M/S Larsen & Toubro Limited & Anr vs State Of Karnataka & Anr on 26 September, 2013

Author: R.M. Lodha

Bench: Madan B. Lokur, J. Chelameswar, R.M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 8672 OF 2013
(Arising out of SLP(C) No.17741 of 2007)

M/s. Larsen & Toubro Limited & Anr. …… Appellants

Versus

State of Karnataka & Anr. ……Respondents

WITH

CIVIL APPEAL NOS. 8673-8684 OF 2013
(Arising out of SLP(C) Nos. 30581-30592 of 2009)

WITH

CIVIL APPEAL NO. 8685 OF 2013
(Arising out of SLP(C) No.17709 of 2012)

WITH

CIVIL APPEAL NO. 8686 OF 2013
(Arising out of SLP(C) No.17738 of 2012)

WITH

CIVIL APPEAL NO. 8687 OF 2013
(Arising out of SLP(C) No.21052 of 2012)

WITH

CIVIL APPEAL NO. 8688 OF 2013
(Arising out of SLP(C) No.21863 of 2012)

WITH

CIVIL APPEAL NO. 8690 OF 2013
(Arising out of SLP(C) No.26226 of 2012)

WITH

CIVIL APPEAL NO. 8691 OF 2013
(Arising out of SLP(C) No.476 of 2012)

WITH

CIVIL APPEAL NO. 8692 OF 2013
(Arising out of SLP(C) No.29143 of 2012)

WITH

CIVIL APPEAL NO. 8693 OF 2013
(Arising out of SLP(C) No.29145 of 2012)

WITH

CIVIL APPEAL NO. 8695 OF 2013
(Arising out of SLP(C) No.29146 of 2012)

WITH

CIVIL APPEAL NO. 8696 OF 2013
(Arising out of SLP(C) No.29147 of 2012)

WITH

CIVIL APPEAL NO. 8697 OF 2013
(Arising out of SLP(C) No.29148 of 2012)

WITH

CIVIL APPEAL NO. 8698 OF 2013
(Arising out of SLP(C) No.29149 of 2012)

AND

CIVIL APPEAL NO. 8699 OF 2013
(Arising out of SLP(C) No.29151 of 2012)

JUDGMENT

R.M. LODHA, J.

Leave granted in all these special leave petitions.

2. Does the two-Judge Bench decision of this Court in Raheja Development[1] lay down the correct legal position? It is to consider this question that in Larsen and Toubro[2] a two-Judge Bench of this Court has referred the matter for consideration by the larger Bench. In the referral order dated 19.8.2008, the two-Judge Bench after noticing the relevant provisions of the Karnataka Sales Tax Act, 1957 and the distinction between a contract of sale and a works contract made the reference to the larger Bench by observing as follows :

> "We have prima facie some difficulty in accepting the proposition laid down in Para 20 quoted above. Firstly, in our view, prima facie, M/s Larsen & Toubro - petitioner herein, being a developer had undertaken the contract to develop the property of Dinesh Ranka. Secondly, the Show Cause Notice proceeds only on the basis that Tripartite Agreement is the works contract. Thirdly, in the Show Cause Notice there is no allegation made by the Department that there is monetary consideration involved in the first contract which is the Development Agreement.
>
> Be that as it may, apart from the disputes in hand, the point which we have to examine is whether the ratio of the judgment of the Division Bench in the case of Raheja Development Corporation (supra) as enunciated in Para 20, is correct. If the Development Agreement is not a works contract could the Department rely upon the second contract, which is the Tripartite Agreement and interpret it to be a works

> contract, as defined under the 1957 Act. The Department has relied upon only the judgment of this Court in Raheja Development Corporation(supra) case because para 20 does assist the Department. However, we are of the view that if the ratio of Raheja Development case is to be accepted then there would be no difference between works contract and a contract for sale of chattel as a chattel. Lastly, could it be said that petitioner - Company was the contractor for prospective flat purchaser. Under the definition of the term "works contract" as quoted above the contractor must have undertaken the work of construction for and on behalf of the contractor (sic.) for cash, deferred or any other valuable consideration.

According to the Department, Development Agreement is not works contract but the Tripartite Agreement is works contract which, prima facie, appears to be fallacious. There is no allegation that the Tripartite Agreement is sham or bogus.

For the aforestated reasons, we direct the Office to place this matter before the Hon'ble Chief Justice for appropriate directions in this regard, as we are of the view that the judgment of Division Bench in the case of Raheja Development (supra) needs re-consideration by the larger Bench."

3. Of the 26 appeals under consideration before us, 14 are from Karnataka and 12 from Maharashtra. Insofar as Karnataka appeals are concerned, it is appropriate that we take the facts from the leading case being Larsen and Toubro2. The ECC division of Larsen and Toubro (for short, "L&T") is engaged in property development along with the owners of vacant sites. On 19.10.1995, L&T entered into a development agreement with Dinesh Ranka, owner of the land bearing survey numbers 90/1, 91, 92 (Part), 94, 95 and 96/1 (Part) together measuring 34 acres all situated at Kothanur Village, Begur Hobli, Bangalore South Taluk, Bangalore, for construction of a multi-storeyed apartment complex. The owner was to contribute his land and L&T was to construct the apartment complex. After development, 25% of the total space was to belong to the owner and 75% to L&T. A power of attorney was executed by the owner of the land in favour of L&T to enable it to negotiate and book orders from the prospective purchasers for allotment of built up area. Accordingly, L&T entered into agreements of sale with intended purchasers. The agreements provided that on completion of the construction, the apartments would be handed over to the purchasers who will get an undivided interest in the land also. Sale deeds, thus, were executed in favour of the intended purchasers by L&T and the owner.

4. On 12.07.2005, the business premises of L&T were inspected by the Deputy Commissioner of Commercial Taxes (Intelligence-1) South Zone, Koramangala, Bangalore (hereinafter referred to as the 'Deputy Commissioner') and a detailed statement of the Finance Manager was recorded.

5. On 21.12.2005, the Deputy Commissioner called upon L&T to furnish the details of development project. L&T furnished details on 24.07.2005 and 26.09.2005.

6. On 04.10.2005, the Deputy Commissioner served a show cause notice on L&T stating that it was liable to tax as per the decision of this Court in Raheja Development1. L&T responded to the show cause notice and submitted preliminary objections on 10.10.2005. By a further communication

dated 10.11.2005, L&T objected to the assessment of tax for development of projects by it. The L&T inter alia submitted that the development agreement was not a works contract per se on account of the reasons: (a) the agreement was to develop and market flats to customers; (b) the intent and purpose of the agreement was to develop property by the petitioners on the one hand and the land owner on the other; (c) the construction and development of the said land involved no monetary consideration; and (d) the only consideration was that upon the completion of the entire project, L&T would be entitled to 75 per cent of the same.

7. Again on 04.01.2006, the business premises of L&T were inspected and certain documents like agreement copies and other documents relating to the transactions of the sale of flats were seized for the purposes of further investigation and verification.

8. On 02.02.2006, the Deputy Commissioner served upon L&T a further notice proposing to tax the sale of materials used in the construction of flats on the ground that it was entitled to 75 per cent of the share of the projects. L&T filed detailed objections to this notice as well.

9. On 03.07.2006, the Deputy Commissioner issued provisional assessment orders under Section 28(6) of the Karnataka Sales Tax Act, 1957 (for short, 'KST Act') for the years 2000-01 to 2004-05. Along with the provisional orders, the Deputy Commissioner also issued demand notices raising a total demand of Rs. 3,99,28,636/-.

10. Initially, L&T preferred a writ petition before this Court challenging the above demands but that writ petition was withdrawn and a writ petition under Article 226 of the Constitution of India was filed before the Karnataka High Court.

11. The Single Judge of the Karnataka High Court noted that the controversy raised by the L&T was covered by the decision of this Court in Raheja Development1 and, accordingly, dismissed the writ petition on 10.07.2007 by observing as follows:

> "From the aforesaid observations of the Apex Court it is very much clear that as the petitioner No. 1 had entered into an agreement to carry out construction activity on behalf of someone else for cash or for deferred payment or for any other valuable construction, it would be carrying out works contract and therefore would become liable to pay turnover tax on the transfer involved in such work contracts. It is also not in dispute in this matter that the agreement of sale is entered into between the first petitioner and the buyers of the flat even prior to completion of the construction of the building. Under such circumstances, as has been held by the Apex Court in the RAHEJA DEVELOPMENT CORPORATION's Case, the petitioners are liable to pay the turnover tax on the transfer of goods involved in such 'works contract'. In view of the dictum laid down by the recent judgment cited supra, this Court does not find any merit in this writ petition."

> 12. L&T preferred an intra-court appeal. The Division Bench of that Court concurred with the Single Judge and dismissed the writ appeal by expressing its opinion as

follows:

"In our view, so far as the definition of 'work contract' in almost similar situation as in the present case has been well considered by the Hon'ble Supreme Court in the case of K. RAHEJA DEVELOPMENT CORPORATION (supra). The question as to whether that judgment as per Article 141 of the Constitution of India is the law of the land binding on all the Courts in the Country. Prima facie, we find that the facts and circumstances in that case are almost similar to the present case and as such, the ratio laid down in the RAHEJA's Case and relied upon by the learned Single Judge is, in our view, just and proper. So far as the other pronouncements are concerned, if the appellant feels that it is necessary to get the pronouncement in RAHEJA's Case reviewed, it is open for him to approach the Apex Court and this Court cannot substitute its own findings on the questions since the same has already been decided by the Apex Court in RAHEJA's case."

13. Insofar as appeals from Maharashtra are concerned, they arise from the judgment of the Bombay High Court. The Bombay High Court was concerned with the group of matters wherein challenge was laid to the constitutional validity of Section 2(24) of the Maharashtra Value Added Tax Act, 2002 (for short, "MVAT Act") as amended initially by Maharashtra Act XXXII of 2006 and thereafter by Maharashtra Act XXV of 2007 and Rule 58(1A) of the Maharashtra Value Added Tax Rules, 2005 (for short, "MVAT Rules").

14. The Division Bench of the Bombay High Court on examination of rival contentions has, inter alia, held; (a) works contract have numerous variations and it is not possible to accept the contention either as a matter of principle or as a matter of interpretation that a contract for works in the course of which title is transferred to the flat purchaser would cease to be works contract; (b) the provisions of MOFA recognise an interest of the purchaser of the apartment, not only in respect of the apartment which forms the subject matter of the purchase, but also an undivided interest, described as a percentage in the common areas and facilities; (c) the amendment to Section 2(24) clarifies the legislative intent that a transfer of property in goods involved in the execution of works contract including an agreement for building and construction of immovable property would fall within the description of a sale of goods within the meaning of that provision and it brings within the ambit of that expression "transactions of that nature" which are referable to Article 366 (29-A)(b); (d) by amended definition of the expression "sale" in clause

(b)(ii) of the explanation to Section 2(24), the transactions which involve works contract have been covered; (e) the amendment in Section 2(24) does not transgress the boundary set out in Article 366(29-A); (f) Rule 58(1A) of the MVAT Rules provides that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property involved in the execution of the construction contract is also transferred, it is the

latter component which is brought to tax; the value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1); and (g) Rule 58(1A) provides for a measure for the tax by excluding the cost of the land.

15. The Division Bench of the Bombay High Court, thus, found no merit in the challenge to the constitutional validity of Section 2(24) of the MVAT Act and Rule 58(1A) of the MVAT Rules. The trade circulars and the notifications were also found to be legal and consequently writ petitions were dismissed.

16. We have heard learned senior counsel and counsel for the appellants and learned senior counsel for Karnataka and learned Advocate-

General and learned senior counsel for Maharashtra at quite some length.

17. Mr. Rohinton F. Nariman, learned senior counsel for L&T led the arguments on behalf of the appellants. His submission is that Raheja Development1 does not lay down correct law. He submits that insertion of clause 29-A (b) in Article 366 following the 61st Law Commission Report is intended to separate the goods component from the labour and services component of a composite works contract. The amendment does not in any manner undo Gannon Dunkerley-I[3] insofar as that decision defines what a works contract is. In this regard, learned senior counsel extensively referred to the decisions of this Court in Builders' Association[4] and Bharat Sanchar[5]. It is argued by him that in Raheja Development1 it was incorrectly assumed that the definition of works contract was wide although the definition of works contract in KST Act and Madras General Sales Tax Act which was under consideration in Gannon Dunkerley-I3 was identical.

18. Alternatively, it is argued by Mr. Rohinton F. Nariman that if it is accepted that the definition of 'works contract' in KST Act is wide which takes within its fold the contracts that are not commonly understood as works contract then this would be outside Entry 54 List II of the Seventh Schedule of the Constitution for the reason that "works contract" as understood in Gannon Dunkerley-I3 has not in any manner been upset by the constitutional amendment and would have to mean "works contract" as commonly understood.

19. Criticizing the conclusions drawn in paragraph 20 of the judgment in Raheja Development1, it is argued by Mr. Rohinton F. Nariman that these conclusions are incorrect for, (a) the well known tests to determine as to whether a particular contract is a "works contract" or "contract of sale" have not been adverted to; (b) the contract is not read as a whole. Its substance and the main object has not been looked at and one phrase is torn out of context without adverting to any other part of the contract and based on this reasoning the contract is said to be a works contract; (c) though it is noticed that construction/development is to be on payment of a price in various installments but does not draw any conclusion from it; (d) it is noticed that developer has a lien on the property but incorrectly states that the lien is because they are not owners. The lien is obviously so that if monies are not recovered from the prospective flat purchasers, the lien can be exercised, showing thereby that the contract is a contract of an agreement to sell immovable property;

(e) after noticing that developer can terminate the agreement if any one installment is not paid and can forfeit 10% of the amount that has been paid and can ultimately resell the flat, it is held that the presence of such a clause does not mean that the agreement ceases to be a "works contract" without appreciating that such a clause would have no place in a works contract and can only be consistent with the contract for the sale of immovable property inasmuch as termination can take place if the entire consideration for the immovable property is not paid; (f) it is stated that if there is termination but there is no re-sale, there would be no works contract only to that extent which is again wholly incorrect because post termination what happens to a particular flat is of no relevance inasmuch as the prospective flat purchaser goes out of the picture; and (g) the distinction between a flat being constructed and a flat under construction is a distinction without a difference for the reason that the judgment notices that if the agreement is entered into after the flat is already constructed, there would be no 'sale' and no 'works contract'. This is obviously for the reason that the flat has already been developed by the developer using his material and his plan and is sold as such to a purchaser.

20. Mr. Rohinton F. Nariman extensively referred to the decisions of this Court in B.C. Kame[6] and Hindustan Shipyard[7]. With reference to paragraphs 7 to 16, 22 and 24 to 26 in Hindustan Shipyard7, it is submitted that in a somewhat similar fact situation, this Court came to conclusion that construction of various ships for and on behalf of the customer would amount to a 'sale' and not to a 'works contract'.

21. Based on the various clauses of the tripartite agreement, it is argued that the main object of the agreement read as a whole and the substance of the agreement is to sell and convey fraction of the land together with a fully constructed flat only when all installments have been fully paid. The work undertaken is for the joint development of the project as a whole, i.e., work is undertaken by the developer for himself and for the owner. The construction is not carried out for and on behalf of the purchaser, but it is carried out entirely by the owner/developer in order to exploit or get the best price for the land and the structure built thereon from various flat purchasers. The flat is to be sold as a flat and not an aggregate of its component parts. No work is carried out for the purchaser who gets title to the property only after all work is complete. Learned senior counsel argued that the ultimate test would be: if a suit for specific performance is filed by the flat purchaser against the owner/developer, such suit would invariably be for the conveyance of title and not for the construction of a building. Conversely a suit by an owner/developer against the flat purchaser would be for payment of consideration of a flat/fractional interest in the land. Such suit would never be for payment of work done at the behest of the flat purchaser and payment of consideration therefor. It is, thus, submitted that the judgment in Raheja Development1 does not lay down good law and deserves to be overruled.

22. Mr. K.V. Vishwanathan, learned senior counsel for Maharashtra Chamber of Housing Industries elaborately argued based on the following contentions. First, that to attract Article 366(29-A)(b) there has to be a "works contract" and in the process of executing the works contract if certain transfer of property occurs, such transfer would be deemed to be sale. If there is no works contract, the question of applying Article 366(29-A)(b) would not arise. A distinction is drawn between "works" and "works contract". It is contended that an agreement for sale is an agreement to transfer

immovable property as an indivisible whole which will result in the execution of a conveyance. There is no element of works contract involved. Even if for the purpose of complying with the obligations of an agreement for sale, a vendor carries out some works, it is not on account of any works contract. Even if there are some "works" involved, there is no "works contract" between the promoter and purchaser.

23. Secondly, that the applicability of Article 366(29-A) read with Entry 54 of List II will arise only in matters which are otherwise not covered under the ambit of sale and cannot apply to an agreement for sale of immovable property resulting in a conveyance. He pressed into service

(i) test of enforceability (ii) common parlance test (view of the reasonable man) (iii) test of substance of the contract and (iv) assignment test. Insofar as common parlance test and test of substance of the contract are concerned, Mr. K.V. Vishwanathan placed reliance upon Bharat Sanchar5. As regards assignment test, paragraph 36 of the judgment in Builders' Association4 was referred to by the learned senior counsel.

24. Thirdly, that amended definition under Article 366(29-A) has not conferred on the States a larger freedom than what they had before the amendment in regard to their power to levy sales tax under Entry 54 of the State List. Paragraph 40 of the Builders' Association4 is relied upon. It is contended that an agreement to sell entered into between the promoter and purchaser continues to remain an agreement to sell and the provisions of MOFA does not change the nature of such agreement. Reference is made to the decision of this Court in Nahalchand Laloochand[8].

25. And fourthly, that if State's submissions are accepted, Article 366 (29-A)(b) has to be read as "a tax on the transfer of property (whether as goods or in some other form) involving works" which will not only distort the amendment but will render the words "in goods" redundant. Article 366 (29-A)(b) does not provide for such an interpretation. The phrase "in some other form" takes its colour from the preceding words namely, "transfer of property in goods" and "whether as goods". The said phrase "in some other form" cannot and would not mean the transfer of an indivisible immovable property as a whole. Reliance is placed on the decision of this Court in Purshottam Premji[9] to differentiate between a sale and works contract. It is contended that the distinguishing factors that have been laid down in Purshottam Premji9 which were relied on by the Law Commission should be considered as the only tests to differentiate a works contract and a contract for sale.

26. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for Promoters and Builders Association made brief oral submissions which were followed by detailed written submissions. The principal issue, according to him, is, whether the agreement entered into between a promoter/developer and a flat purchaser, pursuant to the provisions of Section 4 read with Rule 5 and Form V of MOFA can be divided into two parts, (i) an agreement between the promoter/developer and the flat purchaser to construct a flat; and (ii) an agreement between the promoter/developer and the flat purchaser to eventually sell the flat so constructed and whether the first part of the said agreement can be treated as a works contract whereby the flat purchaser is accorded the status of a principal employer and the promoter/developer acts as a mere contractor

for him and constructs the flat for and on behalf of the flat purchaser. While conceding that an integral part of the transaction of sale of a flat is the activity of construction of the said flat but the moot question in his view is whether such activity of construction has the characteristics or elements of works contract. Learned senior counsel highlighted the distinguishing features between "works contract" and "contract for sale of goods" and having regard to that it is submitted that the activity of construction undertaken by the promoter/developer cannot be said to be works contract for the reasons, (i) that developer does not construct at the behest of the flat purchaser as on various occasions the flat is constructed without there being any booking for the said flat; (ii) the main intention of the agreement between the promoter/developer and the flat purchaser is the sale of flat and not to appoint the developer as the contractor of the flat purchaser for the purposes of carrying out the construction of the flat for and on behalf of the flat purchaser; (iii) the flat purchaser does not have any role in conceptualizing the project of construction nor does he have any say in the designing and lay-out of the building to be constructed. The flat purchaser does not have any control over the type and standard of the material to be used in the construction of the building. He does not get any right to monitor or supervise the construction activity; (iv) the ownership in the material used in the construction remains with the promoter/developer and the said ownership passes to the flat purchaser only on the eventual conveyance of the flat;

(v) the accretion to the goods happens in the hands of the promoter/developer and not when the flat is conveyed to the flat purchaser; and (vi) the construction linked payment schedule is nothing but a method of payment in installments.

27. It is the submission of Dr. Abhishek Manu Singhvi that Article 366(29-A)(b) by a deeming fiction only deems the transfer of property in goods in execution of a works contract as a sale but the said amendment does not contemplate a deemed transfer of goods which actually does not happen at the time of execution of the contract. The provisions of MOFA do not change the character of the transaction entered into between the promoter/developer and the flat purchaser from that of a pure sale of immovable property to a works contract. Even in the absence of a statute like MOFA, the obligations and restrictions prescribed therein would still be present as part of obligations under the Indian Contract Act/Transfer of Property Act and its penalties for breaching the same would still be applicable under the penal statutes.

28. While referring to Section 2(24) MVAT Act, it is submitted by the learned senior counsel that a plain reading of amended explanation b(ii) to Section 2(24) of that Act will show that the said provision has not brought within its scope transactions which are not in their substance works contract. The amendment brought in explanation b(ii) to Section 2(24) is merely explanatory in nature. Even after the amendment the transaction in which there is transfer of property in goods has to be works contract. The amendment cannot be interpreted to mean that transfer of property in goods in execution of any agreement even if it is not a works contract has now been included in the definition of sale. Such interpretation will render the provision unconstitutional. Learned senior counsel submits that the manner in which the State Government is expanding scope of Section 2(24) on the basis of the decision of this Court in Raheja Development1, it has rendered the said provision unconstitutional. According to Dr. Abhishek Manu Singhvi, Raheja Development1 therefore needs to be reconsidered and overruled.

29. As regards constitutional validity of the provisions of Rule 58(1) and 58(1A) of MVAT Rules, it is submitted that these Rules and Rule 58(1-A) of the 2005 Rules include an element of profit earned by a promoter/developer on the sale of a flat. There are no provisions to take the profit element from arriving at the value of goods. As a result income earned by the promoter/developer from the profit on sale of the flat also gets included in the value of goods and eventually the said income gets taxed. Imposition of such tax on the income of the promoter/developer is beyond the legislative competence of the State Government.

30. Without prejudice to the above arguments, it is firstly submitted that assuming that the activity of construction undertaken by the developer is a works contract then the same would be a works contract only from the stage when the developer enters into a contract with the flat purchaser. Only the value addition made to the goods transferred after the agreement is entered into with the flat purchaser can be made chargeable under MVAT Act. VAT cannot be charged on the entire sale price as described in the agreement entered into between developer and flat purchaser as sought to be done under the composition scheme. Secondly, it is submitted that assuming that the agreement entered into between the developer and the flat purchaser has two components, namely, a works contract and sale of proportionate share in the land then the stamp duty on such transaction should be levied under Article 25 (stamp duty for conveyance) only on the component sale of proportionate share in the land and the stamp duty on the value of construction carried out ought to be charged under Article 63 (stamp duty for works contract).

31. Mr. N. Venkatraman, learned senior counsel for Builders Association while highlighting the background in which clause (29-A) came to be inserted in Article 366 and drawing distinction between a conventional sale and a works contract submits that 'transfer' is imminent and indispensable requirement in both but in the case of a conventional sale, property in goods gets transferred as intended by the parties while in a works contract, property in goods get transferred through accretion. Few illustrations have been referred to by him and it is submitted that 'test of accretion' which is sine qua non for works contract is not satisfied in the agreements under consideration. L&T II[10] is referred which says, "once the work is assigned by L&T to its sub-contractor, L&T ceases to execute the works contract in the sense contemplated by Article 366 (29-A)(b) because property passes by accretion and there is no property in goods with the contractor which is capable of a re-transfer whether as goods or in some other form".

32. Learned senior counsel contends that when ultimately the constructed flat is transferred or sold, it becomes a sale of an immovable property at which point of time the question of transfer on accretion does not arise. The transfer of goods has to take place in the course of the construction of a building before becoming an immovable property though the contract may be indivisible contract for construction of a building in the form of an immovable property. Once it becomes an immovable property, Article 366(29-A)(b) cannot be pressed into service to such a transaction. He submits that an agreement to sell is not a sale in its conventional sense and, therefore, cannot be a deemed sale also.

33. It is submitted by Mr. N. Venkatraman that Section 2(24) of MVAT Act and Rules 58 and 58(1A) of MVAT Rules seek to redefine the taxable event by moving away from theory of accretion to

transfer of immovable property by way of conveyance and that renders these provisions unconstitutional.

34. Mr. Vinod Bobde, learned senior counsel appearing on behalf of Promoters and Builders Association, Nasik argues that after insertion of clause 29-A in Article 366, the works contract which was an indivisible one has by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour. Thus, the goods component is exigible to sales tax. However, the amendment has not enlarged the meaning of "works contract" as commonly understood. With reference to Section 2(24) explanation (b)(ii) of the MVAT Act, learned senior counsel submits that this provision aims at taxing the sale of goods involved in the execution of a works contract. In the case of a building contract on land, the contractor must be carrying out the building activity for consideration which obviously means that he should be receiving consideration from the person who has engaged him as contractor. The provision does not cover an owner or developer of land who is constructing a building for the purpose of ultimately selling the flats therein to purchasers. Such owner or developer does not receive any consideration from anyone for carrying out of the building activity; what he receives is simply the sale price of the flats from the purchasers. According to Mr. Vinod Bobde, the provisions so read would not transgress Article 366 (29-A) but if it is read as was done in Raheja Development1, it would be unconstitutional.

35. It is argued by Mr. Vinod Bobde that an agreement of sale whether simplicitor or in Form V under the MOFA is not a "works contract". It only settles terms for the sale of property and the sale ultimately takes place in pursuance thereof unless the contract is terminated. The "works" component and "goods" component are totally absent in the agreement. There is no question of taxing sale of goods in an agreement of sale. The buyer does pay the sales tax on the purchase of goods/material used in construction of the building. Such goods/materials are purchased from the dealers registered under the Act. What the taxing authorities seek to do by treating an agreement for sale of immovable property, namely, flat to be a "works contract" within the meaning of Section 2(24), explanation

(b)(ii) is to again tax the goods used in the construction of the building. This cannot be done because the builder is not building as the contractor for the flat purchaser but for himself, and he cannot possibly transfer such goods to himself.

36. Mr. Vinod Bobde submits that the High Court's view that the element of sale of immovable property can be there in a works contract is clearly erroneous. The agreement of sale in Form V under the MOFA is not an agreement simpliciter and the aspect that MOFA creates the right and interest in the flat as a measure for protecting prospective flat purchasers is irrelevant. With reference to Entries 25, 5 and 63 of the Bombay Stamp Act, 1958 which provide for stamp duty on conveyance including an agreement for sale of property, agreement or its record or memorandum of agreement and works contract respectively, it is submitted that State has been levying stamp duty on agreement of sale under Entry 25 and not under Entry 63 and hence the State does not consider an agreement for sale to be a works contract.

37. Mr. Shivaji M. Jadhav learned counsel appearing for one of the appellants has broadly followed the above submissions. He submits that expression "in some other form" in Article 366(29-A)(b) does not mean immovable property but some other form of goods being movable property. According to him, artificial rules or other enactments like MOFA, Bombay Stamp Act would not be relevant at all in ascertaining whether transfer of property in goods has taken place in the execution of works contract. Model agreement Form V in MOFA does not indicate that construction of a flat by the developer/promoter is being carried on for and on behalf of the purchaser of the flat. Rather it supports the view that buyer is interested in what is constructed as a flat and not the building material. MOFA ensures that the theory of accretion is not applicable and the flat purchaser is not left at the mercy of the builder.

38. Learned counsel also submits that if Section 2(24) explanation b(ii) of the MVAT Act is read in the manner suggested by this Court in Raheja Development1, such provision is rendered unconstitutional. As regards Rule 58(1) and Rule 58 (1-A), the submission of the learned counsel is that these Rules suffer from various infirmities and are unable to carry out the objectives of MVAT Act.

39. In the counter arguments advanced on behalf of the two States – Karnataka and Maharashtra - Raheja Development1 has been stoutly defended. Mr. K.N. Bhat, learned senior counsel for Karnataka submits that view taken in Raheja Development1 is correct and needs no reconsideration – both on merits as well as on the basis of binding precedents on the principles governing reconsideration of an earlier decision. He submits that Article 366(29-A) uses the phraseology employed in Entry 54 of List II that reads, "taxes on sale or purchase of goods ...." For the purpose of Entry 54 List II, "taxes on the sale or purchase of goods" includes "tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract". Transfer of property in goods is the essence of definition of 'sale' in Section 4 of the Sale of Goods Act. Article 366(29-A)(b) can be rephrased as "a tax on the sale of goods involved in the execution of a works contract" and in any case by the deeming fiction incorporated in the above provision, it shall be deemed to be a sale of those goods by the person making the transfer and a purchase by a person to whom such transfer is made. The taxable event is the deemed sale of goods involved in the execution of works contract. Article 366 (29- A) has been inserted to remedy the situation arising from the decision in the Gannon Dunkerley-I3 where attempt to levy sales tax on the sale of goods involved in the execution of works contract was held to be unconstitutional. This was on the basis that a works contract could not be dissected into contract for "works and services" and contract for "sale of goods". Mr. K.N. Bhat submits, relying upon para 41 in Builders' Association4, that definition of 'works contract' KST Act does not go beyond what is contemplated in the Constitution.

40. Mr. K.N. Bhat's submission is that in order to sustain levy of sales tax on the goods deemed to have been sold in the execution of works contract the following conditions are to be met, (a) there must be works contract, i.e., any contract to do construction, fabrication and the like;

(b) the goods deemed to have been sold should have been involved in the execution of a works contract; and (c) the property in those goods must be transferred to a third party either as goods or in some other form. The taxable event is deemed sale. It is irrelevant whether transferee was a party

to the works contract. All that is required to be enquired into is as to whether the goods were involved in the execution of the works. By Forty- sixth Constitutional Amendment, the effect of Gannon Dunkerley-I3 has been neutralized. Now that the works contract which was indivisible according to Gannon Dunkerley-I3 are divisible and the goods involved in the execution of works contract that were then not taxable are now taxable.

41. The whole idea by insertion of clause 29-A(b) in Article 366, Mr. K.N. Bhat submits, is to make the materials used in the building activity liable to sales tax. Any other interpretation will be contrary to the two decisions of the Constitution Benches in Builders' Association4 and Gannon Dunkerley-II[11]. So construed works contract simply means a construction activity. If the building is retained by the builder himself, there is no deemed sale.

42. Mr.K.N. Bhat, however, submits that the statement of law in Raheja Development1 that when a completed building is sold, there is no works contract and, therefore, no liability to tax, may not be correct statement of law. If the building was intended for sale and is in fact sold, tax is attracted to the deemed sale. Even in such cases, goods used in the construction are deemed to have been sold by the builder (dealer) to the purchaser.

43. It also urged by Mr. K.N. Bhat that in the referral order, the Bench has entertained certain doubts in respect of the decision of this Court in Raheja Development1 . However, such doubts that a better view was possible is not good enough to reconsider the decision. Relying upon decisions of this Court in Gannon Dunkerley-II11 and the earlier decision in Keshav Mills[12], he submits that while recommending reconsideration of an earlier decision, the Bench must first come to the conclusion that the earlier decision was clearly wrong for the reasons stated. According to him, within the settled standards, recommendation to consider Raheja Development1 does not fall. Moreover, since Raheja Development1 in May, 2005 almost all States have modified their laws in line with Raheja Development1 and the need for change in a settled practice is not made out.

44. Mr. Darius Khambata, learned Advocate General and Mr. Shekhar Naphade, learned senior counsel advanced arguments on behalf of Maharashtra. It is argued that after insertion of Article 366 (29- A)(b) in the Constitution, the transfer of movable property in a works contract is deemed to be sale even though it is not a sale as per the Sale of Goods Act. The works contract is now divisible. Article 366(29-A)(b) clarifies that the transfer of the goods may be as goods or in some other form. Therefore, the goods may remain as goods or cease to be goods, i.e., they may merge into immovable property. In this regard, extensive reference has been made to Builders' Association4 and it is submitted that the same submissions made by the States which were rejected by this Court in Builders' Association4 are now sought to be raised almost on similar lines by the appellants which have been rightly rejected by the High Court.

45. Learned Advocate General and learned senior counsel for Maharashtra submit that the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. The expression "works" is extremely wide and can either mean the act of bestowing labour or that on which the labour is bestowed. In this regard, the two decisions of this Court (i) Dewan Joynal Abedin[13] and (ii) Kartar Singh[14] have been referred. It is submitted that the term

"works" would include the final product and, therefore, a works contract cannot be confined to a contract to provide labour and services but is a contract for undertaking or for bringing into existence some "works". Nothing in Article 366(29-A)(b) limits the term "works contract". Although, works contract usually have only two elements, i.e., labour and services as well as sale of goods but the addition of few other elements does not denude such contract being works contract. It is possible that there could be a works contract coupled with the sale of immovable property. The transaction does not cease to be a works contract merely because it may include other obligations.

46. Learned Advocate General argues that even in the case of a works contract, the ownership of the goods need not pass only by way of accretion or accession to the owner of the immovable property to which they are affixed or upon which the building is built; property can pass under the terms of a contract or by statute. He submits that the tests laid down in judgments prior to Forty-sixth Constitutional Amendment for determining whether a contract is a works contract or a sale of goods are no longer applicable. There is no question of ascertaining the dominant intention of the contract now since the sale of goods element is a deemed sale under Article 366(29-A)(b) and can be taxed separately. Hindustan Shipyard7 was distinguished and it was submitted that in Associated Cement[15] a three- Judge Bench of this Court has overruled the decision in Rainbow Colour Lab[16] and it has been expressly noted that cases such as Hindustan Shipyard7 relate to the situation prior to Forty-sixth Amendment where the court had no jurisdiction to bifurcate a works contract and impose sales tax on the transfer of property in goods involved in the execution of the contract. Reference was also made to a decision of this Court in P.N.C. Construction[17]. According to learned Advocate General, it has now become possible for the States to levy sales tax on the value of the goods involved in the works contract in the same way in which the sales tax was leviable on the price of the goods supplied in a building contract. This is where the concept of "value addition" comes in. It is on account of Forty- sixth Amendment to the Constitution that the State Government is empowered to levy sales tax on the contract value which earlier was not possible.

47. Mr. Darius Khambata submits that a composite contract comprising both a works contract and a transfer of immovable property does not denude it of its character as a works contract. According to him, Article 366(29-A)(b) provides for a situation where the goods are transferred in the form of immovable property. He referred to an Australian case, M.R. Hornibrook[18] in this regard which has been approved by this Court in Builders' Association4.

48. Learned Advocate General has also pressed into service the aspect theory of legislation. His submission is that different aspects of the same transaction can involve more than one taxable event. There is nothing to prevent the taxation of different aspects of the same transaction as separate taxable events. This would not constitute a splitting of an indivisible contract. Reference is made to a decision of this Court in Federation of Hotel & Restaurant[19]. The submission of the learned Advocate General is that transfer of immovable property cannot be taxed as a sale of goods but there is no constitutional bar to tax only the sale of goods element and separately tax the transfer of immovable property. Taxing the sale of goods element in a works contract under Article 366 (29-A)(b) read with Entry 54 List II is permissible, provided the tax is directed to the value of the goods and does not purport to tax the transfer of immovable property.

49. Stoutly defending the impugned judgment of the Bombay High Court, learned Advocate General submits that Section 2(24) explanation b(ii) of MVAT Act has been rightly held to be constitutional as the provisions in the MVAT Act offer diverse options for valuation of the sale of goods element in a works contract. Each of these options is consistent with the methods approved of by this Court in Gannon Dunkerley-II11.

50. As regards challenge to the constitutional validity of Rule 58A and Rule 58(1A), it is submitted by learned Advocate General that these provisions are consistent with the principles laid down in Gannon Dunkerley- II11. The measure of tax is not determinative of its essential character or of the competence of the legislature. He sought to dispel the impression that Rule 58(1A) may result in double taxation. Distinguishing the decision of this Court in Larsen & Toubro-II[20], learned Advocate General submits that the observations made in para 19 does not apply to Maharashtra inasmuch as Section 45(4) of the MVAT Act ensures that it is either the builder or the sub-contractor who pays the tax (being treated as one and jointly/severally liable). In any case all claims of alleged double taxation will be determined in the process of assessment of each individual case.

51. Highlighting the MOFA agreement in prescribed Form V, learned Advocate General argues that the clauses therein indicate that it comprises of a works contract along with the agreement for sale. There is no reason to deny the applicability of Article 366(29-A) to such a works contract. His argument is that sale of goods element in the works contract contained in a MOFA agreement is taxable under Section 2(24) explanation b(ii) of the MVAT Act. As long as there is an obligation to construct under the agreement between the promoter and the flat purchaser (in the case of Maharashtra being an agreement under the MOFA) the deemed sale of goods involved in the execution of such a works contract can be taxed even after incorporation of the goods in the works and when the property passes as between the promoter and the flat purchaser. It is submitted that what is at issue before this Court is not the determination of when the taxable event takes place but the exigibility to tax of a deemed sale of goods in a composite contract.

52. Prior to Forty-sixth Amendment in the Constitution, levy of sales tax on the sale of goods involved in the execution of the works contract was held to be unconstitutional in Gannon Dunkerley-I3. That was a case where the assessee (Gannon Dunkerley) was carrying on business as engineers and contractors. Its business consisted mainly of execution of contracts for construction of buildings, bridges, dams, roads and structural contracts of all kinds. During the assessment year under consideration, the return filed by the assessee showed as many as 47 contracts most of which were building contracts which were executed by it. From the total of the amount which the assessee received in respect of sanitary contracts and other contracts 20 per cent and 30 per cent respectively were deducted for labour and the balance was taken as the turnover of the assessee for the assessment year in question. Sales tax was levied on the said balance treating it as taxable turnover under the Madras General Sales Tax Act, 1939. Assessee questioned the levy of sales tax on the ground that there was no sale of goods as understood in India and, therefore, no sales tax could be levied on any portion of the amount which was received by the assessee from the persons for whose benefit it had constructed buildings. The Madras High Court concluded that the transactions in question were not contracts for sale of goods as defined under the provisions of the Sale of Goods Act, 1930 which was in force on the date on which the Constitution came into force and, therefore,

the assessee was not liable to pay sales tax on the amounts received by it from the persons for whom it had constructed buildings during the year of assessment. It is from this judgment that the matter reached this Court. The Constitution Bench of this Court held that in a building contract where the agreement between the parties was that the contractor should construct the building according to the specifications contained in the agreement and in consideration received payment as provided therein, there was neither a contract to sell the materials used in the construction nor the property passed therein as movables. It was held that in a building contract which was one (entire and indivisible) there was no sale of goods and it was not within the competence of the Provincial State Legislature to impose tax on the supply of the materials used in such a contract treating it as a sale. The Constitution Bench said, ".....when the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle quicquid plantatur solo, solo cedit, and it vests in the other party not as a result of the contract but as the owner of the land. Vide Hudson on Building Contracts, 7th Edn., p. 386....." It was further stated, ".....that exception does not apply to buildings which are constructed in execution of a works contract, and the law with reference to them is that the title to the same passes to the owner of the land as an accretion thereto. Accordingly, there can be no question of title to the materials passing as movables in favour of the other party to the contract....."

53. In Gannon Dunkerley-I3, this Court held that in a building contract which was one, entirely indivisible, there was no sale of goods and it was not within the competence of the provincial State legislature to impose tax on the supply of materials used in such a contract treating it as a sale. The above statement was founded on the premise that the works contract was a composite contract which is inseparable and indivisible. Entry 48 of List II of Schedule Seven of the Government of India Act, 1935 was under consideration before this Court in Gannon Dunkerley-I3. It is observed that the expression "sale of goods" in that entry has the same meaning as the said expression had in the Sale of Goods Act, 1930. In other words, the essential ingredients of sale of goods are (i) an agreement to sell movables for a price and (ii) property passing therein pursuant to that agreement.

54. The problems connected with powers of States to levy tax, inter alia, on goods involved in execution of works contract following Gannon Dunkerley-I3 was elaborately examined by the Law Commission of India. In its 61st Report, Chapter 1A, the Law Commission specifically examined the taxability of works contract. The Law Commission noted the essential nature and features of the building contracts and the difference between contract of works and contract for sale. It examined the question whether the power to tax indivisible contracts of works should be conferred on the States. The Law Commission suggested three alternatives (a) amendment in the State List, Entry 54, or (b) adding a fresh entry in the State List, or

(c) insertion in Article 366 a wide definition of "sale" so as to include works contract. It preferred the last one, as, in its opinion, this would avoid multiple amendments.

55. Having regard to the above recommendation of the Law Commission, the Constitution Bill No.52 of 1981 was introduced in the Parliament.*

56. The Parliament then enacted the Constitution (Forty-sixth Amendment) Act, 1982 which received the assent of the President on 02.02.1983. Accordingly, clause 29-A was inserted in Article 366 of the Constitution which is set out as below.**

57. Following the above amendment in the Constitution, the sales tax legislations in various States were amended and provisions were made for imposition of sales tax in relation to works contract. The constitutional validity of the Forty-sixth Amendment by which the legislatures of the States were empowered to levy sales tax on certain transactions described in clauses (a) to (f) of clause 29-A of Article 366 of the Constitution as well as the amendments made in the State legislations were challenged in Builders' Association4. The Constitution Bench of this Court upheld the constitutionality of the Forty-sixth Amendment. The Court observed that the object of the new definition introduced in clause 29-A of Article 366 of the Constitution was to enlarge the scope of the expression "tax of sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope any transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f). The Constitution Bench*** explained that clause 29-A refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods – whether as goods or in some other form. A transfer of property in goods under sub-clause (b) of clause 29-A is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by a person to whom such transfer was made.

58. Article 286 puts certain restrictions upon the power of the State to enact laws concerning imposition of sales tax. It lays down that 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) outside the State, or (b) in the course of import of the goods into, or export of the goods out of the territory of India. Sub-clause (2) of Article 286 enables the Parliament to enact law formulating principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). As regards inter-state trade and commerce, clause (3) puts two restrictions. It provides that any law of a State shall, insofar as it imposes, or authorises the imposition of (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-state trade or commerce; (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) and sub-clause (d) of clause 29-A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of tax as the Parliament may by law specify. Clause (3) was substituted by Constitution Forty-sixth Amendment Act, 1982 with effect from 02.02.1983.

59. Clause 29-A was inserted in Article 366 by the Forty-sixth Amendment with effect from 02.02.1983. Entry 54 of List II (State List) enables the State to make laws relating to taxes on the sale or purchase of goods other than the newspapers, subject to the provisions of Entry 92-A of List I. Entry 63 of List II enables the States to provide rates of stamp duty in respect of documents other than those specified in provisions of List I with regard to the rates of stamp duty. Entry 92-A of List I deals with 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. Entry 6 of List III deals with the

subjects, "transfer of property other than the agricultural land; registration of deeds and documents".

60. It is important to ascertain the meaning of sub-clause (b) of clause 29-A of Article 366 of the Constitution. As the very title of Article 366 shows, it is the definition clause. It starts by saying that in the Constitution unless the context otherwise requires the expressions defined in that article shall have the meanings respectively assigned to them in the article. The definition of expression "tax on sale or purchase of the goods" is contained in clause (29-A). If the first part of clause 29-A is read with sub-clause (b) along with latter part of this clause, it reads like this: tax on the sale or purchaser of the goods" 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 and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. The definition of "goods" in clause 12 is inclusive. It includes all materials, commodities and articles. The expression, 'goods' has a broader meaning than merchandise. Chattels or movables are goods within the meaning of clause 12. Sub-clause (b) refers to transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The expression "in some other form" in the bracket is of utmost significance as by this expression the ordinary understanding of the term 'goods' has been enlarged by bringing within its fold goods in a form other than goods. Goods in some other form would thus mean goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. In other words, goods which have by incorporation become part of immovable property are deemed as goods. The definition of 'tax on the sale or purchase of goods' includes a tax on the transfer or property in the goods as goods or which have lost its form as goods and have acquired some other form involved in the execution of a works contract.

61. Viewed thus, a transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

62. The States have now been conferred with the power to tax indivisible contracts of works. This has been done by enlarging the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution. Accordingly, the expression "tax on the sale or purchase of goods" in Entry 54 of List II of Seventh Schedule when read with the definition clause 29-A, includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract. The taxable event is deemed sale.

63. Gannon Dunkerley-I3 and few other decisions following Gannon Dunkerley-I3 wherein the expression "sale" was given restricted meaning by adopting the definition of the word "sale" contained in the Sale of Goods Act has been undone by the Forty-sixth Constitutional Amendment so as to include works contract. The meaning of sub-clause (b) of clause 29-A of Article 366 of the Constitution also stands settled by the Constitution Bench of this Court in Builders' Association4. As a result of clause 29-A of Article 366, tax on the sale or purchase of goods may include a tax on the transfer in goods as goods or in a form other than goods involved in the execution of the works

contract. It is open to the States to divide the works contract into two separate contracts by legal fiction: (i) contract for sale of goods involved in the works contract and (ii) for supply of labour and service. By the Forty-sixth Amendment, States have been empowered to bifurcate the contract and to levy sales tax on the value of the material in the execution of the works contract.

64. Whether contract involved a dominant intention to transfer the property in goods, in our view, is not at all material. It is not necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods and rather it is the rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if it otherwise has elements of works contract. The view taken by a two-Judge Bench of this Court in Rainbow Colour Lab16 that the division of the contract after Forty-sixth Amendment can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer of property takes place as an incident of contract of service is no longer good law, Rainbow Colour Lab16 has been expressly overruled by a three-Judge Bench in Associated Cement15.

65. Although, in Bharat Sanchar5, the Court was concerned with sub- clause (d) of clause 29-A of Article 366 but while dealing with the question as to whether the nature of transaction by which mobile phone connections are enjoyed is a sale or service or both, the three-Judge Bench did consider the scope of definition in clause 29-A of Article 366. With reference to sub-clause (b) it said: "……. sub-clause (b) covers cases relating to works contract. This was the particular fact situation which the Court was faced with in Gannon Dunkerley-I3 and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in Gannon Dunkerley-I3 was directly overcome". It then went on to say that all the sub-clauses of Article 366(29-A) serve to bring transactions where essential ingredients of a 'sale' as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase or sale for the purposes of levy of sales tax.

66. It then clarified that Gannon Dunkerley-I3 survived the Forty- sixth Constitutional Amendment in two respects. First, with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate and second, the dominant nature test would be confined to a composite transaction not covered by Article 366 (29-A). In other words, in Bharat Sanchar5, this Court reiterated what was stated by this Court in Associated Cement15 that dominant nature test has no application to a composite transaction covered by the clauses of Article 366(29-A). Leaving no ambiguity, it said that after the Forty-sixth Amendment, the sale element of those contracts which are covered by six sub-clauses of clause 29-A of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying.

67. In view of the statement of law in Associated Cement15 and Bharat Sanchar5, the argument advanced on behalf of the appellants that dominant nature test must be applied to find out the true nature of transaction as to whether there is a contract for sale of goods or the contract of service in a composite transaction covered by the clauses of Article 366 (29-A) has no merit and the same is

rejected.

68. In Gannon Dunkerley-II11, this Court, inter alia, established the five following propositions : (i) as a result of Forty-sixth Amendment the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on par with a contract containing two separate agreements; (ii) if the legal fiction introduced by Article 366 (29-A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services; (iii) in view of sub-clause (b) of clause 29-A of Article 366, the State legislatures are competent to impose tax on the transfer of property in goods involved in the execution of works contract. Under Article 286(3)(b), Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidents of such tax. This does not mean that the legislative power of the State cannot be exercised till the enactment of the law under Article 286(3)(b) by the Parliament. It only means that in the event of law having been made by Parliament under Article 286(3)(b), the exercise of the legislative power of the State under Entry 54 in List II to impose tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29-A) of Article 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law; (iv) while enacting law imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Article 366 (29-A)(b), it is permissible for the State legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of the inter-state trade or commerce under Section 3 of the Central Sales Tax Act or outside under Section 4 of the Central Sales Tax Act or sale in the course of import or export under Section 5 of the Central Sales Tax Act; and (v) measure for the levy of tax contemplated by Article 366 (29-A)(b) is the value of the goods involved in the execution of a works contract. Though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. Since, the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works and not the cost of acquisition of the goods by the contractor.

69. In Gannon Dunkerley-II11, sub-section (3) of Section 5 of the Rajasthan Sales Tax Act and Rule 29(2)(1) of the Rajasthan Sales Tax Rules were declared as unconstitutional and void. It was so declared because the Court found that Section 5(3) transgressed the limits of the legislative power conferred on the State legislature under Entry 54 of the State List. However, insofar as legal position after Forty-sixth Amendment is concerned, Gannon Dunkerley-II11 holds unambiguously that the States have now legislative power to impose tax on transfer of property in goods as goods or in some other form in the execution of works contract.

70. The Forty-sixth Amendment leaves no manner of doubt that the States have power to bifurcate the contract and levy sales tax on the value of the material involved in the execution of the works contract. The States are now empowered to levy sales tax on the material used in such contract. In other words, clause 29-A of Article 366 empowers the States to levy tax on the deemed sale.

71. Now, if by legal fiction provided in clause (29-A)(b) of Article 366, the works contract becomes separable and divisible, one for the materials and the other for services and for the work done, whatever has been said by this Court in Gannon Dunkerley-I3 with regard to the definition of works contract in Section 2(i) of the Madras General Sales Tax Act pales into insignificance insofar as ambit and scope of the term "works contract" within the meaning of Article 366(29-A) is concerned. To say that insertion of clause (29-A) in Article 366 has not undone Gannon Dunkerley-I3 in any manner, in our view, is not correct. The narrow meaning given to the term "works contract" in Gannon Dunkerley-I3 now no longer survives.

72. There is no doubt that to attract Article 366(29-A)(b) there has to be a works contract but then what is its meaning. The term "works contract" needs to be understood in a manner that the Parliament had in its view at the time of Forty-sixth Amendment and which is more appropriate to Article 366(29-A)(b).

73. The ordinary dictionary meaning of the word "work" means a structure or apparatus of some kind; architecture or engineering structure, a building edifice. When it is used in the plural, i.e., as works, it means architectural or engineering operations, a fortified building, a defensive structure, fortification or any of the several parts of such structures. In Webster Comprehensive Dictionary, International Edition the term "work" is stated to be, ... (2) that upon which labor is expended; an undertaking task. (3) that which is produced by or as by labor, specifically, an engineering structure;..... In the same dictionary, the term "works" is stated as a manufacturing establishment including buildings and equipment.

74. In Radha Raman[21], Allahabad High Court stated (although in the context of Section 40 of the Land Acquisition Act, 1894) that the "work" has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural the word certainly means some outstanding or important result of the labour that has been bestowed and large industrial and scientific establishments are called "works".

75. Hudson's 'Building Engineering Contracts', Eleventh edition, Volume 1, for the purposes of that book, starts by saying that a building or engineering contract may be defined as an agreement under which a person (called builder or contractor) undertakes for reward to carry out for another (building owner or employer), works of building or civil engineering character. It continues to say that in the typical case, the work will be carried out upon the land of the employer or building owner, though in some special cases obligations to build may arise by contract where this is not so, for example, under building leases and contracts for the sale of land with a house in the course of erection upon it. The above statement by Hudson indicates that in a typical case work (structure, building etc.) will be carried out upon the land of the employer or building owner though in some special cases an obligation to build may arise by contract where this is not so. Hudson gives an

example of building leases and contracts for the sale of land with a house in the course of erection upon it.

76. In our opinion, the term 'works contract' in Article 366(29- A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. The Parliament had such wide meaning of "works contract" in its view at the time of Forty-sixth Amendment. The object of insertion of clause 29-A in Article 366 was to enlarge the scope of the expression "tax of sale or purchase of goods" and overcome Gannon Dunkerley- I3. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term 'works contract'. Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. Learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services above. The Parliament had all genre of works contract in view when clause 29-A was inserted in Article 366.

77. The difference between a contract for work (or service) and a contract for sale (of goods) has come up for consideration before this Court on more than one occasion. Before we consider some of the decisions of this Court in this regard, it is of interest to refer to two old decisions of English courts. In Lee[22], it was laid down that if a contract would result in the transaction of property in goods from one party to another then it must be a contract of sale.

78. However, the statement of law in Lee21 did not find favour in Robinson[23] where it was held that if the substance of the contract required skill and labour for the production of the articles then it would not make any difference that there would pass some materials in addition to the skill.

79. In Chandra Bhan Gosain[24], this Court exposited that for finding out whether a contract is one of work done and materials found or one for sale of goods depends on its essence. If not of its essence that a chattel should be produced and transferred as a chattel, then it may be a contract for work done and materials found and not a contract for sale of goods.

80. In Purshottam Premji9, the difference between a contract for work and a contract for sale was explained like this: 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 its property. In a case of 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 other party for price. Mere transfer of property in goods used in the performance of the contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. Ultimately the true effect of an accretion made pursuant to a contract has to be judged, not by an artificial rule that the accretion may be presumed to have become by virtue of affixing to a chattel of part of that chattel but from the intention of the parties to the contract.

81. The factors highlighted in Purshottam Premji9 which distinguish a contract for work from a contract for sale are relevant but not exhaustive. It is not correct to say that these factors should be considered as the only factors to differentiate a works contract and a contract for sale. In our view, there are not and there cannot be absolute tests to distinguish a sale and works contract.

82. This Court in Associated Hotels[25], stated that the determination as to whether the contract involved in a transaction constitutes a contract of sale or a contract of work or service depends in each case upon its facts and circumstances. Mere passing of property in article or commodity during the course of the performance of the transaction does not render it a transaction of sale. For even in a contract purely of work or service, it is possible that articles may have to be used by the person executing the work and property in such cases articles or materials where passed to the other party. That would not necessarily convert the contract into one of sale of those materials. It is stated in Associated Hotels25 that in every case the Court will have to find out what is the primary object of the transaction and the intention of the parties while entering upon it. It has been clarified that in some cases it may be that even while entering into a contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction will not be one and indivisible but will fall into the two separate agreements one of work or service and the other of sale.

83. Halsbury's Laws of England, Third Edition, Vol. 41, para 603, while distinguishing a contract of sale from a contract for work and labour, has highlighted the test thus: whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel.

84. In B.C. Kame6, the Court following Associated Hotels24 observed that determination of the question whether a contract is a contract for 'work and labour' or a contract for 'sale' was not free from difficulty, particularly, when the contract is a composite one. Having said that the Court applied the test stated in Halsbury's Laws of England.

85. In Hindustan Aeronautics[26], the Court noted the difference between contract for service and contract for sale of goods in these words:

> "13. It is well settled that the difference between contract of service and contract for sale of goods, is, that in the former, there is in the person performing work or rendering service no property in the things produced as a whole notwithstanding that a part or even the whole of materials used by him had 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 some time before delivery and the property therein passed only under the contract relating thereto to the other party for price. It is necessary, therefore, in every case for the courts to find out whether in essence there was any agreement to work for a stipulated consideration....."

86. The Court went on to say further in Hindustan Aeronautics25 as follows;

"18. It cannot be said as a general proposition that in every case of works contract, there is necessarily implied the sale of the component parts which go to make up the repair. That question would naturally depend upon the facts and circumstances of each case. Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials....."

87. In Kone Elevators[27], the Court again highlighted the tests to distinguish a works contract and a contract for sale of goods. The Court said;

"5. It can be treated as well settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be

determinative of the nature of the transaction, whether it is a "sale" or a "works contract". Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

88. In Hindustan Shipyard7, this Court stated that it was difficult to lay down an absolute rule to distinguish a contract for sale and a contract for labour. The question under consideration in that case was whether the transactions involved in manufacture and supply of ships by Hindustan Shipyard to its customers are "sale" as defined in clause (n) of Section 2 of Andhra Pradesh General Sales Tax Act, 1957 or a works contract as defined in clause (t) of Section 2 of that Act. While dealing with the above question, the Court in para 6 stated, "the distinction between a contract of sale and works contract is not free from difficulty and has been the subject matter of several judicial decisions. No straitjacket formula can be made available nor can such quick-witted tests be devised as would be infallible. It is all a question of determining the intention of the parties by culling out the same on an overall reading of the several terms and conditions of a contract……." The Court did note the observations made in Variety Body Builders[28], that there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. There may be many common features in both the contracts, some neutral in a particular contract, and yet certain clinching in a given case may fortify conclusion one way or the other.

89. The Court then analysed the recitals and terms and conditions of the contract and also took into consideration para 603 of Halsbury's Laws of England, Fourth Edition, Volume 41, Benjamin's Sale of Goods, Fourth Edition, Para 1.042 and Pollock and Mulla on Sale of Goods [1990, Fifth Edition, Page 53] and summed up the legal position in sub-para 2 and sub-para 3 of para 14 (pgs. 591-592) as under :

> "(2) Transfer of property of goods for a price is the linchpin of the definition of sale. Whether a particular contract is one of sale of goods or for work and labour depends upon the main object of the parties found out from an overview of the terms of the contract, the circumstances of the transactions and the custom of the trade. It is the substance of the contract document/s, and not merely the form, which has to be looked into. The court may form an opinion that the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale, then it is a sale. If the primary object of the contract is the carrying out of work by bestowal of labour and services and materials are incidentally used in execution of such work then the contract is one for work and labour.
>
> (3) If the thing to be delivered has any individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. If 'A' may transfer property for a price in a thing in which 'B' had no previous property then the contract is a contract for sale. On the other hand where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour."

90. The Court in Hindustan Shipyard7 also set out three categories:

> (a) the contract may be for work to be done, for remuneration and for supply of materials used in the execution of work for a price,
>
> (b) contract for work in which the use of the materials is accessory or incidental to the execution of the work and (c) contract for supply of goods where some work is required to be done as incidental to the sale.

Having regard to the recitals of the contract, the Court then concluded that the contracts in question involved sale of respective vessels within the meaning of clause (m) of the Andhra Pradesh General Sales Tax Act and were not merely the works contract as defined in clause (t) thereof.

91. In our opinion, the tests laid down in Hindustan Shipyard7 after Forty-sixth Amendment are not of much help in determining whether a contract is a works contract or sale of goods. In any case, Hindustan Shipyard7 also says that there is no absolute rule for distinguishing a contract for sale (of goods) and a contract for labour (or services).

92. It seems to us (and that is the view taken in some of the decisions) that a contract may involve both a contract of work and labour and a contract of sale of goods. In our opinion, the distinction between contract for sale of goods and contract for work (or service) has almost diminished in the matters of composite contract involving both (a contract of work/labour and a contract for sale for the purposes of Article 366 (29-A)(b). Now by legal fiction under Article 366(29-A)(b), it is permissible to make such contract divisible by separating the transfer of property in goods as goods or in some other form from the contract of work and labour. A transfer of property in goods under clause 29(A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. For this reason, the traditional decisions which hold that the substance of the contract must be seen have lost their significance. What was viewed traditionally has to be now understood in light of the philosophy of Article 366(29-A).

93. The question is: Whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term “works contract”. After all, the term “works contract” is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or lay-out of

the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.

94. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, in our opinion, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met. In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be stated that building contracts are species of the works contract.

95. Ordinarily in the case of a works contract the property in the goods used in the construction of the building passes to the owner of the land on which the building is constructed when the goods and materials used are incorporated in the building. But there may be contract to the contrary or a statute may provide otherwise. Therefore, it cannot be said to be an absolute proposition in law that the ownership of the goods must pass by way of accretion or exertion to the owner of the immovable property to which they are affixed or upon which the building is built.

96. Value addition as a concept after Forty-sixth Amendment to the Constitution has been accepted by this Court in P.N.C. Construction17. While dealing with this concept, the Court said that value addition was important concept which had arisen after the Forty-sixth Amendment by insertion of sub-clause (b) of clause (29-A) in Article 366. It has now become possible for the States to levy sales tax on the value of the goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods in a building contract. On account of the Forty-sixth Amendment in the Constitution the State Governments are empowered to levy sales tax on the contract value which earlier was not possible.

97. Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. Article 366(29-A)(b) does contemplate a situation where the goods may not be transferred in the form of goods but may be transferred in some other form which may even be in the form of immovable property. The decision of the Australian High Court in M.R. Hornibrook18 is worth noticing in this regard. Section 3(4) of the Australian Sales Tax Assessment Act, 1930 was brought in by way of amendment by the Legislature in 1932 which reads, “For the purposes of this Act, a person shall be deemed to have sold goods if, in the performance of any contract under which he has received, or is entitled to receive, valuable consideration, he supplies goods the property in which whether as goods (or in some other form) passes, under the terms of the contract, to some other person”. The question for consideration before the Australian High Court in light of the above provision was whether the contractor was liable to pay sales tax on the transfer of goods involved in a works contract. The majority judgment held as follows:

> “In my opinion the commissioner is right in his contention that this provision applies to the present case. The appellant company, in the performance of a contract for

> building a bridge under which contract it was entitled to receive and doubtless has received valuable consideration, has supplied goods, namely, reinforced concrete piles. Such piles are plainly manufactured articles. They are chattels. They were intended to be incorporated in a structure and were so incorporated. They lost their identity as goods in that structure. But this fact does not prevent the piles from being goods any more than it prevents bricks or stones or nuts and bolts from being goods. The fact that the goods were specially manufactured and designed for a particular purpose cannot be held to deprive them of the character of goods." (Emphasis supplied)

98. M.R. Hornibrook18 has been followed by this Court in Builders' Association4. This Court said that sub-clause (b) of clause (29-A) of Article 366 of the Constitution of India had more or less adopted the language used in Section 3(4) of the Australian Act.

99. Learned Advocate General for Maharashtra vehemently argued that there was nothing to prevent the taxation of different aspects of the same transaction as separate taxable events. Pressing into service the aspects theory, he argued that a contract for carrying out works coupled with the sale of immovable property may be taxed by both, the State legislatures and the Parliament within their respective spheres of legislative competence as there is deemed sale of goods involved in works contracts. The works contract aspect can be taxed by the State legislatures under Entry 54 of List II of Seventh Schedule read with Article 366 (29-A)(b) of the Constitution. The transfer of immovable property can be taxed by the Parliament under Entry 97 of List I. Mr. K.V. Vishwanathan, however, argued that the aspect theory has no application as the State legislatures inherently lack the legislative competence to tax the transfer of an immovable property. According to him, the aspect theory would apply when a tax is sought to be imposed on more than one distinct field of legislation in relation to the same matter provided that there exists in the States/Union legislative competence/legislative power to levy a tax under each distinct head.

100. We have no doubt that the State legislatures lack legislative power to levy tax on the transfer of immovable property under Entry 54 of List II of the Seventh Schedule. However, the States do have competence to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods. Aspects theory though does not allow the State legislature to entrench upon the Union List and tax services by including the cost of such service in the value of goods but that does not detract the State to tax the sale of goods element involved in the execution of works contract in a composite contract like contract for construction of building and sale of a flat therein. In para 88 of Bharat Sanchar5, the Court stated: "the aspects theory does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax". Having said that, the Court also stated that the States were not competent to include the cost of service in the value of the goods sold (i.e. the sim card) nor the Parliament could include the value of the sim card in the cost of services. But the statement in para 92(C) of the Report is clear that it is upto the States to tax the sale of goods element in a composite contract of sale and service. Bharat Sanchar5 thus supports the view that taxation of

different aspects of the same transaction as separate taxable events is permissible.

101. In light of the above discussion, we may summarise the legal position, as follows:

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled:

(one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29- A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such

transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

102. The crucial question would now remain: whether the view taken in Raheja Development1 with reference to definition of "works contract" in KST Act is legally unjustified? The following definition of "works contract" was under consideration before this Court in Raheja Development1:

> "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any moveable or immovable property".

103. The Court also noticed the definition of "dealer" and "taxable turn over ".

104. The broad facts in Raheja Development1 were these:

- Raheja Development carried on the business of real estate development and allied contracts;

- Raheja Development entered into development agreements with the owners of land;

• Raheja Development entered into agreements of sale with intended purchasers. The agreements provided that on completion of the construction, the residential apartments or the commercial complexes would be handed over to the purchasers who would get an undivided interest in the land also;

• The owners of the land would then transfer the ownership directly to the society formed under the Karnataka Ownership Flat (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1972 (for short, 'KOFA').

105. In light of the above facts and the definition of "works contract", the question before this Court was whether Raheja Development were liable to pay turnover tax on the value of goods involved in the execution of the works contract.

106. Section 5-B of the KST Act provides for levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract.

107. On consideration of the arguments that were put forth by the parties, the Court in Raheja Development1 held as under:

(i) The definition of the term "works contract" in the Act is an inclusive definition.

(ii) It is a wide definition which includes "any agreement" for carrying out building or construction activity for cash, deferred payment or other valuable consideration.

(iii) The definition of works contract does not make a distinction based on who carries on the construction activity. Even an owner of the property may be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration.

(iv) The developers had undertaken to build for the prospective purchaser.

(v) Such construction/development was to be on payment of a price in various installments set out in the agreement.

(vi) The developers were not the owners. They claimed lien on the property. They had right to terminate the agreement and dispose of the unit if a breach was committed by the purchaser. A clause like this does not mean that the agreement ceases to be "works contract". So long as there is no termination, the construction is for and on behalf of the purchaser and it remains a "works contract".

(vii) If there is a termination and a particular unit is not resold but retained by the developer, there would be no works contract to that extent.

(viii) If the agreement is entered into after the flat or unit is already constructed then there would be no works contract. But, so long as the agreement is entered into before the construction is complete it would be works contract.

108. The correctness of the view taken in Raheja Development1 has been doubted in the referral order principally for the reasons: (a) the developer had undertaken the contract to develop the property of the owner. It is not alleged by the department that there is monetary consideration involved in the development agreement. If the development agreement is not a works contract, could the department rely upon the second contract which is the tripartite agreement and interpret it to be a works contract; (b) if the ratio in Raheja Development1 is to be accepted then there would be no difference between works contract and a contract for sale of chattel as a chattel and (c) from the definition of works contract, the contractor must have undertaken the work of construction for and on behalf of the flat purchaser for cash, deferred or any other valuable consideration but could it be said that developer was contractor for the prospective flat purchaser.

109. In Raheja Development1, the Court on consideration of the clauses (q) and (r) of the recitals and clauses (1), 5(c) and (vii) of the agreement between the flat purchaser, developer and owner of the land observed that the agreement had an element for carrying out building and construction activity for cash, deferred payment or other valuable consideration. The developer had undertaken to build for the prospective purchaser. Having regard to the various clauses of the recitals and also the clauses of the agreement, the Court was of the view that such agreement was a typical agreement and so long as there was no termination of the contract, the construction is for and on behalf of the purchaser and it remains a “works contract”.

110. The argument on behalf of the developers that the flat purchaser is entitled to transfer of flat and conveyance of fraction of land only when all installments have been fully paid and that shows that the agreement between the developer and the flat purchaser is the sale of flat and not to appoint the developer as the contractor of the flat purchaser for the purposes of carrying out the construction of the flat for and on behalf of the flat purchaser has no merit. The submission overlooks the typical nature of the development agreement which is followed by a tripartite agreement between the owner of the land, the developer and the flat purchaser. Effectively and de facto it is the developer who constructs the building for the flat purchaser. The developer does so for monetary consideration. The label of payment is not decisive but the factum of the payment is. The construction is done on payment of price as agreed upon between the developer and the flat purchaser. It is not necessary to recapitulate all clauses of the agreement under KOFA or for that matter under MOFA. Raheja Development1 takes note of relevant clauses of the recitals and the agreement under KOFA. We need not repeat them. Similarly, Form V of the Maharashtra Ownership Flat Rules contains recital such as, ‘as a result of the Development agreement the promoters are entitled and enjoined upon to construct buildings on the said land’. One of the relevant clauses (omitting unnecessary portion) in Form V reads, “the promoter shall construct the said building/s....in accordance with the plans, designs, specifications .....which have been seen and approved by the flat purchaser with the owner, such variations and modifications as the promoter may consider necessary or as may be required by the concerned local authority/the government.....provided that the promoter shall have to obtain prior consent in writing to the flat

purchaser in respect of variations or modifications which may adversely affect the flat of the purchaser". It is, thus, not correct to say that the work is undertaken by the developer for himself and for the owner and the construction is not carried for and on behalf of the purchaser.

111. In the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. Seen thus, there is nothing wrong if the transaction is treated as a composite contract comprising of both a works contract and a transfer of immovable property and levy sales tax on the value of the material involved in execution of the works contract. The observation in the referral order that if the ratio in Raheja Development1 is to be accepted then there would be no difference between works contract and a contract for sale of chattel as chattel overlooks the legal position which we have summarized above.

112. The argument that flat is to be sold as a flat and not an aggregate of its component parts is already negated by the Constitution Bench in the case of Builders' Association4. As a matter of fact, in Builders' Association4, this argument was advanced on behalf of the States. Repelling the argument, the Constitution Bench observed that it was difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of works contract, but a conglomerate, that is the entire building which is actually constructed.

113. Yet another argument advanced on behalf of the appellants is that in Raheja Development1, it is noticed that the builder has a lien on the property but incorrectly states that lien is because they are not owners. It is argued that lien is because if the monies are not recovered from the prospective flat purchasers, the lien can be exercised and this would show that the contract is a contract of an agreement to sell immovable property. The argument is insignificant because if the developer has undertaken to build for the prospective purchaser for cash or deferred payment or a valuable consideration pursuant to a contract then to that extent, the contract is works contract and there is deemed sale of material (goods) used in the construction of building and merely because the builder has a right of lien in the event due monies are not paid does not alter the character of contract being works contract.

114. In Article 366(29-A)(b), the term 'works contract' covers all genre of works contract and it is not limited to one specie of the contract. In Raheja Development1, the definition of "works contract" in KST Act was under consideration. That definition of "works contract" is inclusive and refers to building contracts and diverse construction activities for monetary consideration viz; for cash, deferred payment or other valuable consideration as works contract. Having regard to the factual position, inter alia, Raheja Development1 entered into development agreements with the owners of the land and it also entered into agreements for sale with the flat purchasers, the consideration being payment in installments and also the clauses of the agreement the Court held that developer had undertaken to build for the flat purchaser and so long as there was no termination of the

contract, the construction is for and on behalf of the purchaser and it remains a "works contract". The legal position summarized by us and the foregoing discussion would justify the view taken by the two Judge Bench in Raheja Development1.

115. It may, however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.

116. The reasons stated in the referral order for reconsideration of Raheja Development1 do not make out any good ground for taking a view different from what has been taken by this Court in Raheja Development1. We are in agreement with the submission of Mr. K.N. Bhat that since Raheja Development1 in May, 2005 almost all States have modified their laws in line with Raheja Development1 and there is no justification for change in the position settled after the decision of this Court in Raheja Development1.

117. The submission of Mr. K.N. Bhat that the view in Raheja Development1 that when a completed building is sold, there is no work contract and, therefore, no liability to tax is not correct statement of law, does not appeal to us. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser. That the building is intended for sale ultimately after construction does not make any difference.

118. We are clearly of the view that Raheja Development1 lays down the correct legal position and we approve the same.

119. There is challenge to the constitutional validity of explanation (b)(ii) to Section 2(24) which was brought by amendment with effect from 20.06.2006 in MVAT Act and sub-rule (1A) which was inserted into Rule 58 of the MVAT Rules by a notification dated 01.06.2009.

120. Clause (24)**** of Section 2 defines sale to mean a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge of pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions. An explanation is appended to this clause. Clause (b)***** of the explanation to Section 2(24) defines what would be a sale for the purpose of the clause and brought in its ambit the transactions mentioned therein. Explanation (b)(ii) was amended with effect from 20.06.2006 by inserting the following words after the words "works contract": "including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property".

121. There is no doubt in our mind that the amendment in explanation b(ii) to Section 2(24) was brought because of the judgment of this Court in Raheja Development1. We have already held that Raheja Development1 lays down the correct legal position. Thus, in our view, there is no merit in the challenge to the constitutional validity to the provisions of explanation (b)(ii) to Section 2(24) of MVAT which were amended with effect from 20.06.2006. The Division Bench of the Bombay High Court took the view that the provision under challenge was not in breach of any constitutional boundaries. This is what it said:

> "34. The amended definition of the expression sale in clause b(ii) of the Explanation to Section 2(24) brings within the ambit of that expression transactions of that nature which are referable to Article 366(29A)(b). The transactions which the legislature had in mind involve works contracts. What the state legislatures can tax under the expanded definition contained in clause b of Article 366 (29A) must meet the governing requirements of that clause. There must be a transfer of property in goods involved in the execution of a works contract. The relevant clause in Section 2(24) is valid because it does not transgress the boundaries set out in Article 366(29A). Indeed, after the 46th Amendment, State legislation must confine itself to the limits set out even in the expanded concept of what constitutes a sale or purchase of goods in Article 366(29A). State legislation cannot expand the ambit of what constitutes a tax on the sale or purchase of goods beyond the constitutional frontiers. In order that Section 2(24) remains within constitutional boundaries, in the context of works contracts, it must be read to cover those cases which fall within the expanded definition as elaborated after the 46th Amendment. Whether there is a works contract in a given case is for assessing authorities to determine. As noted earlier, it is not possible to provide a comprehensive or all encompassing list of what contracts constitute works contracts. Section 2(24) properly construed, even after its amendment, reaches out to those cases which fall within the ambit of Article 366(29A). Explanation b(ii) to Section 2(24) in other words covers those transactions where there is a transfer of property in goods, whether as goods or in any other form, involved in the execution of a works contract. Once those parameters are met, the amended definition in the State legislation in the present case provides a clarification or clarificatory instances. When constitutional norms govern state legislation such as those provided in Article 366(29A) in this case, the legislation must be construed in the context of those norms which it cannot transgress. The law is valid because it does not breach those boundaries. There is no breach of constitutional boundaries."

122. We are in agreement with the above view and reject challenge to amendment to the provisions of explanation (b)(ii) to Section 2(24) of MVAT Act.

123. Sub-rule (1A)****** was inserted into Rule 58 by a notification dated 01.06.2009. As a matter of fact, Rule 58(1) of the MVAT Rules provides that the value of the goods at the time of the transfer of the property in goods involved in the execution of a works contract may be determined by effecting certain deductions from the value of the entire contract insofar as the amounts relating to deductions pertain to the said works contract. The challenge was laid to Rule 58(1A) of the MVAT

Rules before the Bombay High Court. The Division Bench of the Bombay High Court found that there was nothing to show that the proviso to the said provision was arbitrary. It held that the Legislature was acting within the field of the legislative powers in devising a measure for the tax by excluding the cost of the land. The Division Bench recorded the following reasons in repelling the challenge to Rule 58(1A).

"35. The challenge to Rule 58(1A), may now be considered. The Rule has provided that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property involved in the execution of the construction contract is also transferred, it is the latter component which is brought to tax. The value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1). The judgment in the second Gannon Dunkerley specifies the nature of such deductions which can be made from the entire value of the works contracts. This was permitted to the States as a convenient mode for determining the value of the goods in the execution of the works contract. Similarly, the cost of the land is required to be excluded from the total agreement value. Sub- rule (1A) stipulates that the cost shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 as applicable on 1 January of the year in which the agreement to sell the property is registered. The Proviso stipulates that deduction towards the cost of land under the sub-rule shall not exceed 70% of the agreement value. The petitioners have not brought on the record any material to indicate that the proviso to sub- rule (1A) of Rule 58 is arbitrary. Rule 58(1A) provides for the measure of the tax. The measure of the tax, as held by the Supreme Court in its decision in Union of India v. Bombay Tyre International Ltd. [(1984) 1 SCC 467], must be distinguished from the charge of tax and the incidence of tax. The Legislature was acting within the filed of its legislative powers in devising a measure for the tax by excluding the cost of the land."

124. The value of the goods which can constitute the measure of the levy of the tax has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property. The mode of valuation of goods provided in Rule 58(1A) has to be read in the manner that meets this criteria and we read down Rule 58(1-A) accordingly. The Maharashtra Government has to bring clarity in Rule 58 (1-A) as indicated above. Subject to this, validity of Rule 58(1-A) of MVAT Rules is sustained.

125. Once we have held that Raheja Development1 lays down the correct law, in our opinion, nothing turns on the circular dated 07.02.2007 and the notification dated 09.07.2010. The circular is a trade circular which is clarificatory in nature only. The notification enables the registered dealer to opt for a composition scheme. The High Court has dealt with the circular and notification. We do not find any error in the view of the High Court in this regard. Moreover, the Advocate General for Maharashtra clearly stated before us that implementation of Rule 58(1-A) shall not result in double taxation and in any case all claims of alleged double taxation will be determined in the process of assessment of each individual case.

126. After having given answer to the reference, we send the matters back to the Regular Bench for final disposal.

.....J. (R.M. Lodha) .....J. (J. Chelameswar) .....J. (Madan B. Lokur) New Delhi, September 26, 2013.

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[1] K. Raheja Development Corporation v. State of Karnataka; (2005) 5 SCC 162 [2] M/s. Larsen & Toubro Limited & Anr. v. State of Karnataka & Anr.;

[3] State of Madras v. Gannon Dunkerley and Co.; (1959) SCR 379 [4] Builders' Association of India and others v. Union of India and others; (1989) 2 SCC 645 [5] Bharat Sanchar Nigam Limited and another v. Union of India and others; (2006) 3 SCC 1 [6] The Assistant Sales Tax Officer and Others v. B.C. Kame, Proprietor Kame Photo Studio;

[(1977) 1 SCC 634] [7] Hindustan Shipyard Ltd. v. State of A.P.; [(2000) 6 SCC 579] [8] Nahalchand Laloochand Private Limited v. Panchali Cooperative Housing Society Limited; (2010) 9 SCC 536 [9] Commissioner of Sales Tax, M.P. v. Purshottam Premji; [1970] 26 S.T.C. 38 [10] State of Andhra Pradesh & Ors. v. Larsen & Toubro Ltd. & Ors.; [(2008) 9 SCC 191] [11] M/s. Gannon Dunkerley & Co. and others v. State of Rajasthan and Others; [(1993) 1 SCC 364] [12] Keshav Mills Co. Ltd. v. Commissioner of Income Tax, Bombay North, Ahmedabad; [AIR 1965 SC 1636] [13] Dewan Joynal Abedin v. Abdul Wazed; [(1988) Supp SCC 580] [14] Kartar Singh Bhadana v. Hari Singh Nalwa & Ors.; [(2001) 4 SCC 661] [15] Associated Cement Companies Ltd. v. Commissioner of Customs; [(2001) 4 SCC 593] [16] Rainbow Colour Lab & Anr. v. State of M.P. & Ors.; [(2000) 2 SCC 385] [17] State of U.P. & Ors. v. P.N.C. Construction Co. Ltd. & Ors.; [(2007) 7 SCC 320] [18] M.R. Hornibrook (Pty.) Ltd. v. The Federal Commissioner of Taxation; [(1939) 62 C.L.R. 272 [19] Federation of Hotel & Restaurant Association of India, etc. v. Union of India & Ors.; [(1989) 3 SCC 634] [20] State of Andhra Pradesh & Ors.v. Larsen & Toubro Ltd. & Ors.; [(2008) 9 SCC 191] * *The relevant portion of statement of objects and reasons reads :

> "STATEMENT OF OBJECTS AND REASONS Sales tax laws enacted in pursuance of the Government of India Act,1935 as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression "sale of goods", having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, in Gannon Dunkerley's case (A.I.R. 1958 S.C. 560), the Supreme Court held that the expression "sale of goods" as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act, 1930. This decision related to works contracts.
>
> 2. By a series of subsequent decisions, the Supreme Court has, on the basis of the decision in Gannon Dunkerley's case, held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax. As

a result of these decisions, a transaction, in order to be subject to the levy of sales tax under entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, parties competent to contract, mutual assent and transfer of property in goods from one of the parties to the contract to the other party thereto for a price.

5. The various problems connected with the power of the States to levy a tax on the sale of goods and with the Central Sales Tax Act, 1956 were referred to the Law Commission of India.

The Commission considered these matters in their Sixty-first Report and, recommended, inter alia, certain amendments in the Constitution if as a matter of administrative policy it is decided to levy tax on transactions of the nature mentioned in the preceding paragraphs.

9. It is, therefore, proposed to suitably amend the Constitution to include in article 366 a definition of "tax on the sale or purchase of goods" by inserting a new clause (29A). The definition would specifically include within the scope of that expression tax on---

(i) transfer for consideration of controlled commodities;

(ii) the transfer of property in goods involved in the execution of a works contract;

(iii) delivery of goods on hire-purchase or any system of payment by instalments;

(iv) transfer of the right to use any goods for any purpose for cash, deferred payment or other valuable consideration;

(v) the supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration.

12. Clause (3) of article 286 is proposed to be amended to enable Parliament to specify, by law, restrictions and conditions in regard to the system of levy, rates and other incidents of the tax on the transfer of goods involved in the execution of a works contract, on the delivery of goods on hire-purchase or any system of payment by instalments and on the right to use any goods.

13. The proposed amendments would help in the augmentation of the State revenues to a considerable extent. Clause 6 of the Bill seeks to validate laws levying tax on the supply of food or drink for consideration and also the collection or recoveries made by way of tax under any such law. However, no sales tax will be payable on food or drink supplied by a hotelier to a person lodged in the hotel during the period from the date of the judgment in the Associated Hotels of India case and the commencement of the present Amendment Act if the conditions mentioned in

sub-clause (2) of clause 6 of the Bill are satisfied. In the case of food or drink supplied by restaurants this relief will be available only in respect of the period after the date of judgment in the Northern India Caterers (India) Limited case and the commencement of the present Amendment Act." * ** (29-A) "tax on the sale or purchase of goods" includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

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

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any 'other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;'.

* ** ***36. .....After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above.....

39. In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.

40..... The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366(29-A) should be read as

being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29-A) of Article 366 is to be found only in Entry 54 and not outside it.....

41. ..... The case-book is full of the illustrations of the infinite variety of the manifestation of 'works contracts'. Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the State as are applicable to 'works contracts' represented by "building contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366(29-A), would equally apply to other species of 'works contracts' with the requisite situational modifications.

42. The constitutional amendment in Article 366(29-A) read with the relevant taxation entries has enabled the State to exert its taxing power in an important area of social and economic life of the community.....

[21] Radha Raman v. State of Uttar Pradesh & Ors.; [AIR (1954) Allahabad 700]
[22] Lee v. Griffin; [(1861) 1 B. & S. 272]
[23] Robinson v. Graves; [(1935) 1 KB 579]
[24] Chandra Bhan Gosain v. State of Orissa and Others; [(1964) 2 SCR

[25] The State of Punjab v. M/s. Associated Hotels of India Ltd.; [(1972) 1 SCC 472]
[26] Hindustan Aeronautics Ltd. v. State of Karnataka; [(1984) 1 SCC 706]
[27] State of A.P. v. Kone Elevators (India) Ltd.; [(2005) 3 SCC 389]
[28] State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v. M/s.Variety Body Builders; [(1976) 3 SCC 500]
* **** "2(24) "sale" means a sale of goods made within the State for

cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly." * ***** "(b)(i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;

ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.....

iii) a delivery of goods on hire-purchase or any system of payment by instalments;

iv) the transfer of the right to use any goods for any propose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

v) the supply of goods by any association or body of persons incorporated or not, to a member thereof for cash, deferred payment or other valuable consideration;

vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration;"
* ****** "(1A) In case of a construction contract, where along with the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods or in some other form) involved in the execution of the construction contract is also transferred to the purchaser such transfer is liable to tax under this rule. The value of the said goods at the time of the transfer shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value.

The cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995, as applicable on the 1st January of the year in which the agreement to sell the property is registered:

> Provided that, deduction towards cost of land under this sub-rule shall not exceed 70% of the agreement value."
