1981. This definition of consumer shall have to be read down as including within it only such persons who receive the electricity for consumption or distribution for consumption within the State. Without such reading down, the definition of 'consumer' would be rendered ultra vires of Articles 286 and 269 of the Constitution read with Section 3 of the Central Sales Tax Act, 1956.

Consequences on free flow of trade Yet another reason why we cannot accept the line of reasoning advanced on behalf of the States of Andhra Pradesh and Madhya Pradesh is that the same runs counter to the scheme of constitutional provisions and specially the Sixth Amendment. As has been found by the Division Bench of Andhra Pradesh High Court in its impugned judgment, if the reasoning suggested on behalf of the State of A.P. was accepted, the State where the dealer supplying the electricity is located and the electricity originates for sale, as also the States in which the purchaser of electricity is located and it is delivered, shall both subject the electrical energy to taxation, by relying on the theory of territorial nexus. Such a situation would be the one which was obtaining in the country with respect to sales tax prior to coming into force of the Constitution and which led to complications and difficulties in administration of sales tax legislation and therefore, was taken care of by the Sixth Amendment. Such multiple taxation would result in hampering free movement of electricity between the States, and therefore, would be prejudicial to freedom of trade, commerce and intercourse throughout the territory of India, and for the unity and integrity of the country. That would give rise to the same situation which was sought to be remedied by the Constitution and the Sixth Amendment.

On behalf of the States of A.P. and M.P., it was submitted that subject of electricity has been specifically dealt with by Articles 287 and 288 of the Constitution and by implication the Articles, other than 287 and 288, should be read as not dealing with electricity. This submission is stated only to be rejected. These articles make some provisions for electricity and water or electricity in the special context dealt with by those articles and do not exclude applicability of other articles where electricity has been dealt with as goods.

For the foregoing reasons, we are of the opinion that no fault can be found with the judgment of the Andhra Pradesh High Court which is affirmed and Civil Appeal No. 3112 of 1990 is dismissed with costs. Civil Writ Petition T.C. No.3 of 1998 is allowed with costs and the demand raised by the Chief Electrical (Electricity Duty) and Chief Electrical Inspector, Government of M.P. vide its letter dated

30.11.1995 is directed to be quashed.

.....CJIJ. (R.C. Lahoti)
.....J. (N. Santosh Hegde)J. (Ruma Pal)
.....J. (Arijit Pasayat) April 22, 2002.