Supreme Court of India
M/S. Kone Elevator India Pvt. Ltd vs State Of T.N. & Ors on 6 May, 1947
Author: .....J.
Bench: R.M. Lodha, A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Kalifulla

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (C) NO. 232 OF 2005

M/S. Kone Elevator India Pvt. Ltd. … Petitioner

Versus

State of Tamil Nadu and Ors. … Respondents

WITH
Writ Petition (Civil) Nos. 298/2005, 487/2005,
528/2005, 67/2006, 511/2006, 75/2007,
519/2008, 531/2008, 548/2008, 569/2008,
186/2009, 23/2010, 62/2010, 232/2010,
279/2010, 377/2010, 112/2011, 137/2011,
181/2011, 207/2011, 278/2011, 243/2011,
372/2011, 398/2011, 381/2011, 468/2011,
547/2011, 107/2012, 125/2012, 196/2012,
263/2012, 404/2012, 567/2012, 145/2013,
241/2013, 454/2013, 404/2013, 723/2013,
440/2012, 441/2012, 156/2013, 533/2013,
403/2012, 824/2013, 428/2009, 1046/2013,
1047/2013, 1048/2013, 1049/2013, 1050/2013,
1051/2013 1052/2013, 1098/2013,

WITH
Civil Appeal Nos. 5116-5121 of 2014
(Arising out of SLP (C) Nos. 14148-14153/2005)
WITH
Civil Appeal Nos. 5135-5141 of 2014
(Arising out of SLP (C) Nos. 14961-14967/2005)
WITH
Civil Appeal Nos. 5142-5147 of 2014
[Arising out of SLP (C) Nos. 17842-17847/2005
WITH
Civil Appeal No. 5152 of 2014
[Arising out of SLP (C) No. 5377/2006

WITH

Civil Appeal No. 5153 of 2014

[Arising out of SLP (C) No. 7037/2006

WITH

Civil Appeal No. 5154 of 2014

[Arising out of SLP (C) No. 30272/2008

WITH

Civil Appeal No. 5156 of 2014

[Arising out of SLP (C) No. 30279/2008

WITH

Civil Appeal No. 5157 of 2014

[Arising out of SLP (C) No. 5289/2009

WITH

Civil Appeal Nos. 5159-5160 of 2014

[Arising out of SLP (C) Nos. 6520-6521/2009

WITH

Civil Appeal Nos.5162-5164 of 2014

[Arising out of SLP (C) Nos. 4469-4471/2010

WITH

Civil Appeal No. 5165 of 2014

[Arising out of SLP (C) No. 11258/2010

WITH

Civil Appeal No. 5166 of 2014

[Arising out of SLP (C) No. 17228/2010

WITH

Civil Appeal Nos.5167-5168 of 2014

[Arising out of SLP (C) Nos. 17236-17237/2010

WITH

Civil Appeal Nos.5170-5172 of 2014

[Arising out of SLP (C) Nos. 23259-23261/2010

WITH

Civil Appeal No. 5174 of 2014

[Arising out of SLP (C) No. 15732/2011

WITH

Civil Appeal No. 5175 of 2014

[Arising out of SLP (C) No. 16466/2011

WITH

Civil Appeal No. 5178 of 2014

[Arising out of SLP (C) No. 16137/2011

WITH

Civil Appeal No. 5179 of 2014

[Arising out of SLP (C) No. 5503/2011

WITH

Civil Appeal No. 5180 of 2014

[Arising out of SLP (C) No. 11147/2011

WITH

Civil Appeal Nos.5181-5192 of 2014

[Arising out of SLP (C) Nos. 11227-11238/2012

WITH

Civil Appeal No. 5193 of 2014
[Arising out of SLP (C) No. 19901/2013
WITH
Civil Appeal Nos. 5195-5206 of 2014
[Arising out of SLP (C) Nos. 36001-36012/2013 and
WITH
Civil Appeal No. 6285/2010

J U D G M E N T

Dipak Misra, J. [for R.M. Lodha, C.J., A.K. Patnaik, Sudhansu Mukhopadhaya, JJ. and himself] Leave granted in all the special leave petitions.

2. By an order dated 13.2.2008 in Kone Elevator India Private Limited v. State of Tamil Nadu and others[1], a three-Judge Bench of this Court, while dealing with the writ petition preferred by Kone Elevator India Pvt. Ltd. along with Special Leave Petitions, noted that the question raised for consideration in the said cases is whether manufacture, supply and installation of lifts is to be treated as "sale" or "works contract", and a three-Judge Bench, in State of A.P. v. Kone Elevators (India) Ltd.[2], had not noticed the decisions rendered by this Court in State of Rajasthan v. Man Industrial Corporation Ltd.[3], State of Rajasthan and others v. Nenu Ram[4] and Vanguard Rolling Shutters and Steel Works v. Commissioner of Sales Tax[5] and perceiving the manifest discord, thought it appropriate that the controversy should be resolved by the larger Bench. Thereafter, keeping in view the commonality of the controversy in Civil Appeal No. 6285 of 2010 and other Special Leave Petitions, they were tagged with the originally referred matters. Thus, the matters are before us.

3. The seminal controversy which has emerged in this batch of matters is whether a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" or a "works contract". Needless to say, in case of the former, the entire sale consideration would be taxable under the sales tax or value added tax enactments of the State legislatures, whereas in the latter case, the consideration payable or paid for the labour and service element would have to be excluded from the total consideration received and sales tax or value added tax would be charged on the balance amount.

4. Keeping in mind the said spinal issue, we think it apposite to briefly refer to the facts as adumbrated in the writ petition preferred by Kone Elevator India Pvt. Ltd. The petitioner is engaged in the manufacture, supply and installation of lifts involving civil construction. For the Assessment Year 1995-96, the Sales Tax Appellate Tribunal, Andhra Pradesh, considering the case of the petitioner, opined that the nature of work is a "works contract", for the erection and commissioning of lift cannot be treated as "sale". On a revision being filed, the High Court of Andhra Pradesh affirmed the view of the tribunal and dismissed the Tax Case (Revision) filed by the Revenue. Grieved by the decision of the High Court, the State of Andhra Pradesh preferred special leave petition wherein leave was granted and the matter was registered as Civil Appeal No. 6585 of 1999

and by judgment dated 17.2.2005 in Kone Elevators (supra), the view of the High Court was overturned. After the pronouncement in the said case, the State Government called upon the petitioner to submit returns treating the transaction as sale. Similarly, in some other States, proceedings were initiated proposing to reopen the assessments that had already been closed treating the transaction as sale. The said situation compelled the petitioner to prefer the petition under Article 32 of the Constitution. As far as others are concerned, they have preferred the writ petitions or appeals by special leave either challenging the show cause notices or assessment orders passed by the assessing officers or affirmation thereof or against the interim orders passed by the High Court requiring the assessee to deposit certain sum against the demanded amount. That apart, in certain cases, appeals have been preferred assailing the original assessment orders or affirmation thereof on the basis of the judgment in Kone Elevators (supra).

5. Mr. Harish Salve, learned senior counsel for the petitioners, has contended that prior to the decision of this Court in Bharat Sanchar Nigam Ltd. and another v. Union of India and others[6], which has been further explained in Larsen and Toubro Limited and another v. State of Karnataka and another[7], the law as understood was (a) where a contract was divisible by itself, then the element of sale would be taxed as an ordinary sale of goods, irrespective of the element of service; (b) where a contract was for the supply of goods, and for rendition of services, if the pre-dominant intention of the parties was to supply goods, the element of service would be ignored and the entirety of the contract consideration would be treated as the price of goods supplied and the tax imposed accordingly; and (c) as the law did not provide for dividing, by a legal fiction, a contract of such a nature into a contract for goods and a contract for services, the goods in which property passed from the contractor to the owner could not be brought to tax under the law of sales tax. It is assiduously urged by Mr. Salve that the "predominant intention test" is no longer relevant and after the decision in Larsen and Toubro (supra), supply and installation of lift cannot be treated to be a contract for sale. It is argued that a lift comprises of components or parts [goods] like lift car, motors, ropes, rails, etc. and each of them has its own identity prior to installation and they are assembled/installed to create the working mechanism called lift. Learned senior counsel would contend that the installation of these components/parts with immense skill is rendition of service, for without installation in the building, there is no lift.

6. Mr. Salve, learned senior counsel, has also referred to the Bombay Lifts Act, 1939, the Bombay Lifts Rules, 1958 and Bombay Lifts (Amendment) Rules, 2010. He has referred to the Preamble of the Act which stipulates that an Act has been enacted to provide for the regulation of the construction, maintenance and safe working of certain classes of lifts and all machinery and apparatus pertaining thereto in the State of Bombay. The State Act applies to the whole of Maharashtra. He has drawn our attention to the dictionary clause of "lift" as has been defined in clause 3(c) to mean a "hoisting mechanism" equipped with a car which moves in a substantially vertical direction, is worked by power and is designed to carry passengers or goods or both; and "lift installation" which includes the lift car, the lift way, the lift way enclosure and the operating mechanism of the lift and all ropes, cables, wires and plant, directly connected with the operation of the lift. He has also placed reliance on Section 4 which deals with permission to erect a lift, Section 5 that deals with licence to use a lift and Section 7 which provides a lift not to be operated without a licence. Learned senior counsel has also drawn our attention to the various rules that deal with

many a technical aspect and the terms on which lift shall work and what requirements are to be carried out by a licencee under the Act. In essence, the submission is that the manufacture, supply and the installation are controlled by the statutory provisions under an enactment of the legislature and also the rules made in consonance with the Act which would reflect that immense skill is required for such installation and the separate parts of the lift are not sold like goods, but it only becomes operational after it is installed, adjusted, tested and commissioned in a building.

7. Mr. Khambatta, learned Advocate General, appearing for the State of Maharashtra, submitted that in the case of sale and installation of a lift or elevator, the contract would include the obligation to install the lift or to undertake any services in relation to the lift and these elements of value need to be deducted while taxing the sale of goods involved in such a contract. It is his submission that in a given case, there can be a contract which is exclusively for sale of lift, i.e., for sale of goods which does not include any labour or service element at all where the lift is bought from a manufacturer but a separate contract for installation is entered into with an independent engineering contractor. Learned Advocate General urged that such an installation by way of contract is permissible under the Bombay Lifts Act, 1939 read with the Bombay Lifts Rules, 1958. It is urged by him that prior to the decision in Kone Elevators case, the State of Maharashtra had treated contracts for sale and installation of lifts as "works contract" as per the decision of the High Court in Otis Elevator Company (India) Ltd. v. The State of Maharashtra[8]. He has copiously referred to the rule position which is prevalent in the State of Maharashtra. He has brought on record a Trade Circular dated 11.11.2013 to show that from 1.4.2006, the decision in Kone Elevators (supra) has been followed in the State of Maharashtra and it has adjusted the position in accordance with the said authority and the State having adjusted its position to the law rendered by the three-Judge Bench, in case the authority in Kone Elevators (supra) is overruled, it should be given prospective effect.

8. Mr. K.N. Bhat, learned senior counsel for the State of Karnataka, has submitted that the contract of manufacture, supply and installation of lifts comprises a works contract, for the expression "works contract" is not a term of art as has been explained in Builders' Association of India and others v. Union of India and others[9] as well as in Larsen and Toubro (supra). It is put forth by Mr. Bhat that lifts are assembled and manufactured to suit the requirement in a particular building and are not something sold out of shelf and, in fact, the value of goods and the cost of the components used in the manufacturing and installation of a lift are subject to taxation while the element of labour and service involved cannot be treated as goods. In essence, the submission of Mr. Bhat is that taking into consideration the multifarious activities involved in the installation of the lift, it has to be construed as a "works contract" and the decision in Kone Elevators (supra) does not lay down the law correctly.

9. Mr. Rakesh Dwivedi, learned senior counsel appearing for the State of Orissa, has referred to the terms of the quotation, the confirmation letter, the letter of approval, the preparatory erection work or civil work which are to be carried out by the customer at its own cost, the specific mode of payment and the nature of supply and, on that basis, contended that the contract was for sale and supply of a lift to the customer for a monetary consideration. It is urged by him that a part of manufacture is carried out at the project site of the customer and the skill and labour deployed in the installation or the work done is merely a component of the manufacturing process and, as a

matter of fact, the elevator is supplied to the customer only after its erection/installation at the site. It is further contended by him that where a manufacturer of lift first manufactures components and then completes the manufacture of the lift at the site and retains ownership in the components as property while producing the completed lift, it is a case of pure manufacture. It is contended by him that the phraseology used in the contract is not decisive because it is the economic reality which is decisive, for the installation is a part of the manufacturing process resulting in the emergence of the product of elevator which is contracted for. Learned senior counsel would contend that it has to be construed as an elevator bought and sold as such. In this regard, he has drawn inspiration from the authorities in Patnaik & Co. v. State of Orissa[10], T.V. Sundram Iyengar & Sons v. State of Madras[11], Union of India v. Central India Machinery Manufacturing Company Ltd. and others[12], J. Marcel (Furrier) Ltd. v. Tapper[13] and Love v. Norman Wright (Builders) Ltd.[14].

10. Mr. Dwivedi has also contended that even if high degree of skill and craftsmanship goes into installation which is a part of the manufacturing process, it is not more than erecting an article for sale on the basis of a special order. For the aforesaid proposition, he has placed reliance on J. Marcel (Furrier) Ltd. (supra). It is his submission that emphasis on technology and skill including labour and also the instructions in the manual are of no consequence as all are insegregable facets of the manufacturing process. It is proponed by him that erection, commissioning and assembling of parts and components amount to manufacture as has been laid down by this Court in MIL India Ltd. v. Commissioner of Central Excise, Noida[15], Narne Tulaman v. Collector of Central Excise, Hyderabad[16], Titan Medical Systems (P) Ltd. v. Collector of Customs, New Delhi[17], Collector of Central Excise, Calcutta-II v. Eastend Papers Industries Ltd.[18] and Aspinwall & Co. Ltd. v. Commissioner of Income Tax, Ernakulam[19]. He has also placed reliance on Underwood Limited v. Burgh Castle Brick and Cement Syndicate[20] wherein the Kings Bench has ruled that until the railway engine was reassembled and put on rail, it could not be said that the goods were delivered as per the contract. Commenting on the attachment to immovable property as permanent affixation, it is put forth by him that the decisions in Sentinel Rolling Shutters & Engineering Company (P) Ltd. v. Commissioner of Sales Tax[21], Ram Singh & Sons Engineering Works v. Commissioner of Sales Tax, U.P.[22], Man Industrial Corporation (supra) and Vanguard Rolling Shutters & Steel Works (supra) were rendered prior to the amendment of the Constitution and hence, they stand on a different footing as they were fundamentally dealing with indivisible contracts. Elaborating on the nature of affixation, it is urged by him that only the guide rails and the frame of the entry/exit doors are attached to the immovable property by nuts and bolts and the motor is also placed on the beam with the help of nuts and bolts. The sheave is attached to the motor and it enables the steel rope to move. The steel rope is attached to one side of the cabin car and on the other side to the counter weight. These parts are aligned so that the cabin car and the counter weight move up and down in opposite directions. Therefore, contends the learned senior counsel, the lift is only partially attached to the building and the remaining major portions of the components are constantly mobile. In fact, people buy lifts only with the object of movability and the lifts are advertised as transport systems. The learned senior counsel would further submit that if railway engines and coaches are goods notwithstanding motion on rail alone which is fixed to the earth by nuts and bolts, the elevators will also be goods notwithstanding the attachment of guide rails. For the aforesaid purpose, he has drawn inspiration from Sirpur Papers Mills Ltd. v. Collector of Central Excise, Hyderabad[23], Commissioner of Central Excise, Ahmedabad v. Solid & Correct Engineering of Works and

others[24] and Detroit Steel Cooperage Company v. Sistersville Brewing Company[25].

11. Mr. R. Venkataramani, learned senior counsel appearing for the States of Tamil Nadu and Andhra Pradesh, has contended that the primary intention behind the demand of installation of a lift is the intention to have the lift as a system and, therefore, the work of installation merely fulfills the erection and functional part of the system. The service or work element may be the means to render a set of goods constituting a unit to be fit for use and, in fact, the act of installation is to bring the goods to use and hence, it is the culmination of the act of sale. The learned senior counsel has put forth that the contract involved would come in the category of contracts which can be described as contracts where goods, in any form whatsoever, are intended for transfer but the completion of the transfer may involve certain set of activities, by whatever name called, for the purposes of securing the use or consumption of such goods in question and to that class of contracts, the principle of "deliverable state" as used in Section 21 of the Sale of Goods Act, 1930 would be attracted and, therefore, such a contract would be a pure contract for sale of goods. It is emphasized by him that the threshold question to be put in every case is whether the purchaser's true object is to obtain an identifiable product or goods or the intention is to utilize the services of or works from a person for the purposes of realizing an end product which may emerge only for the reason of the execution of the work by rendering of the services in question. Applying the said principle to a lift, it is canvassed by him that a lift or an elevator is an identifiable good which is transferred to the purchaser as such and solely because certain amount of labour or service is required for the purpose of putting together all the components of the lift at the site to bring it to its usable state, the same does not make a difference as to the nature of the contract and it cannot be regarded as a works contract.

12. Ms. Hemantika Wahi and Mr. Preetesh Kumar, learned counsel for the State of Gujarat, while adopting the submissions of the learned senior counsel for the State of Orissa, have submitted that the traditional tests for determining whether a contract is a works contract or not would continue to apply. It is urged that the sale of goods involved in the execution of a works contract is quite distinct from the works performed while executing a sale of goods contract. It is also put forth that it would come within the competence of the State legislature being a measure of tax and for that purpose, reliance has been placed on Federation of Hotel and Restaurant Association of India v. Union of India and others[26]. Be it noted, the learned counsel for the State, while placing reliance on Bharat Sanchar (supra), have also asserted that the dominant nature test or other test approved in Larsen and Toubro (supra) are still relevant. It is apt to note here that in the written note of submission, certain lines from para 45 of Bharat Sanchar (supra) have been reproduced. Relying on the same, it is contended that the "dominant nature test" is still available.

13. Dr. Manish Singhvi, learned counsel appearing for the State of Rajasthan, has submitted that the decision rendered in Vanguard Rolling Shutters & Steel Works (supra), Man Industrial Corporation Ltd. (supra) and Nenu Ram (supra) do not lay down the correct law because the underlying reason accorded in those cases is that if a particular item is to be fixed in the immovable property, then the property passes on as an immovable property and, therefore, cannot be construed as a sale. Reliance has been placed on the Constitution Bench decisions in Patnaik & Co. (supra) and Hindustan Shipyard Ltd. v. State of A.P.[27].

14. Mr. P.N. Mishra, learned senior counsel appearing for the State of Haryana, has supported the law laid down in Kone Elevators (supra) and, on that base, contended that supply and installation of the lift is a contract for sale and not a works contract. For the aforesaid purpose, he has laid emphasis on the specification laid down in the terms and conditions of the contract in which the customer is obliged to undertake certain work of civil construction. He has brought on record an order of assessment for the assessment year 2009-2010 from which it is quite vivid that the assessing officer has treated the transaction as a sale adopting the principle stated in Kone Elevators case. Learned counsel for the State has brought to our notice a Gazette Notification providing 15% tax on labour, service and other like charges as percentage of total value of the contract to show that it has been so done keeping in view the nature of composite contract.

15. Mr. P.P. Malhotra, learned Additional Solicitor General of India appearing for Union of India, has submitted that parts of the lift are assembled at the site in accordance with its design and requirement of the building which may include the floor levels and the lift has to open on different floors or otherwise depending upon the requirement. It has to synchronize with the building and each door has to open on the level of each floor and hence, by no stretch of imagination, it can be treated as a manufacture or mere supply but cumulatively considered, it is a works contract and, more so, when the contract is a composite or turnkey contract. Mr. Malhotra would further submit that it is not a mere case of sale and according to the expanded definition of tax on sale, "tax" is leviable only on the transfer of property in goods, whether in goods or in some other form, involved in the execution of work and no sales tax is leviable on the execution of works contract. Thus, the stand of the Union of India is that supply and installation of lift is not a contract for sale but a works contract.

16. To appreciate the controversy in the backdrop of the rivalised submissions, it is necessary to delve into the genesis of the law in respect of "works contract" and thereafter to dwell upon how far the principles pertaining to "works contract" would govern the manufacture, supply and installation of lifts. In this context, it is seemly to appreciate the legal position as to how the impost of sales tax on "works contract" was treated prior to the insertion of Clause (29A) in Article 366 of the Constitution by the Constitution (Forty-sixth Amendment) Act, 1982 with effect from 1.3.1983 and how this court has dealt with the said facet after the constitutional amendment that changed the concept of levy of sales tax on "works contract". For the aforesaid purpose, chronological recapitulation is imperative. In State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd.[28], the assessee faced a levy in respect of goods sold in relation to works contract under the Madras General Sales Tax Act, 1939 as amended by the Madras General Sales Tax (Amendment) Act 25 of 1947 wherein certain new provisions were incorporated and one such provision, namely, Section 2(i) defined "works contract" to mean "any agreement for carrying out for cash or for deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immoveable property or the fitting out, improvement or repair of any movable property". In pursuance of the said provision, the rules were amended and the assessment was framed. When the matter travelled to the Constitution Bench of this Court, it was contended by the assessee that nothing could be levied that was received by the assessee from the persons for whose benefit it had constructed the buildings. On behalf of the Revenue, it was urged that once there was an agreement between the parties and in the carrying out of that agreement there was transfer of

title in movables belonging to one person to another for consideration, there would be a “sale”. Repelling the said submission, it was held that if the words "sale of goods" were to be interpreted in their legal sense, that sense could only be what it was in the law relating to sale of goods. It was observed that the ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must be taken to have intended that they should be understood in that sense and in interpreting an expression used in a legal sense, the requirement was to ascertain the precise connotation which it possesses in law because both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale, there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. The essence of the concept that both the agreement and the sale should relate to the same subject-matter was highlighted and it was opined that under the law, there could not be an agreement relating to one kind of property and a sale as regards another. The Constitution Bench further held that on the true interpretation of the expression "sale of goods", there must be an agreement between the parties for the sale of the very goods in which eventually property passes and in a building contract, the agreement between the parties being to the effect that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, there was neither a contract to sell the materials used in the construction nor did the property pass therein as movables and, therefore, it was impossible to maintain that there was implicit in a building contract a sale of materials as understood in law. Eventually, the Court summed up the conclusion by stating that the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement and 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 Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.

17. In Carl Still G.m.b.H. & Another v. State of Bihar and others[29], the majority, interpreting the nature of the contract which related to assembling and installing machinery, plant and accessories for a coke-oven battery and by-products plant, opined that the price was agreed for the execution of the works and there was no agreement for sale of materials as such by the appellant therein to the owner and, therefore, the agreement in question was an indivisible one for the construction of specified works for a lump sum and not a contract for sale of materials as such.

18. Patnaik & Co. (supra) related to a case of construction of bus bodies on a chassis and the builder of the bus bodies had taken the responsibility to bear the loss, if any, till the delivery of the chassis with bus bodies. The question arose whether the assessee was liable to pay sales tax under the Orissa Sales Tax Act, 1947 on the whole amount or entitled to deduction from its gross turnover in respect of the amount received from the State Government for building bodies on the chassis supplied by the Government. The majority decision observed that it was a case of fixing chattel on chattel and there was no authority for the proposition that when a chattel was fixed on another chattel, there was no sale of goods. The decision in Gannon Dunkerley-I (supra) was distinguished on the ground that it related to contract to construct a building and the property did not pass in the materials as movables but the property in the bus bodies passed as a movable property. Thus, it was not one but

sum total of several reasons which was the foundation of the majority judgment in Patnaik & Co. (supra).

19. In the case of State of Gujarat v. M/s. Kailash Engineering Co. (Pvt.) Ltd.[30], the issue was whether the construction of third class sleeper coaches by the respondent-assessee on certain conditions amounted to a works contract or it was a sale under the said State enactment. This Court, taking into account all the terms of the contract and treating the same as one entire and indivisible contract for carrying out the works specified in full details in the agreement, and considering that it did not envisage either the sale of materials by the respondent to the Railway, or of the coach bodies as such, treated it as a works contract.

20. In The State of Madras v. Richardson & Cruddas Ltd.[31], there was a postulate that a consolidated lump sum would be paid per ton for fabrication, supply and erection at site of all steelwork, and there was no provision under the contract for dissecting the value of the goods supplied and the value of the remuneration for the work and labour bestowed in the execution of the work and the predominant idea underlying the contract was bestowing of special skill and labour by the experienced engineers and mechanics of the respondent. Taking into consideration the said aspects and relying on the principles stated in Clark v. Bulmer[32], the Court held that the contract was a works contract and not a contract for sale.

21. In Man Industrial Corporation Ltd. (supra), which has been taken note of in the referral order, this Court treated the contract for providing and fixing four different types of windows of certain sizes according to "specifications, designs, drawings and instructions" set out in the contract as a contract for work and labour and not a contract for sale, for 'fixing' the windows to the building was not incidental or subsidiary to the sale, but was an essential term of the contract. Similar view has been expressed in Nenu Ram (supra).

22. In The State of Punjab v. M/s. Associated Hotels of India Ltd.[33], the Constitution Bench, while dealing with the construction of a contract of work and labour on the one hand and contract for sale on the other, opined that the difficulty which the Courts have often to meet in construing a contract of work and labour, on the one hand, and a contract for sale, on the other, arises because the distinction between the two is very often a fine one and it is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. The Court thereafter proceeded to state thus: -

"Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed and 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[34]." Be it stated, in the said case, the

respondent-company carried business as hoteliers and, as a part of its business, the company received guests to whom it furnished certain amenities. The Court ruled that the transaction between a hotelier and a visitor was essentially one of contract of service and facilities provided at reasonable price.

23. In State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v. M/s. Variety Body Builders[35], this Court, after referring to the passage from Halsbury's Laws of England, Third Edition, Volume 34, page 6, ruled thus: -

"47. It can be treated as well settled 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 particular context, and yet certain clinching terms in a given case may fortify a conclusion one way or the other. It will depend upon the facts and circumstances of each case. The question is not always easy and has for all time vexed jurists all over."

24. In Vanguard Rolling Shutters and Steel Works' case, the assessee manufactured rolling shutters according to specifications given by the parties and fixed the same at the premises of the customers. The assessee claimed that it was not liable to sales tax on the ground that the amount received by it represented the proceeds of works contract. When the matter travelled to the High Court, it opined that the contracts entered into by the assessee were not works contracts but contracts for supply of goods simpliciter and the assessee was, therefore, liable to pay sales tax. While reversing the decision of the High Court, this Court took note of certain aspects, namely, that the amount from the owner of the premises was in lump sum without specifying as what part was meant for the material and the fabricated part and what part was meant for service or labour put in by the contractor; that the materials as supplied was not supplied by the owner so far as to pass as chattel simpliciter, but actually affixing to one immovable property and after they were fixed and erected, they became permanent fixture so as to become an accretion to the immovable property; and that the operation to be done at the site could not be said to be merely incidental to the contract but was a fundamental part of the contract. In this backdrop, it was ruled that the contract in question was not a pure and simple sale of goods or materials as chattels but was a works contract.

25. In Ram Singh & Sons Engineering Works (supra), the assessee-

> manufacturer had entered into contracts for fabrication, supply and erection of overhead travelling cranes. Under the contract, it was required to design, fabricate and erect the machines at the customers' factories according to the specifications given by the customers. The Court followed the principles laid down in Commissioner of Sales Tax, Madhya Pradesh v. Purshottam Premji[36], Sentinel Rolling Shutters & Engineering Co. (P) Ltd. (supra) and Man Industrial Corporation (supra) and treated it as works contract on the ground that the erection is a fundamental and integral part of the contract, because without it, the 3-motion electrical overhead travelling crane does not come into being. It was further observed that the manufacturer would undoubtedly be the owner of the component parts when he fabricated them, but at no stage does he become the owner of the 3-motion electrical overhead travelling crane

> as a unit so as to transfer the property in it to the customer. Emphasis was laid on the fact that the 3-motion electrical overhead travelling crane comes into existence as a unit only when the component parts are fixed in position and erected at the site, but at that stage, it becomes the property of the customer because it is permanently embedded in the land belonging to the customer and, therefore, there is no transfer of property in it by the manufacturer to the customer as a chattel.

26. In Hindustan Aeronautics Limited v. State of Orissa[37], the Court, while emphasizing that there is no rigid or inflexible rule applicable alike to all transactions which can indicate distinction between a contract for sale and a contract for work and labour, opined that basically and primarily, whether a particular contract was one of sale or for work and labour depended upon the main object of the parties in the circumstances of the transaction.

27. The aforesaid authorities clearly show that a works contract could not have been liable to be taxed under the State sales tax laws and whether the contract was a works contract or a contract for sale of goods was dependent on the dominant intention as reflected from the terms and conditions of the contract and many other aspects. In certain cases, the court has not treated the contract to be a works contract by repelling the plea of the assessee after taking into consideration certain special circumstances. No straitjacket formula could have been stated to be made applicable for the determination of the nature of the contract, for it depended on the facts and circumstances of each case. As the works contract could not be made amenable to sales tax as the State Legislatures did not have the legislative competence to charge sales tax under Entry 48 List II of the Seventh Schedule of the Constitution on an indivisible contract of sale of goods which had component of labour and service and it was not within the domain of the assessing officer to dissect an indivisible contract to distinguish the sale of goods constituent and the labour and service component. The aforesaid being the legal position, the Parliament brought in the Forty-sixth Amendment by incorporating Clause (29A) in Article 366 of the Constitution to undo the base of the Constitution Bench decision in Gannon Dunkerley's-I case.

28. To have a complete picture, we think it apt to reproduce the said constitutional provision: -

"366 (29A) "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 or those goods by the person to whom such transfer, delivery or supply is made;"

29. After the amendment in the Constitution, various States amended their legislations pertaining to sales tax for levy of sales tax on works contract. The constitutional validity of the Forty-Sixth Amendment by which the State Legislatures were conferred the competence to levy sales tax on certain transactions, as incorporated in sub-clauses (a) to (f) of Clause (29A) of Article 366 of the Constitution as well as the amendments made by the State Legislatures, were challenged in Builders' Association (supra). The Constitution Bench took note of the various problems which arose on account of the decisions in the field pertaining to works contract and the recommendations by the Law Commission in its 61st Report recommending for certain amendments in the Constitution so as to levy sales tax on transactions of the nature which were not liable to sales tax and the purpose of the amendment to bring many of the transactions in which property in goods passed for the purpose of levy of sales tax within the scope of power of the State to levy tax. The Constitution Bench also took note of the amendments that were incorporated in clause (1) of Article 269 and clause (3) of Article 286 and eventually upheld the constitutional validity of the amendment. In that context, the court observed that sub-clause (b) of clause (29-A) states that 'tax on the sale or purchase of goods' includes, among other things, a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract, but does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract and the latter part of clause (29A) of Article 366 of the Constitution makes the position very clear. Further, the Court explained the constitutional validity of clause (29A) of Article 366 of the Constitution by expressing thus:

"…. a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also." After so stating, the Constitution Bench, observed that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of Article 366 of the Constitution are subject to the

restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses

(b), (c) and (d) of clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of Article 286(3) of the Constitution. The Constitution Bench further opined that it is open to the States to segregate works contract into two separate components or contracts by legal fiction, namely, contract for sale of goods involved in the works contract and for supply of labour and service.

30. At this juncture, the pronouncement in M/s Gannon Dunkerley and Co. and others v. State of Rajasthan and others[38] is necessary to be noted. While dealing with the various submissions of the counsel for the States, the Constitution Bench referred to the Builders' Association case wherein it has been clearly stated that the tax leviable by virtue of sub-clause (b) of clause (29A) of Article 366 of the Constitution becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. After so stating, the Court did not think it appropriate to reopen the issues which were covered under the Builders' Association case and proceeded to deal with the matter in accordance with the law laid down in that case.

31. Be it noted, the Constitution Bench, in Gannon Dunkerley-II (supra), has unequivocally restated and reaffirmed the principle that the States have legislative power to impose tax on the transfer of property in goods or in some other form in the execution of works contract and they have also the power to bifurcate the contract and levy sales tax on the value of materials used in the execution of the works contract, regard being had to the principle that the State Legislatures have been empowered under Clause (29A) of Article 366 to levy tax on the deemed sales. We may state with profit that certain principles have been laid down in the said decision to which we shall refer to at the appropriate stage.

32. Having dealt with the aforesaid authorities, as advised at present, we shall refer to certain authorities as to how the term "works contract" has been understood in the contextual perspective post the constitutional amendment. In Hindustan Shipyard Ltd. (supra), the Court observed that the distinction between a contract of sale and a works contract is not free from difficulty and has been the subject-matter of several judicial decisions. It is further observed that neither any straitjacket formula can be made available nor can such quick-witted tests devised as would be infallible, for 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. Thereafter, the two- Judge Bench set out three categories of contracts and explained the contours, namely, (i) the contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; (ii) it may be a contract for work in which the use of the materials is accessory or incidental to the execution of the work; and (iii) it may be a contract for supply of goods where some work is required to be done as incidental to the sale. Thereafter, it opined that the first contract is a composite contract consisting of two contracts, one of which is for the sale of goods and the other is for work and labour; the second is clearly a contract for work and labour not involving sale of goods; and the third is a contract for sale where the goods are sold as chattels and the work done is merely incidental to the sale.

33. Commenting on the said decision in Larsen and Toubro (supra), a three-Judge Bench opined that after the 46th Amendment, the thrusts laid down therein are not of much help in determining whether the contract is a works contract or a contract for sale of goods. We shall elaborate the perception as has been stated in Larsen and Toubro (supra) at a later stage.

34. In Bharat Sanchar Nigam Ltd. (supra), a three-Judge Bench was concerned with the question of the nature of the transaction with regard to whether mobile phone connections which are enjoyed, is a sale or is a service or both. Though the context pertained to the meaning of the term "goods" under Article 366(29A), yet the Court referred to the case in Associated Cement Companies Ltd. v. Commissioner of Customs[39] and stated thus: -

"After the Forty-sixth Amendment, the sale element of those contracts which are covered by the 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. Therefore when in 2005 C.K. Jidheesh v. Union of India[40] held that the aforesaid observations in Associated Cement were merely obiter and that Rainbow Colour Lab v. State of M.P.[41] was still good law, it was not correct."

35. We have referred to the aforesaid decision only to point out that the "dominant nature test" relating to the works contract that gets covered under Article 366(29A) of the Constitution has been held therein to be not applicable.

36. In K. Raheja Development Corporation v. State of Karnataka[42], the appellants were involved in carrying on business of real estate development and allied contracts and had entered into development agreement with the owners of the land. They had entered into agreement with the intended purchasers for residential apartments and/or commercial complexes. The agreement 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 with the further condition that the owners of the land would then transfer the ownership directly to the society which was being formed under the State Legislation. The question that arose for consideration was whether the appellants, the dealers, were liable to pay turnover tax under the Karnataka Sales Tax Act. Their returns were not accepted by the adjudicating authority and they were assessed to sales tax. Facing failure at all levels including the High Court, the appellant preferred an appeal by way of special leave. The two- Judge Bench considered the scope of Section 2(1)(u-1) of the Karnataka Sales Tax Act and other provisions and, considering the wide amplitude of the definition of "works contract" in the Act, interpreted the contract and came to hold that the contract remained a works contract within the meaning of the term as defined under the said Act. The Bench further clarified that if the agreement was entered into after the flat or unit was already constructed, then there would be no works contract. But so long as the agreement was entered into before the construction was completed, it would be a works contract. We may hasten to add that the aforesaid decision has been approved to have been laying down the correct legal position in Larsen and Toubro (supra).

37. In State of U.P. and others v. P.N.C. Construction Co. Ltd. and others[43], the raw materials were bought by the assessee which were used in the manufacture of hot mix utilized for road construction. The question that emanated before the Court was whether, on the said facts, the Department was right in denying the benefit of recognition certificate as contemplated under Section 4B of the U.P. Trade Tax Act, 1948. In that context, it was observed that after the introduction of sub-clause (b) of Clause 29-A in Article 366, the emphasis is on the expression "transfer of property in goods (whether goods as such or in some other form)" and, therefore, the works contract which is an indivisible contract is, by a legal fiction, divided into two parts—one for sale of goods and the other for supply of labour and services, which has made it 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 supplied in a building contract, for the concept of "value addition" comes in.

38. Reference to the aforesaid authorities is for the purpose that post the constitutional amendment, the Court has been interpreting a contract of work, i.e., works contract in the constitutional backdrop. In certain cases, which involve transfer of property and also an element of service in the context of work rendered, it has been treated as works contract.

39. The essential characteristics have been elucidated by a three-Judge Bench in Larsen and Toubro (supra) thus: -

"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 [pic]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 purchase 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 of 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."

40. On the basis of the aforesaid elucidation, it has been deduced that a transfer of property in goods under Clause (29A)(b) of Article 366 is deemed to be a sale of goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made. One thing is significant to note that in Larsen and Toubro (supra), it has been stated that after the constitutional amendment, the narrow meaning given to the term "works contract" in Gannon Dunkerley-I (supra) no longer survives at present. It has been observed in the said case that even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract, for the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. It has been further held that once the characteristics or elements of works contract are satisfied in a contract, then irrespective of additional obligations, such contract would be covered by the term "works contract" because nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only.

41. In the said case, another significant aspect has been considered. That relates to the "dominant nature test". We think it apt to reproduce what has been stated in Larsen and Toubro (supra):-

"Whether the 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..."

42. At this juncture, it is condign to state that four concepts have clearly emerged. They are (i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;

(ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable; (iii) the term "works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and (iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

43. Having noted the conceptual telescopic arena of the term "works contract" and the principles we have stated hereinabove, it is necessitous to refer to how the installation of a lift was understood and treated prior to the decision in Kone Elevators case. In Otis Elevator (supra), a contract was entered into between the parties for supply and installation of two lifts and in pursuance of the contract, the assessee duly erected and installed two lifts in accordance with the terms of the contract and, eventually, the lifts were handed over to the customer. The question arose for determination whether sales tax was payable by the applicant therein in respect of the said contract. It was

contended that it was an entire and indivisible contract for the erection and installation of lifts and the materials furnished were only in execution of the works contract and there was no sale of goods and materials by them. The learned Deputy Commissioner of Sales Tax came to hold that though the contract was one and indivisible contract and of lump sum value, yet in essence, it was to transfer the property in the goods for money consideration and so, the contract involved a sale of lifts. When the matter travelled to the Sales Tax Tribunal, it concurred with the view expressed by the Deputy Commissioner of Sales Tax. It was observed by the Tribunal that the amount or price of the materials supplied was overwhelming as compared to the amount agreed upon for labour and service and that apart, the price of the materials supplied was subject to adjustment. It was further held by the Tribunal that the intention of the parties was that there was a sale qua lifts for money consideration and there was also to be the installation of those lifts by the applicants. On a reference being made by the Tribunal, the High Court scanned the terms of the contract and took note of certain facts, namely, that detailed provisions were given regarding the dimensions and travel of the car, the load and speed of the elevator, the type of the platform and the car enclosure, and what the car was to consist of, as also of the place where the machine was to be located, viz., above the hoistway upon rolled steel joists to be provided to the elevator; that the car-frame was to be made of structural steel and equipped with suitable guides and an Otis car safety device; that the counterbalance was also to be of a suitably guided structural steel frame with appropriate filler weights which would be furnished to promote smooth and economical operation; that terminal limit switches were to be provided to slow down and stop the car automatically at the terminal landing and final limit switches were to be furnished to automatically cut off the power and apply the brake, should the car travel beyond the terminal landings; that there was a reference to terminal buffers; that Otis spring buffers were to be installed as a means for stopping the car and counterweight at the extreme limits of travel; that there were provisions regarding the machine, brake and motor; that the motor was to be of Otis design and manufacture, or equivalent suited to the service proposed and arranged for ample lubrication; that there were also provisions regarding sheaves and beams; that the contract also made provisions for a special operating device in the car and at hoistway landings; that for the actual operation of the car, a provision was made for the car door or gate, hoistway doors and alarm bell; and that the contract specifically provided for the item of maintenance. The High Court referred to various components of the price and, after referring to Richardson and Cruddas Ltd. (supra), opined that after the lifts were properly erected and installed in the building, they became permanent fixtures of the premises. The Court took note of the terms of the agreement and held that the terms in the agreement were also indicative of the fact that the whole contractual obligation was not divisible in parts, and was intimately connected with the labour and services undertaken by the applicants in erecting and installing the apparatus. After so stating, the Court observed that the work of erection and installation of an apparatus like the lift in a huge building, which has to carry passengers to several floors, is a type of work which calls for considerable skill and experience and the technical skill and precision in execution of the work is absolutely essential if satisfactory services are to be rendered by the person who undertakes such work. Eventually, the High Court ruled that it would be difficult to hold that the mere use of the material, or the ultimate passing of property in the article or apparatus as a result of the execution of the contract, will make it possible to sever the agreement into two parts, one for the sale of goods, and the other for services rendered, for the two are so intimately connected that severance is not possible in such cases and, in fact, it was an indivisible contract.

44. The aforesaid decision makes it limpid how many facets are to be taken care of for the purpose of installation of the elevator, regard being had to its technical facet, safety device and actual operation. That apart, the decision has taken note of the fact that upon the installation of the lift in the building, it becomes a permanent fixture in the premises and that the involvement of technical skill and experience pertain to the precision in execution for rendering satisfactory service and the obligation to maintain which are integral to the supply and installation.

45. In this backdrop, we shall now proceed to deal with the submissions advanced by the learned counsel for the respondents which we have already noted. The fundamental submission of Mr. Dwivedi is that the manufacturer of the lift retains ownership in the components as property while producing the completed lift and, hence, it would be a case of pure manufacture. A distinction has been sought to be made that if another agency is appointed to install, it does not have the ownership of the components. To bolster the basic submission, as we find, he has referred to various facets. The said proponement, as we understand, is based on the assumption that the supplier remains the owner of the components as per the contract; that the manufacture is a process or activity which brings in existence new identifiable and distinct component; that installation is an integral part of the manufacturing process and proceeds from the manufacture of the components themselves; that the concept of permanent fixture to a building cannot be enlarged to such an extent to put it in the realm of works contract or to take it away from the conceptual meaning of manufacture. We have already dealt with the principles stated in Patnaik and Co. (supra), Hindustan Aeronautics Ltd. (supra), T.V. Sundaram Iyengar (supra), Kailash Engineering Co. (supra) and the observations made by Sikri, J., in Patnaik & Co. (supra) wherein the decision in Anglo-Egyptian Navigation Co. v. Rennie[44] was distinguished by stating that whenever a contract provides for the fixing of a chattel to another chattel, there is no sale of goods. Be it noted, in Patnaik & Co. (supra), an illustration was given that when a dealer fits tyres supplied by him to the car of the customer, it would tantamount to sale of the tyres by the dealer to the customer. In these cases, the Court was really dealing with the terms of the contract contextually to come to a conclusion as to whether the contract in question was a contract for sale or a works contract. The fundamental principle that was applied is that what was sold was a chattel as chattel or the contract was a composite one on a different base/foundation.

46. The other decisions which have been relied upon by Mr. Dwivedi to show that installation is a part of the manufacturing process are J. Marcel (Furriers) Ltd. (supra), Central India Machinery Manufacturing Company Ltd. (supra), Norman Wright (Builders) Ltd. (supra), Titan Medical Systems (supra), MIL India Ltd. (supra), Eastend Papers Industries Ltd. (supra) and Aspinwall & Co. (supra). In J. Marcel (Furriers) Ltd. (supra), the plaintiff had kept a stock of furs made up ready for sale and they also made up furs, coats, jackets, and boleros for customers. An order was placed by the defendant for a mutation mink jacket. As the jacket was not up to mark, it was rejected by the defendant. In that context, the Court observed that though huge degree of skill and craftsmanship had gone into making up of a fur jacket as was made for the defendant, yet it was no more than making an article for sale to the defendant on a special order and the transaction, in fact, related to sale of a complete article and the receipt of the price.

47. In Norman Wright (Builders) Ltd. (supra), an agreement was entered into by the appellant for fixing of black-out curtains at some London police stations. The appellant-plaintiff contended before

the Court that the fixing of curtains was not a sale of goods but a contract for work and labour and the supply of material in connection therewith. Repelling the said submission, it was held that as the contract involved transferring chattels, namely, curtains to the defendants for a price, in which they had no previous right, it was a sale of goods.

48. Narne Tulaman Manufacturers Pvt. Ltd., Hyderabad v. Collector of Central Excise, Hyderabad[45], Eastend Paper Industries Ltd. (supra), Aspinwall & Co. Ltd. (supra), MIL India Ltd. (supra) and Sirpur Papers Mills Ltd. (supra) are the decisions under the Central Excise Act, 1944 which are really not of relevance as they relate to the concept, term and expression "manufacture" as used and understood under the said Act. The concept of "manufacture" has limited relevance and cannot be a determining factor to decide whether the contract is one for supply of goods or is a composite contract. In Narne Tulaman Manufacturers Pvt. Ltd. (supra), installation of weighbridges was held to be manufacture for the purpose of excise duty, observing that the assessee was obsessed with the idea that part of the machinery was liable to duty but the whole of the product was not dutiable as excisable goods. Similarly, in Aspinwall & Co. (supra), curing of coffee, it was held, amounts to manufacture, as a new and distinct commodity of independent identity, distinct from raw material, had come into existence. In Sirpur Paper Mills Ltd.'s case, the question arose whether paper making machine was an immovable property as it was embedded on the earth and, therefore, not exigible to excise duty. This Court opined that paper making machine was exigible to excise duty as the whole machine could be dismantled and it was attached to the earth only for operational efficiency. Though the entire machine was assembled from various components, yet, by itself, it was a new marketable commodity that had emerged as a result of the manufacturing activity. The aforesaid decisions cannot be taken aid of to come to a conclusion that installation is assembling and, in the ultimate eventuate, it is a part of the manufacturing process. We are disposed to think so as there is a fundamental fallacy in the submission as far as installation of the lift is concerned. It is not a plant which is erected at the site. It is not a different item like coffee which comes into the market after processing. It is also not like a "weighbridge" as is understood under the excise law. It has to be understood in the conceptual context of the manufacture and installation of a lift in a building. The lift basically comprises components like lift car, motors, ropes, rails, etc. having their own identity even prior to installation. Without installation, the lift cannot be mechanically functional because it is a permanent fixture of the building having been so designed. These aspects have been elaborately discussed in Otis Elevator (supra) by the High Court of Bombay. Therefore, the installation of a lift in a building cannot be regarded as a transfer of a chattel or goods but a composite contract. Hence, we unhesitatingly hold that the said decisions are not of much help to the learned senior counsel for the State of Orissa.

49. Coming to the submissions of Mr. Venkataramani, we find that the fundamental facet of the contention is based on the principle of "deliverable state" and the intention of the purchaser to obtain an identifiable product or goods and the said identified product comes into being after the components are fixed at the site to make the lift usable. As submitted, the rendering of service is only to make the lift deliverable. The aforesaid submission, on proper appreciation, really rests on the bedrock of incidental or ancillary service involved in the installation of lift. We shall deal with this aspect when we address more elaborately to the dominant nature test and the incidental service in the context of clause 29A(b) of Article 366 of the Constitution.

50. As far as the submission put forth by the learned counsel for the State of Gujarat, it is based on the edifice that the "dominant nature test" is still available in view of the decisions in Bharat Sanchar (supra) and Larsen and Toubro (supra). On a careful reading of the written note of submission of the learned counsel for the State of Gujarat, we find that the learned counsel have not appositely understood the ratio laid down in the aforesaid authorities. Reliance was placed on para 45 of the decision in Bharat Sanchar (supra). It is noticeable that the Court was analyzing the principle stated in Gannon Dunkerley-I (supra) and thereafter, in para 49, which we have reproduced hereinabove, it has been clearly held that after the Forty Sixth Amendment of the Constitution, the works contract which is covered under Clause (29A)(b) of Article 366 of the Constitution is separable and may be subject to sales tax by the State under Entry 54 of List-II and there is no question of the dominant nature test being applicable. Thus, the submission is absolutely misconceived.

51. The submission of Dr. Manish Singhvi, learned counsel for the State of Rajasthan, primarily rests on the base that decisions which have been discussed in the referral order, do not lay down the correct law. In our considered opinion, the judgments rendered in the said cases rested on the nature of the contract and the tests laid down in Gannon Dunkerley-I (supra). We see no reason to hold that the said decisions do not lay down the correct law in the context of works contract as it was understood and treated prior to the Forty Sixth Amendment.

52. Coming to the stand and stance of the State of Haryana, as put forth by Mr. Mishra, the same suffers from two basic fallacies, first, the supply and installation of lift treating it as a contract for sale on the basis of the overwhelming component test, because there is a stipulation in the contract that the customer is obliged to undertake the work of civil construction and the bulk of the material used in construction belongs to the manufacturer, is not correct, as the subsequent discussion would show; and second, the notification dated 17th May, 2010 issued by the Government of Haryana, Excise and Taxation Department, whereby certain rules of the Haryana Value Added Tax Rules, 2003 have been amended and a table has been annexed providing for "Percentages for Works Contract and Job Works" under the heading "Labour, service and other like charges as percentage of total value of the contract" specifying 15% for fabrication and installation of elevators (lifts) and escalators, is self-contradictory, for once it is treated as a composite contract invoking labour and service as a natural corollary, it would be works contract and not a contract for sale. To elaborate, the submission that the element of labour and service can be deducted from the total contract value without treating the composite contract as a works contract is absolutely fallacious. In fact, it is an innovative subterfuge. We are inclined to think so as it would be frustrating the constitutional provision and, accordingly, we unhesitatingly repel the same.

53. As far as submissions of Mr. K.N. Bhat, learned senior counsel for the State of Karnataka, and Mr. P.P. Malhotra, learned Additional Solicitor General, are concerned, as their stand is that the decision in Kone Elevators (supra) is not correct, we have only noted that for completeness.

54. Having dealt with the submissions advanced by the learned counsel for various States and the learned Additional Solicitor General for the Union of India, we shall presently proceed to deal with the correctness of the legal position as stated in Kone Elevators case. In the said case, a three-Judge

Bench took note of the submissions on behalf of the Department that the main object of the contract in question was to sell the lifts and the works done by the assessee for installation was incidental to the sale of lifts. It had also taken note of the submission that the legislature has classified the commodity "lift" under Entry 82 of the First Schedule to the Andhra Pradesh General Sales Tax Act, 1957 keeping in mind that the word "installation" was ancillary to the "sale" of lifts. The Court, while dealing with the differentiation between "contract for sale" and "works contract", opined thus: -

"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."

55. After so stating, the three-Judge Bench adverted to the definitions in the State Act, referred to the decision in Gannon Dunkerley-I (supra), placed reliance on the decision in Hindustan Shipyard Ltd. (supra) and, analyzing the principle stated therein, observed thus:

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"9. In the case of Hindustan Shipyard Ltd. v. State of A.P. this Court held that 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 the bulk of material used in construction belongs to the manufacturer who sells the end product for a price, then it is a strong pointer to the conclusion that the contract is in substance one for the sale of goods and not one for labour. However, the test is not decisive. It is not the bulk of the material alone but the relative importance of the material qua the work, skill and labour of the payee which also has to be seen. If the major component of the end product is the

material consumed in producing the chattel to be delivered and skill and labour are employed for converting the main components into the end products, the skill and labour are only incidentally used, the delivery of the end product by the seller to the buyer would constitute a sale. On the other hand, if the main object of the contract is to avail the skill and labour of the seller though some material or components may be incidentally used during the process of the end product being brought into existence by the investment of skill and labour of the supplier, the transaction would be a contract for work and labour."

56. Applying the above test, the learned Judges referred to the terms of the contract and took note of the fact that the entire onus of preparation and making ready of the site for installation of lift was on the customer. It was agreed that under no circumstances would the assessee undertake installation of lift if the site was not kept ready by the customer inasmuch as under clause 4(g) of the "Customers' Contractual Obligations", the assessee reserved the right to charge the customer for delay in providing the required facilities. The Court observed that these facts clearly indicated that the assessee divided the execution of the contract into two parts, namely, "the work" to be initially done in accordance with the specifications laid down by the assessee and "the supply" of lift by the assessee. "The work" part in the contract was assigned to the customer and "the supply" part was assigned to the assessee and the said "supply" part included installation of lift. Therefore, the learned Judges further observed that the contractual obligation of the assessee was only to supply and install the lift, while the customer's obligation was to undertake the work connected in keeping the site ready for installation as per the drawings. The Court took note of the contractual obligations of the customer and the fact that the assessee undertook exclusive installation of the lifts manufactured and brought to the site in knocked-down state to be assembled by the assessee and ruled that it was clear that the transaction in question was a contract of "sale" and not a "works contract". The Court perused the brochure of the assessee Company and noticed that the assessee was in the business of manufacturing of various types of lifts, namely, passenger lifts, freight elevators, transport elevators and scenic lifts and a combined study of the above models, mentioned in the brochure, indicated that the assessee had been exhibiting various models of lifts for sale and the said lifts were being sold in various colours with various capacities and variable voltage. From the further analysis, it is manifest that the Court took into account the fact that it was open for a prospective buyer to place purchase order for supply of lifts as per his convenience and choice and ruled that the assessee, on facts, satisfied the twin requirements to attract the charge of tax under the 1957 Act, namely, that it carried on business of selling the lifts and elevators and it had sold the lifts and elevators during the relevant period in the course of its business. To strengthen the conclusion, it has been held that the major component of the end product is the material consumed in producing the lift to be delivered and the skill and labour employed for converting the main components into the end product are only incidentally used.

57. From the aforesaid decision, it is perceptible that the three-Judge Bench has drawn distinction between the contract for sale and works contract and, in that context, the essence of the contract or reality of the transaction as a whole, regard being had to the predominant object of the contract, the circumstances of the case and the custom of the trade have been taken into consideration. In that context, the learned Judges have opined that it is not the bulk of the material alone but the relevant importance of the material qua the work, skill and labour of the payee which also has to be seen and

if the major component of the end product is the material consumed in producing the chattel to be delivered and skill and labour are employed for converting the main components into the end product, the skill and labour are only incidentally used and the delivery of the end product by the seller to the buyer would constitute a sale. On the aforesaid principle, the three- Judge Bench has finally ruled that a dealer carries on business of selling lifts and elevators and the major component of the end product is the material consumed in producing the lift to be delivered and the skill and labour employed for converting the main components into the end product are incidentally used and, therefore, the delivery of the end product by the assessee qua the customer has to be constituted as a sale and not a works contract.

58. To understand the reasons ascribed in the said decision, it is requisite to appreciate the principle relating to the overwhelming component test or major component test. We have already referred to the decision in Bharat Sanchar (supra) wherein it has been clearly stated that the dominant nature test has no application. The said principle has been reiterated in Larsen and Toubro (supra) by stating thus: -

"87. 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 [pic]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)." xxx xxx xxx "97.5. 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.

97.6. 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."

59. It is also necessary to state here that in Larsen and Toubro (supra), the question arose whether taxing of sale of goods in an agreement for sale of flat which is to be constructed by the developer-promoter is permissible under the Constitution. The three-Judge Bench opined that though the ultimate transaction between the parties may be sale of the flat, yet it cannot be said that

the characteristics of works contract are not involved in that transaction because the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute the work and such an activity of construction bears all the characteristics and elements of works contract. In that context, in paragraph 107 of the decision, reliance was placed on Builders' Association (supra) wherein the contention that a flat is sold as a flat and not as an aggregate of its component parts was negated on the ground that the properties that were transferred to the owner in the execution of the works contract are not goods involved in the execution of the works contract, but a conglomerate, that is, the entire building which is actually constructed.

60. The aforesaid analysis has to be understood on the anvil of Article 366 (29A) of the Constitution. In this regard, we may fruitfully reproduce a passage from Builders' Association case: -

"... 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."

61. Explaining the said passage, the Constitution Bench, in Gannon Dunkerley-II (supra), has opined thus:-

"This would mean that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought on a par with a contract containing two separate agreements."

62. It has been further observed therein as follows: -

> "36. 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 a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services."

63. Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in Larsen and Toubro (supra) as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract.

64. Coming back to Kone Elevators (supra), it is perceivable that the three-Judge Bench has referred to the statutory provisions of the 1957 Act and thereafter referred to the decision in Hindustan Shipyard Ltd. (supra), and has further taken note of the customers' obligation to do the civil construction and the time schedule for delivery and thereafter proceeded to state about the major component facet and how the skill and labour employed for converting the main components into the end product was only incidental and arrived at the conclusion that it was a contract for sale. The principal logic applied, i.e., the incidental facet of labour and service, according to us, is not correct. It may be noted here that in all the cases that have been brought before us, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. As has been held by the High Court of Bombay in Otis Elevator (supra), various technical aspects go into the installation of the lift. There has to be a safety device. In certain States, it is controlled by the legislative enactment and the rules. In certain States, it is not, but the fact remains that a lift is installed on certain norms and parameters keeping in view numerous factors. The installation requires considerable skill and experience. The labour and service element is obvious. What has been taken note of in Kone Elevators (supra) is that the company had brochures for various types of lifts and one is required to place order, regard being had to the building, and also make certain preparatory work. But it is not in dispute that the preparatory work has to be done taking into consideration as to how the lift is going to be attached to the building. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. Involvement of the skill has been elaborately dealt with by the High Court of Bombay in Otis Elevator (supra) and the factual position is undisputable and irrespective of whether installation is regulated by statutory law or not, the result would be the same. We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site, i.e., building, and prepared for delivery. The conclusion, as has been reached in Kone Elevators (supra), is based on the bedrock of incidental service for delivery. It would not be legally correct to make such a distinction in respect of lift, for the contract itself profoundly speaks of obligation to supply goods and materials as well as installation of the lift which obviously conveys performance of labour and service. Hence, the fundamental characteristics of works contract are satisfied. Thus analysed, we conclude and hold that the decision rendered in Kone Elevators (supra) does not correctly lay down the law and it is, accordingly, overruled.

65. Ordinarily, after so stating, we would have directed the matter to be listed before the appropriate Division Bench. However, it is not necessary to do so in this batch of cases inasmuch as the writ

petitions have been filed either against the show-cause notices where cases have been reopened or against the orders of assessment framed by the assessing officers and civil appeals filed against certain assessment orders or affirmation thereof which are based on the decision of the three-Judge Bench in Kone Elevators case. Considering the factual matrix, we direct that the show-cause notices, which have been issued by taking recourse to reopening of assessment, shall stand quashed. The assessment orders which have been framed and are under assail before this Court are set aside. It is necessary to state here that where the assessments have been framed and have attained finality and are not pending in appeal, they shall be treated to have been closed, and where the assessments are challenged in appeal or revision, the same shall be decided in accordance with the decision rendered by us.

66. The writ petitions and the civil appeals are disposed of with no order as to costs.

.....CJI [R.M. Lodha] .....J.

[A.K. Patnaik] .....J.

[Sudhansu Jyoti Mukhopadhaya] .....J.

[Dipak Misra] New Delhi;

May 06, 2014.

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 232 OF 2005

M/s. Kone Elevator India Pvt. Ltd. ….Petitioner

VERSUS

State of T.N. & Ors. .…Respondents

With

W.P.(C) No.298/2005, W.P.(C) No.487/2005, W.P.(C) No.528/2005, W.P.(C) No.67/2006, W.P.(C) No.511/2006, W.P.(C) No.75/2007, W.P.(C) No.519/2008, W.P.(C) No.531/2008, W.P.(C) No.548/2008, W.P.(C) No.569/2008, W.P.(C) No.186/2009, W.P.(C) No.23/2010, W.P.(C) No.62/2010, W.P.(C) No.232/2010, W.P.(C) No.279/2010, W.P.(C) No.377/2010, W.P.(C) No.112/2011, W.P.(C) No.137/2011, W.P.(C) No.181/2011, W.P.(C) No.207/2011, W.P.(C) No.278/2011, W.P.(C) No.243/2011, W.P.(C) No.372/2011, W.P.(C) No.398/2011, W.P.(C) No.381/2011, W.P.(C) No.468/2011, W.P.(C) No.547/2011, W.P.(C) No.107/2012, W.P.(C) No.125/2012, W.P.(C) No.196/2012, W.P.(C) No.263/2012, W.P.(C) No.404/2012, W.P.(C) No.567/2012, W.P.(C) No.145/2013, W.P.(C) No.241/2013, W.P.(C) No.454/2013, W.P.(C) No.404/2013, W.P.(C) No.723/2013, W.P.(C) No.440/2012, W.P.(C) No.441/2012, W.P.(C) No.156/2013, W.P.(C) No.533/2013, W.P.(C) No.403/2012, W.P.(C) No.824/2013, W.P.(C) No.428/2009, W.P.(C) No.1046/2013, W.P.(C) No.1047/2013, W.P.(C) No.1048/2013, W.P.(C) No.1049/2013, W.P.(C) No.1050/2013, W.P.(C) No.1051/2013, W.P.(C) No.1052/2013, W.P.(C) No.1098/2013 SLP(C) Nos.14148-14153/2005, SLP(C) Nos.14961-14967/2005, SLP(C) Nos.17842-17847/2005, SLP(C) No.5377/2006, SLP (C) No.7037/2006, SLP (C) No.30272/2008, SLP (C) No.30279/2008, SLP (C) No.5289/2009, SLP (C) No.6520-6521/2009, SLP (C) No.4469-4471/2010, SLP(C) No.11258/2010, SLP (C) No.17228/2010, SLP (C) No.17236-17237/2010, SLP (C) No.23259-23261/2010, SLP (C) No.15732/2011, SLP(C) No.16466/2011, SLP (C) No.16137/2011, SLP (C) No.5503/2011, SLP (C) No.11147/2011, SLP (C)

No.11227-11238/2012, SLP (C) No.36001- 36012/2013, SLP (C) No.19901/2013, C.A. No.6285/2010 J U D G M E N T Fakkir Mohamed Ibrahim Kalifulla, J.

. 1. I had the benefit of reading the illuminating judgment of my brother Justice Dipak Misra. With respect, I state that I am not able to subscribe to the views and conclusions of His Lordship. Therefore, I wish to record my reasoning and conclusions holding that the manufacture, supply and installation of lifts are to be treated as a contract of 'Sale' in the following paragraphs.

. 2. By an Order dated 13.02.2008, a three Judge Bench of this Court, headed by the Hon'ble Chief Justice, referred the following question to be decided by a Constitution Bench, namely, "Whether manufacture, supply and installation of LIFTS are to be treated as a contract of 'Sale' or 'Works Contract'?" . 3. In the decision reported in State of Andhra Pradesh vs. Kone Elevators (India) Pvt. Ltd., (2005) 3 SCC 389, it was held that a contract for supply of LIFTS constituted a 'Sale' and did not amount to a 'Works Contract' and that the element of service provided by the vendor of the elevator was negligible. The referral order referred to the other decisions which were drawn to the attention of the Court, namely, State of Rajasthan & Anr. vs. Man Industrial Corporation Ltd., [1969] 24 STC 349, State of Rajasthan vs. Nenu Ram, [1970] 26 STC 268 and M/s. Vanguard Rolling Shutters and Steel Works vs. Commissioner of Sales Tax, (1977) 2 SCC 250, wherein a contrary view was expressed than what has been taken in Kone Elevators (India) Pvt. Ltd (supra).

. 4. On behalf of the State of Tamil Nadu, Gujarat, Uttar Pradesh and Andhra Pradesh, it was submitted that Kone Elevator (India) Pvt. Ltd. (supra) was correctly decided and placed reliance on Hindustan Shipyard Ltd. vs. State of Andhra Pradesh, (2000) 6 SCC 579, apart from contending that the Writ Petition under Article 32 was not maintainable. In the referral order, while giving liberty to raise all contentions at the time of final hearing, the issue came to be referred to this Constitution Bench.

. 5. We heard Mr. Harish N. Salve, learned Senior Counsel appearing for the Petitioner and Mr. Rakesh Dwivedi, Dr. Manish Singhvi, Mr. R. Venkataramani, Mr. Kapoor, Mr. K.N. Bhatt and Mr. Darius Khambata, Counsel for the State of Orissa, Rajasthan, Tamil Nadu, Andhra Pradesh, Gujarat, Karnataka and Maharashtra. We also heard Mr. P. P. Malhotra, learned Additional Solicitor General, who appeared on behalf of the Union of India.

. 6. Mr. Salve, learned Senior Counsel for the Petitioner in his submission contended that after the 46th Amendment, Article 366(29A)(b) came to be introduced and in the light of the ratio laid down in a recent decision of this Court in Larsen & Toubro Ltd. vs. State of Karnataka reported in 2013 (12) SCALE 77, the nature of contract as between the Petitioner and the various buyers of LIFTS was nothing but a 'contract for works' and consequently, whatever materials used in the performance of the contract could be taxed only based on the prescription contained in Article 366(29A)(b) and that the transaction could not be categorized as one of 'Sale' attracting payment of Sales Tax under the various State enactments, as well as the Central Sales Tax Act.

. 7. At the very outset, it must be stated that in the light of the three Judge Bench decision in Kone Elevators (India) Pvt. Ltd. (supra) and the decision of the same strength of Judges reported in

Larsen & Toubro Ltd. (supra), the ultimate answer to the question would result in affirming either of the views of the above two decisions. Further, certain Constitution Bench decisions should also have to be kept in mind, wherein the basic principle/test to be applied to find out as to whether the contract is one for 'Sale' or 'Works Contract'. The first decision is the M/s. Patnaik and Company vs. State of Orissa reported in AIR 1965 SC 1655, wherein the principle stated by the High Court was affirmed by the Constitution Bench of this Court. The said principle was to the effect that it makes no difference whether an article is a ready-made article or is prepared according to the customer's specification. It would also make no difference whether the assessee prepares it separately from the thing and then fixes it on it, or does the preparation and the fixation simultaneously in one operation. It was further held that it is the essence of the transaction viz., the agreement and sale, which relates to the same subject-matter, i.e. the goods agreed to be sold and in which the property gets transferred. In another Constitution Bench decision of this Court in The Commissioner of Commercial Taxes Mysore, Bangalore vs. Hindustan Aeronautics Ltd. reported in (1972) 1 SCC 395, it was again held that the answer to the question whether it is a works contract or it is a contract of sale depends upon the construction of the terms of the contract and in the light of the surrounding circumstances. It will have to be further noted that the principles set down in the above Constitution Bench decisions were neither varied nor upset in any other judgment of equal strength, though in Larsen & Toubro Ltd. (supra) it has been stated that the 'Dominant Nature Test' laid down in State of Madras vs. M/s. Gannon Dunkerley and Co. (Madras) Ltd., AIR 1958 SC 560, no longer survives. In my humble view, it will have to be stated that even after the Constitutional Amendment introducing Article 366(29A)(b), it will have to be necessarily examined for its application as to whether a particular contract would fall within the expression 'Works Contract' and only thereafter, the incidence of taxation as provided in the said sub-clause could operate. I must also point out that this principle has also been emphasised in the decision of Larsen & Toubro Ltd. (supra). Therefore, while venturing to answer the question referred for our consideration, the various principles laid down in the Constitution Bench decisions have to be necessarily kept in mind to state whether the decision in Kone Elevators (India) Pvt. Ltd. (supra) will prevail or the one in Larsen & Toubro Ltd. (supra) should be followed.

. 8. Before referring to the detailed submissions of the respective counsel, since the substantive submission of the Counsel for the Petitioner centers around the contract between the Petitioner and its customers, which contains various terms and conditions, the same are to be noted in the forefront. With that in view, I wish to refer to the specimen documents relating to the supply of the elevators by the Petitioner for its customers. Annexure A1 consists of the order of acknowledgement of the model, details of the benefits of the elevator to be supplied, the preparatory work to be carried out by the customer, the document containing price variation clause and elevator works contracts, the general conditions of Contract, the acceptance document by both parties and the invoice raised along with the various bills for purchase of the model items. A detailed reference to each one of the documents has to be noted in order to examine the question as to whether the manufacture, supply and installation of LIFT by the Petitioner should be treated either as a 'Sale' or 'contract for work'.

. 9. The above documents are found in Volume 1 of I.A. No. 2 of 2013. The details of the above documents are available in Annexure A-1, which are at pages 6 to 27. The first document is dated 23.12.2009, addressed to one of the customers of the Petitioner. The subject column reads as under:

"Order Acknowledgment for One (1) No. OTIS Electric Traction Passenger Elevator for your Building at "BAPU NAGAR, JAIPUR, RAJASTHAN"." . 10. In the body of the said letter, the order placed by the customer was acknowledged by referring to the acceptance of the Petitioner's proposal for 'SUPPLY' and 'INSTALLATION' of one (1) No. OTIS Electric Traction Passenger Elevator for their building. Along with the said letter, a copy of the proposal duly approved by the Petitioner's authorized officer was also enclosed. The contract number allocated to the customer was also mentioned. The first document enclosed along with the said letter dated 23.12.2009, is a document dated 21.10.2009, containing nine pages and in the last page the signatures of the Petitioner and its customers were found affixed in proof of acceptance of the Petitioner's offer to supply and installation of its elevator. Though it is one single contract, it contains separate terms and conditions dealing with different aspects relating to the supply and erection of the elevator.

. 11. The first one is titled as Model Code, which contains the various details about the elevator to be supplied. Such details relate to the load and speed, the travel and rise of the LIFT, the stops and openings of the LIFT, the power supply requirement for its operation, the control aspect of the LIFT, the nature of operation of the LIFT manual or automatic, the mechanical aspect of the LIFT, the size of the LIFT, the requirement of the hoist way for installing the LIFT, the various panels to be provided in the LIFT and handrails to be provided inside the LIFT, the nature of false ceiling, the nature of flooring, the width of opening in the LIFT, the method of operation of the doors of the LIFT, the design of the signals, other details such as the type of Buttons at different levels of the LIFT, the type of LIFT car operating panel with Touch Screen facility, Battery operated alarm bell & emergency light, fireman's switch at main lobby and one number colour LCD in the lobby. It also specifies the colour scheme of the LIFT and the shape of the LIFT.

. 12. The next page of the document is under the caption 'A.C. Variable Voltage Variable Frequency Control'. In the said document description of the machine, the brake system, the motor and other technological details have been set out. As far as the type of machine is concerned, various details about the operating mechanism, which is part of the elevator such as motor, electro-mechanical brake, chromium molybdenum steel worm, bronze gear etc., have been mentioned. The brake system has been described as direct current brake with spring applied and electrically released and designed to provide for smooth stop under variable loads. As far as the motor is concerned, it is mentioned that the A.C. motor has been designed for elevator service, which will have high starting torque with low starting current. That apart, the advance technological system, which is called as 'Microprocessor Based Control' that will be provided in the LIFT has been stated in detail. The details about the digital control provisions, other user friendly features included in the Microprocessor Based Control has also been furnished. It is finally mentioned in the said document that the system would continuously monitor critical aspects of system health, self-health, diagnostic capabilities, which are built into the control system to speed up trouble-shooting, which can be monitored from seven segment display provided in the logic board and that it will facilitate quick identification of fault for restoration of normal operation.

. 13. The next page of the document annexed is under the caption 'Benefits of ACV F (Variable Voltage Variable Frequency Drive)'. This document contains 10 specific details, namely, (i) smooth and controlled acceleration/deceleration, (ii) better riding quality, (iii) assured leveling accuracy +/-

5 MM, (iv) improved flight time, (v) improved reliability & increased efficiency, (vi) reduced power consumption about 50% and improved power factor, (vii) reduced heat release, (viii) flexibility of programme and programming of features at site, (ix) enhances the value of building, and (x) simplified maintenance. A cursory glance of the details furnished under the above 10 heads by way of benefits of the offered LIFT discloses the claim of the Petitioner as to the advantage that will be available to the customer in the event of ordering for supply of the said type of elevator.

. 14. The next page of the document is under the caption 'Maintenance'. Under the head of 'Maintenance' it is mentioned as to from when the free maintenance for 12 months period as per the quotation would commence, the nature of inspection and examination that would be carried out during the said period of 12 months of free maintenance and the extent to which replacement of parts could be made free of cost, as well as on chargeable basis. It also specifies the exclusion of any special examination that may be carried out in between the monthly free examination dates, in which event, the exclusive responsibility would be of the Purchaser as owner when once possession is handed over apart from the force majeure clause.

. 15. The next page of the document is under the heading 'Preparatory Work'. This document contains as many as 21 Clauses and at the very outset it is stipulated as 'You Agree at your cost'. The nature of preparatory work set out in the said 21 Clauses relates to the RESPONSIBILITY OF THE PURCHASER to furnish within two weeks or sooner if required from the date of acceptance of the proposal all the required data for the performance of the contract, to design and furnish a properly framed and enclosed legal ELEVATOR HOIST WAY/STRUCTURE, to furnish an ELEVATOR PIT of proper and legal depth below the lowest landing, to furnish properly lighted and FIRE PROOF MACHINE ROOM of sufficient size to accommodate the Petitioner's equipment with other detailed specifications, to furnish and install necessary HOIST WAY DOOR FRAMES and allied provisions, to provide continuous SILL BEARING AREA for each hoist way entrance of such constructions, to do all painting except elevator material, to do all CUTTING OF WALLS, floors, partitions including grouting of all bolts, sills etc., to furnish REQUIRED POWER at the top floor landing terminating in suitable main switches for power and light circuits with allied provisions, to furnish LIGHT OUTLET POINTS at the middle of the hoist way and a light point in the pit, to be furnished during the erection of the elevators, ELECTRIC POWER SUPPLY of necessary characteristics to provide illumination and operation of tools and hoists etc., to guard and protect the hoist way, TO COMPLETE ALL THE WORKS IN SUCH SPECIFIED TIME so that no delay is caused in carrying out the installation by the Petitioner, to relieve the Petitioner of any responsibility in respect of expenses relating to power supply or expenses of any nature relating to the rest of the building and other contractor's work, to pay all fees that may be required in connection with erection of preparation of the structure in which the elevator equipment is to be erected including any general permit/certificate fees, usually billed by the Government Agency licence fee etc., to PROVIDE SCAFFOLDING for erector's requirement in the elevator hoist way, during the erection period AND FOR ITS REMOVAL thereafter and in the event of the elevator hoist way being more than 40 meter height, such scaffolding should be in steel structure by OTIS, to provide suitable weatherproof lock-up storage accommodation of approximately 50 sq.mt. per elevator at the ground floor level near the hoist way, to provide and maintain adequate safety and security measures, as also retain OTIS safety infrastructure to prevent any injury to third party or damage, theft or pilferage of

material during erection period till the installed LIFT is handed over, to provide hoisting beam in the machine room ceiling and rolled steel sections with bearing plates for support of the machine if required, to provide acceptable living accommodation with facilities such as light, running water, sanitary for the erection crew at or near the site and to indemnify and SAVE THE PETITIONER HARMLESS AGAINST ALL LIABILITY GROWING OUT OF THE PURCHASER'S FAILURE TO CARRY OUT ANY OF THE FOREGOING. Out of the above 21 items, the aspects for which Petitioner takes the responsibility are the provision of a ladder in a pit, provision of steel fascia by OTIS in respect of S. No.6 and the provision relating to scaffolding. It also states that the clause relating to provision for living accommodation is not applicable. The rest of the works to be carried out relating to provision of a HOIST, which is otherwise also called as 'Well' for erecting the LIFT has been entirely fastened on the Purchaser. It is also relevant to note that under the heading 'Preparatory Work', major responsibility has been entrusted with the Purchaser for providing the HOIST/WELL, which relates to both prior to the erection of the LIFT, as well as in the course of the erection of the LIFT.

. 16. The next page of the document is under the caption 'IEEMA Price Variation Clause for Elevator Works Contracts'. It is described therein that the price quoted/confirmed is based on the cost of raw materials/components and labour costs as on the date of quotation and the same is deemed to be related to Wholesale Price Index Number for Metal Products and All India Average Consumer Price Index Number for Industrial Workers as specified in the said document and that in case of any variation in the index numbers, the price would be subject to adjustment up or down in accordance with the formula. Though, a formula is set out in the said document, based on enquiries with the counsel appearing for the Petitioner, it is revealed that the said formula is a formal one and is never applied for the purpose of determining the cost. For the purpose of working out the formula, the details of various abbreviations noted in the formula are furnished. Inasmuch as it was informed to this Court that the formula as a matter of practice is not worked out, there is no need to go into the details of those abbreviations mentioned in the formula. There are two notes, namely, Note 1 and Note 2 at the bottom of the said document, which states that the sole purpose of the above stipulation is to arrive at the amount of the entire contract under the various situations and the above stipulations do not indicate any intentions to sell materials under this contract as movables. Note No.2 states that the indices MP and WO are regularly published by IEEMA in monthly basic price circulars based on information bulletins from the authorities mentioned and those indices would be used for determining price variation and only IEEMA circulars would be shown as evidence, if required. Another very important clause stated in the said document is 'Payment Terms', which reads as under:

> "Under this clause claim for manufactured materials shall be paid along with our material invoice and claim for installation labour shall be paid along with our final invoice.

Firm prices: The prices quoted in this proposal will be firm upto 5/5/10. Thereafter for any delay in completion of installation and commissioning due to reasons attributable to your goodselves prices will be adjusted in accordance with the above clause." . 17. Therefore, it is quite apparent that there is no relevance to the subtitle, namely, 'Elevator Works Contract' mentioned in the said page of the

document. The only relevant aspect which is required to be noted is that in the event of price variation due to the delay attributable to the Purchaser, the labour cost and the material cost would be worked out based on the prevailing Consumer Price Index Number for Industrial Workers and Wholesale Price Index Number for Metal Products. In other words, there is no significant relevance for the subtitle and the various details mentioned in the said page of the document.

. 18. The next page of the document is a very relevant document, which is in two pages, which carries the title 'Conditions of Contract'. As many as 27 conditions have been stipulated. In order to appreciate the stand of the Petitioner and to arrive at a conclusion whether the contract of supply of erection can be construed as 'Sale' or 'Works Contract', the conditions have to be necessarily examined in detail. The first condition mentions that the quotations are effective for 30 days from the date of proposal and thereafter, are subject to change without notice. The second condition pertains to the various circumstances under which the Petitioner would be entitled to vary the price as per 'IEEMA Price Variation Clause' inasmuch as the price quoted would be valid for 52 weeks from the date of acceptance of the proposal. Condition No.3 also is an ancillary stipulation relating to the application of Price Variation Clause as per 'IEEMA Price Variation Clause'. Condition No.4 again shifts the burden on the Purchaser to furnish the Petitioner within two weeks from the date of the agreement, all required data for performance of the contract, that the PURCHASER TO AGREE TO PREPARE THE HOIST WAY STRUCTURE and make it ready with proper electric power supply as per the required data to enable the Petitioner to have uninterrupted use for installation and adjustment of the elevator. It also mentions that if the electric power supply is not provided, the installation of the equipment would still be completed and the Purchaser should be prepared to take over the elevator and make the payment as they fall due. Condition No.5 consists of the payment schedule and also a default clause. The payment schedule is 90% on acceptance of the proposal and the balance 10% by way of final payment either on commissioning or in the event of delay by any cause beyond the control of the Petitioner, which is to be paid within 90 days from the date the materials are ready for dispatch. In the event of any fault on the part of the Purchaser in making the Preparatory Work unavailable to enable the Petitioner to carry out the installation, such as defects in the hoist room or for any other lapse, the option is retained by the Petitioner to discontinue the work or withhold the release of completed elevator subject however, to charge of over payments to be charged at the rate of 1.5% per month of the agreed price. It also entitles the Petitioner to reschedule the erection time depending upon the delay caused at the instance of the Purchaser. Condition No.6 relates to the provision to be made by the Purchaser for the stay of the employees of the Petitioner who are assigned the task of erection of the LIFT. Condition No.7 relates to the work timings and in the event of the employees of the Petitioner were to work overtime based on mutual agreement with the Purchaser, such overtime charges should be borne by the Purchaser. Condition No.8 is a mutual FORCE MAJEURE clause as between both the parties. Condition No.9 specifies that the title to each elevator would pass on to the Purchaser when payment for such elevators are fully paid to the Petitioner and in the event of default being committed by the Purchaser, the right of the Petitioner to retrieve the elevator in full or in part and also its right to recover from the Purchaser, the value of the elevator supplied, can be initiated by appropriate legal proceedings. Condition No.10 mainly uses the expression that the contract should be deemed to be an INDIVISIBLE WORKS CONTRACT though the cost of labour involved and the price of movables could be specifically ascertained. Condition No.11 is prescription of the defect liability period, which

would be 18 months from the date of initial supply of materials or 12 months from the date of completion of the erected elevator, whichever is earlier. The default clause is that such agreed warranty period would apply for normal wear and tear only and if any repair or damage would occur due to any unauthorized person's handling, such warranty would not be applicable. Condition No. 12 relates to any work to be carried out for the purpose of erection of an elevator due to statutory prescription and according to the Petitioner that would be the responsibility of the Purchaser and if for any reason the Petitioner is to carry out such works, extra cost would be charged on the Purchaser. Condition No.13 pertains to any changes, modifications, additions, deletion or extra work involved in which event the cost escalation would be mutually agreed between the parties and finalized. As per Condition No.14, the Petitioner wants to call the Contract as indivisible Works Contract and states that the materials such as packing cases, left over materials, tools tackles, instruments, etc., brought to site by the Petitioner would remain the property of the Petitioner and also its right to sub-contract any of the work which it deems fit. Under Condition No.15, the Petitioner wants to make it clear that any descriptive matter, drawings or illustrations brochures furnished along with its proposal are not accurate but are approximate. Under Condition No.16, it is made clear that the specifications of the Petitioner will be the one which can be relied upon even if such specifications varied with the requirements made by the Purchaser prior to the Contract. Condition No.17 is again a FORCE MAJEURE clause. Under Condition No.18, the Petitioner wants to reserve its right to effect the supply either from its factory at Karnataka or from any other place in India or by importing the LIFT from a foreign country. Condition No.19 is the provision under which the Petitioner's right to claim compensation/damages in the event of breach of contract at the instance of the Purchaser. Condition No.20 provides for settlement of the disputes by way of conciliation at the bipartite level and on its failure to go in for Arbitration. Condition No.21 refers to the manner in which the apportionment over the expenses of the contract relating to the amount or advances paid by the Purchaser, which would be determined by the Petitioner and that the same cannot be questioned by the Purchaser even before the legal forums. As per Condition No.22, the proposals when accepted by the Purchaser, the same would supersede all other earlier proposals, representations etc. Condition No.23 clarifies that in order to authenticate any change in the conditions of the contract after the signing of the contract, the same can be done only by the authorized person from the Head Office of the Petitioner. Condition No.24 states that the contract could be deemed to be concluded at Mumbai/Delhi/Calcutta/Bangalore after allocation of the contract by the Petitioner. Clause 25 specifies the delivery time and erection time and that the completion of the installation would be made within 16 weeks from the date of the receipt of the order, advance payment, layout approval and settlement of all technical details, whichever is later. It however, reserves the Petitioner's right to vary the delivery and the erection schedule depending upon any delay being caused at the instance of the Purchaser in carrying out the Preparatory Works as per the contract. Condition No.26 is again a default clause for escalation of the cost of labour in the event of the Petitioner withdrawing the work force for no fault of its. The last Condition No.27 shifts the entire responsibility on the Purchaser for getting necessary certificates/permits/licenses from the Statutory/Regulatory Authorities, including payment of all necessary fees for such certificates/licenses/permits etc. and that the Petitioner will not be in anyway liable for any delay occurring on that score.

. 19. The last page of the document, which is also dated 21.10.2009, disclose the signature affixed by the Authorized Official/Signatory of the Petitioner and the Purchaser wherein, the price of the elevator to be supplied in a sum of Rs.12,50,000/- is quoted. In the said page, applicable rate of Excise Duty, Service Tax and other statutory tax liabilities to be incurred are all mentioned. Along with the above document, the payment of Rs.12,12,500/- already made by the Purchaser, as well as the final invoice raised for value of the full amount, namely, Rs.12,50,000/- is also enclosed.

. 20. Before adverting to the other statutory provisions, which are to be noted while dealing with the issue involved, as well as the submissions made by either side, it will be appropriate to sum up the nature of the contract that is normally transacted by the Petitioner with its customers, based on the above Annexure A-1. From what has been noted from the said Annexure, the following facts emerge:

. (a) Every supply and erection of an elevator by the Petitioner is always preceded by a proposal furnishing the requirement of the customer. The model of the LIFT specifying its capacity load, technical aspects and other minute details relating to the LIFT to be supplied along with the works to be carried out at the instance of the Purchaser to enable the Petitioner to supply and erect the LIFT are also furnished.

. (b) Based on the proposal of the Petitioner, once the order is placed by the Purchaser by way of acknowledging the said order, specific communication is issued furnishing a distinct contract number. In the said acknowledgment of order, the entire set of documents relating to the proposal and the signed contract is also enclosed with the price agreed between the parties.

. (c) The documents found in the ultimate agreed contract, therefore, contain the details relating to the model and the mechanical details about the operation of the LIFT, which are furnished with detailed particulars.

. (d) The various details contained in the proposal are all mainly related to the nature of the LIFT to be supplied and as to how the technology involved in the LIFT would be advantageous to the customer when it is ultimately erected and put into operation.

. (e) The details of the Preparatory Work is one of the relevant aspects of the contract, which disclose that at the site, where the LIFT is to be installed, the entire Preparatory Work is to be carried out by the customer such as, the setting up of the hoist way/structure, elevator pit, fire proof machine room, hoist way door frames, provision of sill bearing area, all cutting of the walls, provision of required power supply, furnishing of light outlet points, provision of elevators electric power supply, provision of required accommodation for the work force of the Petitioner and above all, the time within which the above works have to be carried out by the customer. As part of the Preparatory Work, the only area where the Petitioner comes forward to take the responsibility are the provision of a ladder in a pit, the provision of a steel fascia and the provision relating to scaffolding.

. (f) As far as the price variation clause is concerned, it only states that in the event of any delay being caused not due to the fault of the Petitioner, the price variation of the labour cost and material cost would depend upon the All India Average Consumer Price Index Number for Industrial

Workers and Wholesale Price Index Number for Metal Products.

. (g) The specific condition imposed in the prescription contained under the heading 'Preparatory Work' makes it clear that only after the customer satisfactorily completes all the basic works such as, erection of the hoist/structure and other allied necessary works, the Petitioner would commence its installation. In the event of any delay being caused at the instance of the customer, the commencement of the installation would get postponed at the risk of the customer.

. (h) Though, in the conditions of contract the expression used in condition number 10 is 'indivisible works contract' the reading of as many as 27 conditions disclose that it only highlights the overall responsibility of the customer to undertake the main work of providing a solid hoist/structure to enable the Petitioner to bring its LIFT and fix it in the said earmarked place with all the other provisions readily made available by the Purchaser, including the electric points.

. (i) As per condition No.5 of the conditions of contract, 90% of the value is to be paid on acceptance of the proposal. Balance 10% payment is payable either on commissioning or in the event of any delay being caused and not attributable to the Petitioner, within 90 days of the materials relating to the LIFT to be supplied being made and kept ready for dispatch. Therefore, the said condition is required to be examined in detail to ascertain as to whether the payment schedule really determines the nature of the contract.

. 21. Having noted the above salient features of the contract relating to the supply and erection of the LIFT by the Petitioner, to which I will discuss in detail in the latter part of this judgment, I wish to refer to the statutory provisions which are required to be noted at this stage. Mr. Salve, learned Senior Counsel in his submissions drew our attention to various statutory provisions relating to LIFTS, which provide for charging of duty under the provisions of the Central Excise Legislation as well as the provisions brought out by various States for charging tax on supply and installation of LIFTS construing the same as 'Works Contract' and the subsequent changes brought about after the decision of this Court in Kone Elevators (India) Pvt. Ltd. (supra), besides the Constitutional provision, namely, Article 366(29A)(b) of the Constitution.

. 22. Under Article 366(29A), tax on the sale or purchase of the goods is defined and the concerned sub-clause (b) of sub-Article (29A), reads as under:

"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;" . 23. This clause was inserted under the Constitution 46th Amendment Act of 1982. A reading of the said sub-clause (b), which is a part of various other definitions under Article 366, would enable the tax levying authorities to levy tax on the transfer of property in goods involved in the execution of a 'Works Contract'. In order to apply the said sub-clause

(b), in the foremost, what is to be ascertained is whether there is a 'Works Contract' and while executing such a 'Works Contract' any transfer of property in goods are involved, whether as goods or in some other form on which a tax can be validly levied by the concerned authorities.

. 24. Having noted the constitutional mandate provided therein, it will be beneficial to refer to the other statutory prescriptions brought to our notice. Mr. Salve, learned Senior Counsel brought to our notice the definition of 'Works Contract' under Section 2(jj) of the Orissa Sales Tax Act, 1947. The said provision reads as under:

> "works contract includes any agreement for carrying out for cash or 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." . 25. It was also brought to our notice certain provisions in the Bombay Lifts Act, 1939. The relevant provisions are Sections 3(c),(d),(e)&(f), which defines 'Lift, Lift Car, Lift Installation and Lift way'. Section 4 stipulates that every owner of a place intending to install a LIFT after the commencement of the said Act, should make an application to the concerned authority of the State Government for permission to erect such a LIFT and while seeking for such a permission, the obligation is on the applicant to furnish the various details about the LIFT to be erected.

Section 5 deals with the licence to be obtained to use a LIFT, which states that every owner of a place who is permitted to install a LIFT under Section 4 should within one month after completion of the erection of such LIFT, inform the Authorized Officer of the State Government who has been empowered to issue a licence for the working of the LIFT. Such intimation about the erection of the LIFT and the nature of licence to be issued in the prescribed format has been specified. The required fee to be paid is also mentioned in the said section. Section 7 specifies that no LIFT should be operated without a licence. The corresponding rules, namely, Rules 3, 5, 6, 9 and 9(a), as well as Form A has also been referred. In furtherance of Sections, 4, 5, 6 and 7 of the Bombay Lifts Act, 1939 and the Bombay Lifts Rules, 1958, namely, Rules 3, 4, 5, 6, 9 and 9(a), what is specified is the detailed procedure to be followed by approaching the concerned authorities initially for the erection of the LIFT by getting a permission and securing a licence after successful installation of the LIFT and the periodical inspection to be carried out in order to ensure that the LIFT erected does not cause any damage to men and materials due to any defect in the material used while installing the LIFT, as well as in its future operation on regular basis, as well as in the course of its maintenance. Rule 9A(5) prescribes the fee for issuing a licence to LIFT contractors for permission, while issuing the licence for prescribed number of LIFTS. Apart from the above rules, Form A is the prescribed form by which an application for permission to install a LIFT or for making any addition or alteration to the LIFTS is to be made. The details to be furnished in the said form includes the name of the owner, the name of the person who would be installing the LIFT, the place where the LIFT would be installed and some basic details about the LIFT which is to be installed. Under Form A-1, the LIFT installation contractor has to make a declaration as to the successful installation of the LIFT undertaken by it.

. 26. Reference to the above provisions contained in the Bombay Lifts Act and Rules show that before erection of LIFT in the premises, necessary permission has to be obtained from the concerned authority appointed by the State Government. By making a specific application for permission for the erection of a LIFT and secure a licence when a LIFT is erected, thereafter also

periodical intimation is to be sent to the concerned authority about the proper maintenance of the LIFT, which has been erected in the premises of the owner. The underlining requirement of the statute is apparently to ensure that such a LIFT installed in a premises, which would be regularly used by the persons visiting the said premises should not endanger their lives either due to any defects in the installation or its operation or in its maintenance after its installation. Therefore, reference to the above provisions in my view is not decisive for finding out as to whether the manufacture, supply and installation of a LIFT would fall within the expression 'Works Contract' or not.

. 27. Mr. Salve, learned Senior Counsel in his submissions also made reference to the definition 'Commissioning and Installation Agency' and 'Taxable Service' under Section 65(29) and (105)(zzd) of the Finance Act, 1994 as was brought out w.e.f. 14.05.2003 and subsequently w.e.f. 10.09.2004 and 16.06.2005. In fact, the learned Senior Counsel also referred to the definition of 'Erection, Commissioning and Installation' as was inserted as sub-section (39a) to Section 65 by the Finance Act (No.2) of 2004 w.e.f. 10.09.2004. The definition of the above provisions were made w.e.f. 16.06.2005. Lastly, learned Senior Counsel brought to our notice the definition of 'Taxable Service' under sub-clause (zzzza) to sub- section (105) of Section 65, which was inserted by the Finance Act, 2008 w.e.f. 16.05.2008. The said provision reads as under: "105 – Taxable Service means any service provided,-

"(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation-For the purposes of this sub-clause, "works contract" means a contract wherein-

i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

ii) Such contract is for the purposes of carrying out,-

a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

c) construction of a new residential complex or a part thereof; or

d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c) or

e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects:" . 28. Before referring to the details of the above provisions brought to our notice, it is relevant to mention at this juncture the specific prayers of the Petitioner in the leading case W.P.(C) No.232 of 2005 and W.P.(C) No. 548 of 2008. In W.P.(C) No.232 of 2005, the Petitioner seeks to challenge the impugned notices dated 30.03.2005 by which the First Respondent wanted to re-open the assessment for the Assessment Years 1999- 2000 (C.S.T. No. 631067/1999-2000) under the Central Sales Tax Act and again for the years 1999-2000 (TNGST No. 1340636/99-2000), and 2000-2001 (TNGST No. 1340636/2000-01) under the Tamil Nadu General Sales Tax Act, 1959. Similarly, in W.P No.548 of 2008, the challenge is to the revised pre-assessment notices dated 23.06.2006 for the assessment period 2002- 2003 and 03.04.2008 for the Assessment Year 2001-2002, issued by the Third Respondent and the Second Respondent respectively. Keeping the said challenges in mind, the provisions will have to be examined. As has been stated in the opening part of this Judgment, the answer to the question referred to us will have to be made, keeping in mind the statutory provisions relating to charging of tax vis-à-vis the impact of Article 366 (29A)(b) of the Constitution.

. 29. Sub-section (29) of Section 65 of the Finance Act, 1994 defines what is 'Commissioning and Installation Agency' providing services in relation to commissioning and installation. Sub-clause (zzd) to sub-section (105) of Section 65 defines the 'taxable service' to mean any service provided to a customer by a commissioning and installation agency in relation to commissioning or installation. These definitions relating to taxable service of commissioning and installation agency as was prevailing w.e.f. 14.05.2003, were general and there was no specified category or class of service referred to therein. With effect from 10.09.2004, there was an addition made in sub-section (29) of Section 65 by which while defining a 'commissioning and installation agency', the expression 'erection' came to be added. A further sub-section, namely, sub-section 39(a) was also introduced by Finance Act (No.2) of 2004 w.e.f. 10.09.2004, which further defined the expression 'erection, commissioning or installation' to mean any service provided by a commissioning and installation agency in relation to erection, commissioning of installation of plant, machinery or equipment. Consequently, in sub-section 105(zzd) the expression 'erection' was added along with the other expressions 'commissioning or installation', which was again to operate w.e.f. 10.09.2004. The above definition relating to 'commissioning and installation agency' under sub- section (29) of Section 65 continued even w.e.f. 16.06.2005. However, in sub-section 39(a) of Section 65 while defining 'erection, commissioning or installation', an elaborate definition came to be introduced as per which the expression 'erection, commissioning or installation' would mean any service provided by a commissioning or installation agency in relation to installation of among other classes of service included under sub-clause

(ii)(e) LIFT and ESCALATOR, fire escape staircases or travelators or such other similar services, which came into operation w.e.f. 16.06.2005. However, the definition of Taxable Service under sub-section 105(zzd) remained unaltered.

. 30. Chapter V under the caption 'Service Tax' of the 'Finance Act', 1994 underwent a further change wherein a sub-clause (zzzza) to sub-section 105 came to be added, which while defining a 'taxable service' to any person by any other person in relation to the execution of 'Works Contact' excluding

'Works Contract' in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams, specifically brought out an explanation for the purpose of the said sub-clause, in and by which, the expression 'Works Contract' came to be defined for the first time. As per the said definition, it meant that a transfer of property in goods involved in the execution of such contract would be leviable to tax as sale of goods and to ascertain whether the said contract is a 'Works Contract', it went on to State that such contract should be for the purpose of carrying out inter alia for the erection, commissioning or installation of LIFT and Escalator, fire escape staircases or elevators. It is very relevant to note that this definition of 'Works Contract' by way of an explanation to sub-clause (zzzza) to sub-section (105) of Section 65 came to be introduced for the first time w.e.f. 16.05.2008.

. 31. Therefore, while examining the question referred to this Bench in the order of reference dated 12.05.2005, in an attempt to answer the said reference, it will have to be necessarily noted at the very outset that as and from 16.05.2008, the erection, commissioning or installation of LIFT and Escalator would fall within the expression 'Works Contract' having regard to the specific definition so brought out under the Finance Act, 1994 w.e.f. 16.05.2008 for the purpose of Service Tax. However, the question still remains whether the same would hold good for levy of Sales Tax on the anvil of Article 366(29A)(b) of the Constitution read along with the provisions of the Sales Tax Act and that to for the period prior to the said date, namely, 16.05.2008. As noted by us, in the Writ Petitions, the challenge is to the revised pre-assessment notices under the Central Sales Tax Act or under the respective State General Sales Tax Act for the assessment periods related to the years 1999-2000, 2000-2001, 2001-2002 and 2002-2003. Therefore, the question for consideration is what is the legal position with reference to the nature of contract of the Petitioner vis-à-vis its Purchaser with reference to manufacture, supply and installation of LIFTS. Based on the terms of the specific contracts, a specimen copy is placed before us vis-à-vis the relevant statutory provisions which are in existence during the relevant years.

. 32. Other statutory provisions which are relevant to be noted while construing the definitions prior to 16.05.2008 are sub-clause (29), (39a) and (105)(zzd) of Section 65. Service Tax was levied at the rate of 12% for the value of the 'taxable services' referred to under sub-clause (zzd) of sub-section (105) of Section 65. After 16.05.2008, under the amendments introduced by Finance Bill No.2 of 2009, the charge of service tax underwent a change and the rate was brought down to 5% of the value of taxable services referred to in sub-clauses (zzd) and (zzzza) of sub- section (105) of Section 65.

. 33. Having noted the above statutory provisions, we are now again mandated to examine the question as to whether the manufacture, supply and installation of LIFTS by the Petitioner would fall within the expression 'Works Contract' or 'Sale'. For examining the said question, a recapitulation of the various details has to be noted based on the specimen contract that came into existence as between the Petitioner and the Purchaser. A detailed reference has been made to the salient features of the said contract and I have also highlighted the terms contained therein. There was a detailed description of the product to be supplied by the Petitioner, namely, the LIFT to its Purchaser. The description about the product content with very many minute details relating to the model, the capacity it would carry, namely, the number of passengers, the weight, the sophisticated

equipments such as feather touch buttons, highly precisioned stop facility at each floor of its operation, the smooth sailing of the LIFT in between different floors, the other safety gadgets provided in the LIFT and so on. Thereby, what was highlighted in one part of the contract was the advantage that a customer would get when the Petitioner's LIFT is purchased and erected in its premises. In the other parts of the contract, the obligation of the Purchaser was to provide certain facilities such as hoist way, power supply, procurement of permits, licences, etc. under certain other enactments, the payment schedule with the time schedule along with the default clauses are stipulated. There are also provisions in the contract relating to the time within which the LIFT will be commissioned, namely, within 52 weeks and if for any reason any delay is caused beyond the control of the Petitioner, even then there would be a requirement of making the full payment by the Purchaser to the Petitioner. This is on the Petitioner informing its readiness with the materials of the LIFT to be commissioned available at the premises of the Petitioner with no obligation for its commissioning. Also a period of 90 days is stipulated for effectuating the final payment.

. 34. The arguments on behalf of the Petitioners was mainly addressed by Mr. Salve, learned Senior Counsel. In his submissions, learned Senior Counsel contended that after the decision of this Court in Kone Elevators (India) Pvt. Ltd. (supra), the various States who were earlier contending that supply and erection of a LIFT was a 'Works Contract', took a diametrically opposite view and started contending that the said contract will amount to 'Sale' and not 'Works Contract'. The learned Senior Counsel drew our attention to some of the counter affidavits filed on behalf of the State of U.P., Andhra Pradesh and Karnataka in Writ Petition No.232 of 2005, wherein such a stand has been taken by the respective State Governments. The learned Senior Counsel by referring to the definition of 'Works Contract' under Section 2(jj) of the Orissa Sales Tax Act, 1947, which has been extracted in the earlier part of this Judgment, submitted that the manufacture, supply and erection/installation of a LIFT squarely falls within the said definition of 'Works Contract' and, therefore, the stand of the Petitioner is well-founded. In support of his submissions, the learned Senior Counsel also relied upon the Division Bench decision of the Bombay High Court in OTIS Elevators Co. (India) Ltd. vs. The State of Maharashtra reported in [1969] 24 STC 525.

. 35. The learned Senior Counsel then referred to the Standard Contract Form of the Petitioner, as well as the Field Installation Manual and contended that the various works to be carried out in the course of installation of a LIFT can only be held to be a 'Works Contract'. By doing so, he drew our attention to the Field Installation Manual, which is meant for its field staff at the time of erection of the LIFT to follow the various instructions and the manner in which the LIFT is to be assembled at the premises of the Purchaser. By making reference to the said manual, which contains very many details as to the various parts of the LIFT and how these parts are to be assembled and also the safety measures to be followed, submitted that such an elaborate process involved in the assembling of the LIFT is nothing but a contract for work and not for sale. He therefore, contended that the decision in Kone Elevators (India) Pvt. Ltd. (supra) has to be varied.

. 36. The learned Senior Counsel in his submissions further contended that in the light of the prescription contained in sub-Article 29A(b) of Article 366 of the Constitution and having regard to the nature of operation/function in the supply and installation of a LIFT, the said activity cannot be called as a mere 'Sale' but can only be called as a 'Works Contract'.

. 37. The learned Senior Counsel also relied upon the decision in State of Madras vs. Richardson Cruddas Ltd. reported in [1968] 21 STC 245 in support of his submissions. By referring to the provisions contained in the Bombay Lifts Act, 1939 in particular Sections 3, 4, 5 and 7 and Rules 3, 5, 6, 9 and 9A along with Form A1, the learned Senior Counsel contended that the said provisions in the Acts and the Rules, also goes to show that the installation of a LIFT, having regard to the nature of the activity and the functions involved can only be held to be a 'Works Contract' and not a 'Sale'. According to the learned Senior Counsel, the contract being an indivisible contract for supply and erection of the LIFT to the customer and the erection part of it is so intertwined with the supply of the LIFT, the contract can only be construed as 'Works Contract' and not a 'Sale'.

. 38. The learned Senior Counsel also relied upon a decision of the Government of India in In re: OTIS Elevator Co. (India) Ltd. (1981) ELT 720 in support of his submissions. That was a decision of the Government of India in an appeal filed by OTIS Elevator Company under the provisions of the Central Excise Act, wherein it was contended that erection and installation of elevators and escalators were indivisible 'Works Contract' and do not constitute contracts for mere sale of goods. While dealing with the said submission, the above decision came to be rendered by the Government stating that elevators and escalators erected and installed by the company became a part of immovable property and hence are not goods. It was, however, held that the component parts of the elevators and escalators manufactured and cleared from their respective factory would be chargeable to duty at the appropriate rates.

. 39. By relying on the above decision, the learned Senior Counsel also brought to our notice an order under Section 37B of the Central Board of Excise and Customs dated 15.01.2002, wherein the assessibility of plant and machinery assembled at site was explained and as regards the LIFTS and Escalators in sub-paragraph (iv) of paragraph 5, it was described that though LIFTS and Escalators are specifically mentioned in sub-heading 8428.10, those which are installed in buildings and permanently fitted into the civil structure cannot be considered to be excisable goods. The learned Senior Counsel therefore, by referring to the above orders of the Government of India and the Board of Central Excise, contended that the same reasoning would hold good while considering the case of the Petitioner.

. 40. As regards the question whether manufacture, supply and installation of LIFTS would fall within the expression 'Sale' or 'Works Contract', the learned Senior Counsel heavily relied upon the recent three Judge Bench decision of this Court in Larsen & Toubro Ltd. (supra). The judgment was rendered by one of us, Hon'ble Mr. Justice R.M. Lodha, wherein in paragraph 101, this Court while answering a reference made by a two Judge Bench, held that a contract may involve both work and labour and also an element of sale and in such composite contract, the distinction between a contract for sale of goods and contract for work (or services) virtually gets diminished. It was further held that the 'Dominant Nature Test' has no application and the earlier decisions which held that the substance of the contract must be seen, have lost their significance where transactions are of the nature contemplated in Article 366(29A). It went on to hold that 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'. Ultimately, it was held that the enforceability test is also not determinative. The learned Senior Counsel drew our attention to paragraphs 17, 19, 21, 47, 60 to 65 and 76, as well as paragraph 101 where the legal position was summarised while answering the question referred to it.

. 41. The learned Senior Counsel by drawing our attention to the definition contained in the Finance Act of 1994, in particular sub-sections (29), 39(a) of Section 65 and sub-clause (zzd) to sub-section (105) of Section 65, contended that such definitions in the Finance Act under Chapter V for imposition of Service Tax, would show that the installation of a LIFT is nothing but a 'Contract for Works' and not 'Sale'. The learned Senior Counsel drew our attention to sub-clause (zzzza) to sub-section (105) of Section 65 wherein, in the explanation to the said sub-clause, the erection of a LIFT has been defined to mean a 'Works Contract'. The learned Senior Counsel would, therefore, contend that there cannot be two different meanings relating to 'Works Contract', one for the purpose of Service Tax and the other for the purpose of Sales Tax. The submission of the learned Senior Counsel was adopted by all other counsel who appeared for the Petitioners in the other cases.

. 42. Mr. Dwivedi, learned Senior Counsel appearing for the State of Orissa, in his submissions contended that the contract as between the Petitioner and its Purchaser, going by its terms, is always one for sale of its branded LIFTS, which having regard to the nature of the product has to be necessarily erected at the site, that 90% of payment is to be made on the signing of the contract, that the LIFTS would be handed over to the Purchaser on its erection and that the contract provides for the payment of balance 10% on fulfillment of certain other conditions. The learned Senior Counsel would, therefore, contend that in the present case, there can be no doubt at all as to the nature of contract as between the parties, which is one for sale and, therefore, there is no necessity to further examine whether it is a 'Sale' or 'contract for works'. The learned Senior Counsel by drawing our attention to the judgment in Larsen and Toubro Ltd. (supra) contended that the converse position argued by the learned Senior Counsel Mr. Rohinton Nariman in the said judgment as recorded therein, would explicitly show as to how a clear distinction can be drawn as between a 'Works Contract' and a 'contracts for Sale'. The learned Senior Counsel further pointed out that in the case on hand, the contract being one for sale of the LIFTS, the same cannot fall within the expression 'Works Contract'. In support of his submissions the learned Senior Counsel relied upon the decisions in M/s Patnaik and Company (supra), M/s T.V. Sundram Iyengar & Sons vs. The State of Madras - (1975) 3 SCC 425, Union of India vs. The Central India Machinery Manufacturing Company Ltd. and others - (1977) 2 SCC 847 and also referred to the decision in Hindustan Aeronautics Ltd. (supra), to state as to what are the basic tests to be applied in order to find out whether a contract as between the parties will fall within the expression 'Works Contract' or one of 'Sale'. The learned Senior Counsel, however, fairly brought to our notice the provisions contained in the Orissa Value Added Tax Act, 2004, in particular Rule 6 and the Appendix, to show that by virtue of the said Act in the State of Orissa, as far as value added tax is concerned, erection of a LIFT, Elevator and Escalator would fall under the category of 'Works Contract' and that in the Appendix, a provision of 15% is made for deduction towards labour charges, while arriving at the taxable turnover.

. 43. Mr. R. Venkataramani, learned Senior Counsel, appearing for the State of Tamil Nadu and Andhra Pradesh, drew our attention to the definition of 'Sale' and 'Works Contract' under the

Andhra Pradesh General Sales Tax Act, 1957 as defined in Section 2(n) & (t) and submitted that going by the definition of 'Sale' every transfer of the property in goods in pursuance of a contract or otherwise by one person in the course of his trade or business, for cash, or for deferred payment or for any other valuable consideration, the same would be a sale and by referring to the definition of 'Works Contract' under Section 2(t), he pointed out that the definition itself makes it clear that any agreement for cash or for any other valuable consideration for carrying out the building construction, manufacture, fabrication etc., including erection/installation or commissioning of any movable or immovable property alone would fall within the said definition. By referring to the above statutory provisions, the learned Senior Counsel contended that there is a world of difference as between a contract by which one party agrees to supply a product as compared to a party agreeing to carry out a work such as construction of building, erection, installation or commissioning of movable or immovable property. In other words, according to the learned Senior Counsel going by the terms of the contract between the Petitioner and the prospective Purchasers, what is agreed to between the parties is the supply of LIFTS and the act of installation is not the contract for which the parties were ad idem. Therefore, if the contract distinctly discloses that it is one for supply of a LIFT and the same is effected by erecting it in the premises of the Purchaser, it cannot be held that the act of erection alone should be taken into account and on that basis hold that the contract was one for 'Works' and not for 'Sale'.

. 44. The learned Senior Counsel by referring to paragraph 101 of the judgment in Larsen & Toubro Ltd. (supra) contended that by installation, the LIFT in its full form is brought out and handed over to the Purchaser. In other words, according to the learned Senior Counsel by installation, the LIFT is put in a fit condition for use and submitted that the principles laid down in the case of M/s. Patnaik and Company (supra), T.V. Sundaram Iyengar & Sons (supra), have all laid down the correct principles and, therefore, the decision in Kone Elevators (India) Pvt. Ltd. (supra) was rightly decided. While referring to the decisions in Vanguard Rolling Shutters and Steel Works (supra) and Man Industrial Corporation Ltd. (supra), the learned counsel submitted that none of the said decisions can be said to warrant any consideration. In support of his submission learned Senior Counsel relied upon the decision in Dell Inc. vs. Superior Court No.A118657 and relied upon the following passage in the said judgment:

> "Drawing the line between taxable sales of tangible property and nontaxable sales of services or intangibles is sometimes difficult, especially where property that was largely created by personal services is transferred. (Hellerstein, State Taxation (3d ed.2007) 12.08[1], p.1). Where services and tangible property are inseparably bundled together, determination of the taxability of the translation turns upon whether the purchaser's "true object" was to obtain the finished product or the service." . 45. The learned Senior Counsel, therefore, contended that when the true object of the transaction in the case on hand was to obtain a finished product whatever services involved should be held to be incidental and also should be treated as part of a sale of the tangible property and thus subject to 'sales' or 'use tax'.

. 46. Dr. Singhvi, learned Additional Advocate General appearing for the State of Rajasthan prefaced his submission by contending that the first question to be examined is whether the transaction is a

'Sale' or 'Works Contract'. According to the learned Counsel, the test that was prevailing pre 46th Amendment, continued to hold good and that the sale of a LIFT is definitely not a 'Works Contract'. The learned Counsel relied upon the decision reported in Bharat Sanchar Nigam Ltd. and Another vs. Union of India and others, (2006) 3 SCC 1, in particular paragraph 43 and pointed out that the transactions which are 'mutant sales' alone are limited to the clauses of Article 366 (29-A) and that all other transactions would have to qualify sales within the meaning of Sale of Goods Act, 1930 for the purpose of levy of sales tax. The learned Counsel while referring to the judgment in Larsen & Toubro Ltd. (supra) by making specific reference to paragraph 90, contended that although the decision in Hindustan Shipyard Ltd. (supra) has been distinguished, paragraph 6 of the said decision is still the correct proposition of law to be applied in all cases to find out the nature of a contract.

. 47 Mr. Preetesh Kumar, learned Standing Counsel for the State of Gujarat by referring to paragraphs 71 to 76 of the judgment in Larsen & Toubro Ltd. (supra) and in particular the ratio laid down in paragraph 76, contended that even by applying the test stated therein, the contract of the Petitioner for supply of the LIFT could not be brought within the concept of 'Works Contract'. The learned Counsel contended that in the light of the agreement by which the Petitioner came forward to supply the LIFT and erect the same in the premises of the Petitioner, it could only be held to be a 'contract for sale' and not 'Works Contract', thereby attracting Article 366 (29-A) (b) of the Constitution.

. 48. Mr. Darius Khambata, learned Advocate General for Maharashtra and Mr. K.N. Bhatt, learned Senior Counsel for Karnataka actually conceded to the effect that the question posed for consideration has been fully answered in the decision in Larsen & Toubro Ltd. (supra).

. 49. Mr. Malhotra, learned Additional Solicitor General for Union of India contended that the Union of India has nothing to do with the issue as to whether it is a 'Sale' or 'Works Contract', inasmuch as erection of LIFT has been brought under the definition of 'Works Contract' for the purpose of levying service tax.

. 50. Mr. Salve, learned Senior Counsel in his submissions referred to the decisions in M/s Vanguard Rolling Shutters and Steel Works (supra), Commissioner of Sales Tax, M.P. vs. Purshottam Premji reported in (1970) 2 SCC 287 and Commissioner of Central Excise, Ahmadabad vs. Solid and Correct Engineering Works and others reported in (2010) 5 SCC 122. The learned Senior Counsel attempted to distinguish the decision in M/s Vanguard Rolling Shutters and Steel Works (supra). In so far as the decision in Solid and Correct Engineering Works and others (supra), the learned Counsel after making reference to paragraph 16, 23 and 25, submitted that erection or installation of a LIFT could not, therefore, be held to be a structure which was embedded to the earth on a permanent basis in order to call it an immovable property.

. 51. Having heard the learned Counsel for the Petitioners and the Respondents and having considered the material papers placed before us and the various decisions relied upon by the Petitioners as well as the Respondents, at the foremost, what has to be first ascertained is whether the contract between the Petitioner and its Purchaser would fall within the definition of 'Works

Contract' in order to attract clause (b) to Sub- Article (29-A) of Article 366 of the Constitution. In fact, if an answer to the said question can be held in the affirmative, then that would axiomatically lead to an answer in favour of the Petitioner. Though, several decisions, wherein various tests have been highlighted, were cited before us and also reference to various provisions of different statutes, as well as the Finance Act provisions were brought to our notice, in my view, before adverting to those tests and the provisions, in the first instance, it will have to be found out as to what exactly was the nature of contract, as between the Petitioner and its Purchasers.

. 52. At the outset, even before examining the terms of the contract, it will have to be stated that the only business of the Petitioner is manufacture and supply of LIFTS/ELEVATORS. In fact, neither Mr. Salve nor any other Counsel appearing for the Petitioners submitted before us that the business of the Petitioner included any other activity along with the manufacture and supply of LIFTS/ELEVATORS. Certainly, it is not the case of the Petitioner that mere installation/erection of LIFT/ELEVATOR simpliciter is their business activity. It cannot also be contended that the job of installation/erection of a LIFT/ELEVATOR can be done only by LIFT/ELEVATOR manufacturers. In other words, manufacture of LIFT and erection of a LIFT can be independently handled by different persons. Therefore, the best course to proceed is on the admitted position that the business of the Petitioner is manufacture and supply of LIFTS/ELEVATORS as well as its installation. Once, the said factual position relating to the business of the Petitioners is steered clear of, the next question relates to the basis of the Contract that emerged between the Petitioners and the Purchasers in regard to the supply of the LIFTS/ELEVATORS and thereby ascertaining what were the agreed terms as between the parties. It must be stated that in order to find out the answer to the question referred, namely, whether manufacture, supply and erection/installation of LIFTS would fall within the concept of 'Sale' or 'Works Contract', analyzing the various tests in the forefront and thereafter apply them to the contract concerned, may not be an appropriate approach in the peculiar facts of this case.

. 53. Therefore, in my view, the proper course would be to first analyze what exactly is the contract between the Petitioner and the Purchaser and under the terms of the 'Contract' what is the element of works/service involved in order to hold that it is a 'Works Contract'. Therefore, at the risk of repetition, it will have to be stated that the initial exercise to be carried out is as to what are the terms of the contract.

. 54. I have set out in detail the said terms based on the specimen contract filed before us in the form of Annexure A-1 along with its enclosures. These terms have been set out in detail in paragraphs 8 to 19 and 32. I have also found that the Purchaser placed an order with the Petitioner for supply of LIFTS/ELEVATORS mentioning the specifications. In fact, the document dated 23.12.2009, along with which all the other connected annexures have been enclosed states that it is by way of acknowledgement of the order of the proposed features of the LIFT to be supplied. It is true that in the enclosures annexed along with the said document, in few places, the expression 'Works Contract' has been used. It is needless to state that simply because someone calls an activity as a 'Works Contract' that by itself will not ipso facto make the activity a 'Works Contract' unless the activity as explained in the document affirms and confirms to the effect that the said activity is nothing but a 'Works Contract'. In my opinion, when a detailed reference to the terms agreed upon between the

Petitioner and the Purchaser is made, it will not be proper to merely go by such expression used sporadically to hold that the contract is a 'Works Contract'. On the other hand, I find that what the Petitioner has agreed under the Contract, is only to supply its branded LIFT in the premises of the Purchaser. I can firmly and validly state that a careful analysis of the terms contained in the contract will lead only to that conclusion and not any other conclusion.

. 55. As stated earlier and as has been set out in detail in paragraphs 8 to 19, the Petitioner while agreeing to supply an Elevator of a specific model, highlighted the details of the LIFTS, such as, its technical details, advantages of its product and other sophisticated equipments put into the product. In fact, if at all any work element is involved in the activity of supply of the LIFTS/ELEVATORS, I find that the major part of the work has been directed to be carried out by the Purchaser, in its premises, in order to enable the Petitioner to erect its LIFT/ELEVATOR in the said premises. In a very insignificant manner, the Petitioner undertakes to attend to certain aspects while erecting the LIFTS in the premises of its Purchaser, such as connecting the power supply to the LIFT after fixing it in the identified place where the Purchaser has prepared the Hoist/Well in its premises and such other aspects as mentioned in the contract. The Petitioner cannot be heard to say that it brings different parts of the LIFT and that its activity of assembling the same in the premises of the Purchaser should be construed as one of service. In view of the nature of product that the Petitioner agreed to supply to its Purchaser, it has to necessarily assemble different parts in the premises of the Purchaser and thereby, fulfill its contract of supply of the LIFT/ELEVATOR in a working condition.

. 56. When examining the claim of the Petitioner that what was agreed by the Petitioner in the contract with its Purchaser is nothing but a 'Works Contract', such a claim should be explicit and must be discernable from the contract itself. When in the Contract the element of 'Works Contract' is totally absent and what was agreed between the parties was only supply of its elevator for a fixed price, mere mentioning of the expression 'Works Contract' or by making reference to the basis for fixing the cost of labour involved in the manufacture or by simply using the expression 'Works Contract' without any scope of performing any work at the command of the Purchaser, in my opinion, the Petitioner's claim to hold its activity as a 'Works Contract' cannot be accepted on mere asking. In other words, the contract must disclose in no uncertain terms that it was one for carrying out 'the work' and the supply of the materials were part of such agreement to carry out any such specified work. Here, it is the other way around, the contract is only for supply of LIFTS/ELEVATOR and whatever element of works which the Petitioner claims to carry out in effecting the supply is virtually very insignificant as compared to the element of sale, which is paramount as found in the terms of the contract. The whole of the preparatory work for the erection of the LIFT is that of the Purchaser and the Petitioner merely goes to the Purchaser's premises and fixes the various parts of the LIFT in the slots created for it.

. 57. While making a deeper scrutiny of the terms of the contract as a whole, as noted earlier, in Annexure A-1, which is the acknowledgement of the Order dated 23.12.2009, the very subject column States:

> "Order Acknowledgment for One (1) No. OTIS Electric Traction Passenger Elevator for your Building at "BAPU NAGAR, JAIPUR, RAJASTHAN"." . 58. The contents of

the letter also states that the Petitioner was glad to receive the valued order placed with it by the Purchaser and stated that it is prepared to supply and install One (1) No. OTIS Electric Traction Passenger Elevator. Thus, while acknowledging the order placed by the Purchaser, the proposed specifications submitted earlier based on the Purchaser's requirement have been enclosed. A specific Contract number is also provided. Rest of the documents consist of the details of the model, the nature of the machine that would be operating the LIFTS, the brake system, the type of parts that are used in the Machine and the peculiar features of those mechanical aspects. Thereafter, the benefits of the LIFTS are set out, namely, the smooth and controlled acceleration/deceleration, better riding quality, assured leveling accuracy of +/- 5 MM, improved flight time, improved reliability and increased efficiency, reduced power consumption, reduced heat release, flexibility of programme and programming of features at site, enhancing the value of the building where the LIFT is erected and simplified maintenance. The other terms relate to maintenance, wherein the Petitioner's offer of providing 12 months free maintenance, the time from which such maintenance would commence and the conditions upon which such maintenance offered would operate and also making it clear that during the period of maintenance the Purchaser will be the owner and also the circumstances in which the Petitioner would be liable for any damage that occurs to the LIFT. A consideration of this part of the contract also does not refer to or contain any element of work or service to be provided as agreed between the parties.

. 59. The other set of terms are called as 'Preparatory Work'. Under the said head, it is mainly stated as to the nature of preparatory work that the Purchaser will have to organize in its premises, such as, the time within which such preparatory work is to be carried out, which would require the Purchaser to design and furnish what is called as Elevator hoist way/structure to provide in its building to enable the Petitioner to supply its LIFT and locate it. It contains as many as 21 different aspects of preparatory work wherein, what all the Petitioner has come forward to provide is a ladder for having access to the pit. The other one which the Petitioners agreed to provide is a steel fascia for each sill. The third one is the cutting of walls, floors or partitions together with any repairs to be made necessary including, grouting of all bolts, sills, members indicator and button boxes, etc. and a steel scaffolding to be made in the course of erection, which the Petitioner undertakes to provide.

. 60. As far as the provision of a ladder in the pit is concerned, it can again be taken only as a material part of the LIFT and it does not involve any work to be performed. Similarly, provision of a steel fascia at every sill level is again another part of the LIFT and here again there is no element of work or service to be rendered. The provision relating to cutting of walls, floors or partitions together with any repairs to be made necessary including grouting of all bolts, sills, members indicator and button boxes etc., are but certain incidental minor jobs to be attended to in the course of the supply and erection of the LIFT. When under the contract, the Purchaser has been directed to prepare the hoist way, which is a solid structure in the building and in the course of the erection of the LIFT if some holes are to be drilled for fixing a frame or a nut and bolt as compared to the enormity of the preparatory work that has been entrusted with the Purchaser for the purpose of erecting the LIFT, it must be stated that the said work of cutting the walls to fix the frames and

grouting the bolts could not be held to be a service or work for which the contract was entered into. It is like doing some incidental work for fixing a Fan or an Air Conditioner. Providing a steel scaffolding again is not a matter which can be held to be a contract for works. On the other hand, for the purpose of grouting bolts and fixing the frames in a hoist way, which is stated to be having 30/40 metres height/depth, it has to be mandatorily arranged by someone but here again it will have to be stated that the same cannot be a decisive one for ascertaining the nature of contract, as between the parties. Therefore, on the whole, the terms under the head 'Preparatory Work' does not in anyway persuade us to hold that what was agreed between the parties in this contract was a 'Works Contract'.

. 61. The next set of conditions contained in the Contract is under the head 'IEEMA Price Variation Clause for Elevator Works Contracts'. As stated earlier, this is the document in which the expression 'Works Contract' has been used. When examining the details contained under the said head what all it says is that the price quoted/confirmed is based on the cost of raw materials/components and labour cost as on the date of quotation and the same is deemed to be related to Wholesale Price Index Number for Metal Products and All India Average Consumer Price Index Number for Industrial Workers. The said part of the contract is nothing but an indication that the price agreed between the parties or the supply of the LIFT may vary under certain contingencies and such variation will depend upon the price indices relating to Metal Products and the Consumer Price Index. I see no co-relation at all for the said stipulation contained vis-à-vis the caption 'Elevator Works Contract'. Merely because the price is likely to vary based on the variation in the indices of the price of Metals and Consumer Price, I fail to understand as to how that has any relevance or a reference to those indices would determine the nature of the contract as a 'Works Contract'. Therefore, the caption 'Elevators Works Contract', while referring to the Price Variation Clause is a total misnomer and based on the said caption simpliciter, the whole contract cannot be called as a 'Works Contract'. Under the very same head it is stipulated by way of payment terms that claim for manufactured materials should be paid along with the material invoice and claim for installation should be paid along with their final invoice, which according to the Petitioner would relate to the labour costs. It however, states that the price quoted in the proposal would be formed upto a particular date and thereafter, if there is any delay in completion of installation and commissioning due to reasons attributable to the Purchaser, the price would be varied in accordance with the above costs indices. The price variation is supposedly agreed between the parties to prevail upto a specified date. Therefore, in the event of the contract being completed within the specified date, there is no question of any price variation arising in order to work out such variation based on the 'Wholesale Price Index' or 'Consumer Price Index'. Even assuming a contingency arises due to the fault of the Purchaser, at best it may result in some variation in the price and I fail to understand as to how based on the working out of such variation in the price, it can be held that the whole contract is a 'Works Contract'.

. 62. I do not find any sound logic or basis in the Petitioner referring to the Price Variation Clause under the caption 'Works Contract'. Therefore, it can be validly stated that by calling the Price Variation Clause as an 'Elevator Works Contract', the contract cannot be construed as a 'Works Contract'. On the other hand, going by the stipulations contained therein viz., that the claim for manufactured materials should be paid along with material invoice and the installation charges to

be paid based on final invoice makes it clear that the contract is divisible in its nature and to call it an indivisible one, is contrary to its own terms.

. 63. With this, the 'Conditions of the Contract' can be referred to, which contains as many as 27 conditions. These conditions have been elaborately discussed in paragraph 18 of this judgment, to which I once again bestow my serious consideration, in order to appreciate whether, these conditions at least throw any light to state that the contract can be brought within the expression 'Works Contract'.

. 64. When examining these conditions, in the first instance, the most relevant and clinching condition is the one relating to the payment to be effected by the Purchaser, which is to the effect that on signing the contract, 90% of the contract amount should be paid and the balance 10% either on the commissioning of the LIFT or within 30 days of the Petitioner's offer to commission the LIFT and if for any delay caused beyond the control of the Petitioner, within 90 days from the date the materials are ready for dispatch at the premises of the Petitioner. The agreed period for execution of the supply of the LIFT, as per the contract, is 52 weeks i.e., one full year. Whereas by reason of any delay beyond the control of the Petitioner, within 90 days from the date of the commencement of the contract, the Petitioner will have the right to demand for the entire payment without doing anything towards the erection part of it. Alternatively, while the Purchaser would be liable to pay the entirety of the contracted amount for the supply of the LIFT, the Petitioner after receiving the full payment would still have sufficient time to effectuate the supply in the event of the supply not being effectuated within the due date, then, on that ground the inability to commission the LIFT within 30 days or within 90 days after the materials are ready for dispatch will not for any reason be attributable to the Petitioner. In fact, Condition No.8 at the end states that if for any reason the Petitioner is not able to supply any equipment within 52 weeks, then at its option, it can cancel the contract without there being any liability for payment of damages or compensation. Therefore, those terms relating to payment in Condition No.5 and the right retained by the Petitioner to cancel the contract for any reason whatsoever under Condition No.8 disclose that for mere signing of the contract for supply of the LIFT, the Petitioner would get the whole value of it without any corresponding obligation to effect the supply or to suffer any damages. The said outcome based on the payment conditions when read along with the other stipulations, disclose that the claim for manufactured materials should be paid along with the material invoice and the claim for installation should be paid along with their final invoice. It further makes it abundantly clear that the right of the Petitioner to realize the full value of the materials of the LIFT to be supplied does not entirely depend upon the installation part of it. In other words, supply of materials of the LIFT and installation costs are separately worked out in order to ensure that irrespective of the installation, the Petitioner will be able to realize the value of the material cost. This conclusion which is based on the above terms, also strengthens the reasoning that the contract is not an indivisible one and is always separable i.e., one for supply of materials and the miniscule part of the work involved. The division of 90% payment in the first instance and the balance 10% under certain other situations, fully supports the above conclusion.

. 65. A reference to the various other conditions in the contract also do not suggest that the consideration under the Contract to be borne by the Purchaser, has got anything to do with the

installation part of the LIFT. On the other hand, the terms have downright been agreed upon between the parties only to mandate the Purchaser to pay 90% of the contracted amount on mere signing of the contract and to pay the balance 10% within 30 days of the Petitioner's offer to commission the LIFT and even if the said event of commissioning of the LIFT fails to occur due to any reason not attributable to the Petitioner or beyond its control, within 90 days of the materials made ready for dispatch at the premises of the Petitioner. In that situation also what all the Petitioner will have to ensure is that such components of the LIFTS are ready for dispatch. At the risk of repetition, it can be stated that if on the date of the signing of the contract 90% payment is made and within the contract period i.e 52 weeks, the Petitioner is able to show that the whole of the components of the LIFTS are ready for dispatch at its premises, the Purchaser is bound to pay the balance 10% also within 90 days from the date of such availability of materials for dispatch without any other stipulation as to such equipments or components being delivered at the spot of the Purchaser for its installation. If the conditions of the contract relating to payment are discernable to that effect, it can only be stated that the contract of the Petitioner with the Purchaser is virtually for the manufacture of the materials and for its absolute readiness to supply those materials and nothing more. The sum and substance of the conditions of the contract de hors the other clauses is only to that effect.

. 66. As far as the other clauses are concerned, they have nothing to do with the execution of the works or creating any duty or responsibility on the Petitioner to carry out such execution and thereby, any corresponding liability being fastened on the Petitioner in the event of its failure to carry out the erection/installation part of it will not become attributable. It will also be relevant to note that if for any reason, the contract is not fulfilled due to reasons attributable to the Purchaser, the apportionment clause will enable the Petitioner to retain such part of the amount of 90% already received to cover its costs and expenses. In fact the whole discretion vests with the Petitioner to determine such apportionment under Clause 21. Therefore, on a detailed consideration of the conditions of the contract, one will not be able to state with any certainty that the contract has got anything to do only with any work or service to be performed in the course of supply of the LIFT/ELEVATOR by the Petitioner.

. 67. The signed part of the said contract makes it clear that the price is inclusive of indirect taxes, as is currently applicable either leviable by the Central Government or State Government or any local Authority, including Excise Duty and Service Tax. However, it also states that in the event of any such statutory levy or payment of tax or otherwise faced by the Petitioner, then under such circumstances, that should be borne by the Purchaser.

. 68. Having considered the above terms of the contract threadbare, I am convinced that it can only be concluded that this contract is only one for the manufacture and supply of the LIFT/ELEVATOR and the installation though mentioned in the contract, has very insignificant relation to the consideration agreed upon between the parties. In any event, as I have found that the contract of supply and installation are divisible in very many aspects, it is difficult to hold that it is a 'Works Contract'. Therefore, it will have to be held that the manufacture, supply and erection of LIFT/ELEVATOR agreed upon by the Petitioner to any of its customers, would only fall within the expression 'Sale' and can never be called as 'Works Contract'. Once that is the conclusion that can be

made based on the contractual terms as agreed between the Petitioner and its customers, the application of Article 366(29A)(b) cannot be made and does not in any way support the contentions raised by the Petitioner.

. 69. De hors the abovesaid conclusion, based on the very contract, I wish to deal with the various submissions of the Petitioner based on various decisions relied upon, including the decision in Larsen & Toubro Ltd. (supra).

. 70. Keeping the above salient features of the contract between the Petitioner and the Purchaser in mind, I now deal with the submissions made by the learned Senior Counsel for the Petitioners. Mr. Salve, learned Senior Counsel in his opening submission relied upon Section 2(jj) of the Orissa Sales Tax Act, 1947 and contended that applying the said definition of 'Works Contract' to the present contract, the same would squarely fall within the said definition. When examining the said contention, it will be relevant to make a detailed reference to the said provision under the Orissa Sales Tax Act. For appreciating this provision, a reading of it is required and has been extracted in paragraph 24 of this judgment. The definition of 'Works Contract' under Section 2(jj) of the Orissa Sales Tax Act states that it would include any agreement for carrying out for cash or deferred payment or other valuable consideration, among other activities, fabrication, erection, installation or commissioning of any movable or immovable property.

. 71. As far as a LIFT is concerned, in one sense it can be called as a movable property when it is in the course of operation after its installation and that it is not embedded to the earth permanently while, in another sense, having regard to the manner in which the LIFT is installed in a premises, it can also be stated to be part of an immovable property. In my view, whether as a movable property or immovable property, it may not make any difference while considering the other prescriptions contained in the said provision. What is really relevant for consideration is to examine the issue by referring to the said provision, which in the foremost, depends upon an agreement between the parties. The said agreement should ordain an obligation on one party who has been entrusted with the task of fabrication, erection, installation of any movable or immovable property. The most mandatory requirement for invoking the said provision and for applying the said definition would be that the whole of the agreement should be for carrying out the work of fabrication, installation or erection of a movable or immovable property. Significantly, the expression 'manufacture' is absent in Section 2(jj).

. 72. Next, as per the agreement, it should be for cash or deferred payment or other valuable consideration. In other words, it must first satisfy the definition of a 'concluded contract' as provided under that Section. In this context, it would be relevant to refer to Section 2(h) and the first part of Section 10 of the Indian Contract Act, 1872. Section 2(h) reads as under:

> "An agreement enforceable by law is a contract." The first part of Section 10 reads as under:

"What Agreements are contracts – All Agreements are Contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with the lawful object and are not

hereby expressly declared to be void." . 73. Therefore, in order for a contract to be valid, it must be one which can be enforced by law and such agreements if made between the parties must be for a lawful consideration and with a lawful object. It is needless to state that for any contract to be valid and lawful, the basic ingredients of offer and acceptance for valuable consideration must be present. Keeping the said provisions relating to a valid contract under the provisions of the Indian Contract Act in mind, when an examination is made on the implication of the definition of 'Works Contract' under Section 2(jj) of the Orissa Sales Tax Act to the case on hand, at the foremost, it is necessary to examine as to whether there is a valid agreement and that valid agreement and if such an agreement is for a lawful consideration to perform the work of fabrication, erection, installation of any movable or immovable property. Further, such an agreement should also be one for cash or deferred payment or other valuable consideration.

. 74. Keeping the above statutory prescriptions in mind, the same can be applied to the case on hand. As has been pointed out in the earlier part of the judgment, where the various terms of the contract as between the Petitioner and the Purchaser have been examined, in particular the consideration part of it, it is found that the majority of the consideration was payable to the Petitioner within one month from the date of commissioning or within 90 days of keeping the materials ready for supply in its premises. This is on the ground that the commissioning could not be effected as agreed or within 30 days of its readiness to commission and by stating that its inability to commission was delayed due to reasons beyond its control. This provision in the Contract is de hors the stipulation in Condition No.25(a) under which a minimum of 16 weeks is prescribed for commissioning while the maximum period is 52 weeks, which again depends upon the fulfillment of the agreed conditions fastened on the Purchaser. It also provides for extending the contract periods. To recapitulate the said regime of the contract, it can be stated that the parties agreed as per the agreement wherein the Purchaser is bound to pay 90% of the agreed sum at the time of signing of the contract itself and the balance 10% within 90 days from the day the Petitioner gets the materials ready for dispatch in its premises, if it could not commission as agreed or within 30 days of its readiness to commission. Therefore, the whole of the valuable consideration becomes payable and was relatable or as agreed upon by the parties merely for the Petitioner's readiness to take up the contract of supply of the ELEVATOR and for its endeavour to effect the manufacture, procure the entire materials for a LIFT/ELEVATOR and keep it ready for dispatch in its premises. In other words, the moment the materials for a LIFT/ELEVATOR are made ready and kept for dispatch in the premises of the Petitioner, under a particular contingency within 90 days thereof, the majority of the contracted amount is to be paid to the Petitioner without any corresponding legally enforceable obligation on the Petitioner to carry out the erection or installation in the premises of the Purchaser.

. 75. In fact, the period actually agreed between the parties, as per which the Petitioner is to carry out the installation part of the LIFT runs to 52 weeks i.e., for one full year, whereas the whole of the consideration would become payable within 90 days from the date the materials are kept ready for dispatch in the premises of the Petitioner. Therefore, I fail to understand as to how it can be held that there was any sordid agreement as between the Petitioner and the Purchaser for any valuable consideration only for the purpose of carrying out erection/installation of the LIFT in the premises of the Purchaser. If for any reason after the full payment is effectuated by the Purchaser as per the term relating to the payment of the contracted amount, due to any fault of the Petitioner, the supply

of the material or erection or installation fails to take place, the remedy of the Purchaser may at best be for recovery of the material part of the contract and I do not find any provision in the terms of the contract, which would entitle the Purchaser to lawfully enforce as against the Petitioner for the execution part of it, namely, the erection/installation of the LIFT in its premises. In my opinion such a consequence would be inevitable having regard to the terms of the contract, which in spite of my best efforts, was not able to discern any specific clause which would entitle the Purchaser to seek for such enforcement for erection/installation. On one hand, a provision from the contract states that the Purchaser may be entitled to retain the materials even in uninstalled position in the event of the contract not being fulfilled in its fullest terms.

. 76. On the other hand, in the event of any failure on the part of the Purchaser in effectuating the payment or in fulfilling certain other aspects, such as construction of hoist way and other works related, obligations to be performed on its part, the Petitioner has retained every right to charge interest for such delay, if any, caused at the instance of the Purchaser and in the event of the Contract failing to fructify, the Purchaser would be liable to pay compensation/damages to the Petitioner and not vice versa. Since the above conclusion is the outcome based on the relevant terms of the Contract, the mentioning in Clauses 10 and 14 that the contract is otherwise indivisible 'Works Contract' will not by itself make it indivisible or a 'Works Contract'. When that is the factual and legal outcome as per the terms of the contract, it will have to be held that there is no scope to apply Section 2(jj) of the Orissa Sales Tax Act to the case on hand and hold that the manufacture, supply and installation of the LIFT by the Petitioner would fall within the said definition of 'Works Contract'. It may be a different situation if the contract was one for mere fabrication/erection/installation. Certainly a simple activity of fabrication cannot be equated to manufacture of parts of a LIFT since such fabrication may take place at the site with the aid of material and labour.

. 77. That apart, provisions of the Indian Contract Act stipulates the element of offer, acceptance and consideration for a concluded contract. In the case on hand, the offer would be for supply of the LIFT as described in the proposal made by the Petitioner. The consideration upto 90% would become payable the moment the Purchaser agrees to the proposal made by the Petitioner and the balance 10% can also be collected without any positive guarantee for completion of erection or installation of the LIFT under certain contingencies without any corresponding right in the Purchaser to seek for enforcement of the erection/installation. In fact for payment of the balance 10% under such contingencies, what all the Petitioner has to show is that the materials meant for the supply of the LIFTS are ready for dispatch in its premises, which would mandate the Purchaser to make the payment within 90 days of such readiness as reported by the Petitioner. In effect such a contract as agreed between the Petitioner and its Purchaser as per the provisions of the Indian Contract Act if were to be considered for the invocation of the definition of 'Works Contract' under Section 2(jj), it can be found that the said contract does not in any way create any legal obligation on the Petitioner to effect the erection or installation of the LIFT as a movable or immovable property, satisfaction of which contract alone will attract the definition of 'Works Contract' under Section 2(jj) of the Orissa Sales Tax Act.

. 78. Mr. Salve, learned Senior Counsel then contended that the terms contained in the contract for manufacture, supply and installation of the LIFT as well as the various prescriptions contained in the Field Installation Manual show that what was agreed as between the parties would fall within the definition of 'Works Contract' and therefore, be held as the same. In the previous paragraphs, it has been stated as to how the contract between the Petitioner and its Purchaser is mainly for the supply of the LIFT and the agreement is not in any way conditional to the installation part of it. Therefore, the reference to the Field Installation Manual will be of no assistance to the Petitioner, since it only describes as to how various steps are to be followed by the personnel of the Petitioner while erecting the LIFT. Since, the agreement, namely, the proposal for the supply and the consideration was agreed as between the Parties, without creating any legally enforceable rights as regards the installation part of it, the reference to the Field Installation Manual, which is an internal document of the Petitioner issued to its employees for their guidance, does not in anyway advance the case of the Petitioner. Therefore, for the very same reasons, the said contention of the learned Senior Counsel is also liable to be rejected.

. 79. I have also highlighted how as per the payment terms the parties agreed specifically to the effect: 'under this clause claim for manufactured materials shall be paid along with our material invoice and claim for installation labour shall be paid along with our final invoice.' In fact the copy of the two invoices dated 17.12.2009 and 20.09.2010, clearly explains the fact that the first one related to material cost and the subsequent one only related to labour cost.

. 80. I have examined the provisions of the Bombay Lifts Act, 1939 which have been raised by learned Senior counsel for the petitioners in paragraph 25 and have extensively dealt with them in paragraph 37 of this judgment. Based on such examination of the various provisions of the Act, I have found that these provisions are meant for getting a permit, licence, registration etc. and for the purpose of ensuring that in the course of the installation, as well as, while the LIFT is in operation or in the course of the maintenance of the LIFT, no damage is caused to men and materials. Beyond that, based on the said provisions there is no scope to reach a conclusion that a contract as between the Petitioner and the Purchaser would come within the definition of the 'Works Contract'. Therefore, the said submission of the learned Senior Counsel cannot also be accepted.

. 81. The learned Senior Counsel then referred to a decision of the Government of India reported in In Re: OTIS Elevator Co. (India) Ltd. (supra), which has been dealt in paragraph 38 of this judgment. I fail to see any scope to rely on the said decision, as it is only that of the Department of Government of India. Even otherwise, the said decision was for the purpose of finding out as to whether 'excise duty' was payable at the time when the manufactured parts of elevators/escalators were cleared from the premises of the Petitioner. I do not find any scope at all to apply the said conclusion of the Government of India to the case on hand, apart from the fact that the said conclusion reached under the provisions of the Central Excise Laws cannot be applied to the legal issue with which we are concerned. In any event, such a decision of the authority of the Government of India cannot even have a persuasive value on this Court.

. 82. A reference was also made to a notice issued by the Central Board of Excise and Customs dated 15.01.2002, under Section 37B of the Central Excise Act which has been dealt with in paragraph 39

of this judgment. Here again I fail to see any acceptable grounds to apply any of the reasoning for such conclusion. When I examined the nature of the contract of the Petitioner for manufacture, supply and installation of the LIFTS to its Purchaser, I do not find any scope at all to apply those decisions or the conclusions taken by the concerned authority under the provisions of Central Excise Act.

. 83. The learned Senior counsel for the petitioner lastly made reference to sub-Sections 29, 39(a) and sub-clause (zzd) to sub-Section 105 of Section 65 along with a further reference to sub-Clause (zzza) to sub- Section 105 to Section 65, which has been dealt with in paragraph 41 of this judgment. Though in the first blush, the submission appears to be forceful, on a meticulous examination of the provisions with particular reference to the contract as between the Petitioner and its Purchaser, I am compelled to reject the said submission as it has no force.

. 84. To note the fallacy in the submission, a clear understanding of the said provision is required. At the very outset, it will have to be stated that the present attempt is to find out an answer to the question whether manufacture, supply and erection of a LIFT, will fall under the category of 'Sale' or 'Works Contract' for the purpose of a levy under the Sales Tax Act. Section 65(29), 65(39a) and 65(105) (zzd) and (zzzza) are all provisions for the levy of Service Tax. It is well known that while interpreting taxing statutes, strict and literal interpretation should be made. For this proposition of law, reference can be made to one of the earliest decisions of England in Cape Brand Syndicate vs. Inland Revenue Commissioner, 1921-1 KB 64. The above decision was followed in Income Tax Officer, Tuticorin vs. T.S. Devinatha Nadar, Etc., AIR 1968 SC 623 wherein it held that what is applicable to another taxing statute may not be applied to a case governed by sales tax statutes. Keeping the above fundamental principle in mind, an examination of Section 65(29), defines 'commissioning and installation agency' to mean any agency providing service in relation to erection, commissioning or installation. Section 65(39a) further defines the expression 'erection, commissioning or installation' to mean any service provided by any such agency, in relation to, inter alia installation of LIFT and escalation. Section 65(105) (zzd) defines 'Taxable Service' inter alia to mean service provided or to be provided to any person by erection, commissioning or installation agency in relation to commissioning and installation. Therefore, reading the above provisions together, what emerges is that any service provided by way of commissioning and installation of LIFT and Escalators by any agency would be a Taxable Service. Once the said position is steered clear of, the other provision referred to was Section 65(105)(zzzza), which again is one other taxable service, namely, a service to any person by any other person in relation to the execution of 'Works Contract'. It excludes 'Works Contract' in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams obviously because those are services of the State. The said sub-clause, however, contains a definition of 'Works Contract' in the explanation part. It, however, refers to a contract which includes transfer of property in goods involved in the execution of a works contract. In Clause (i) of the Explanation, it makes it clear that such transfer of goods would attract levy of tax as sale of goods, under the relevant statutes, namely, Sales Tax Acts; State or Central. In Clause (ii) of the Explanation, it specifically includes erection, commissioning or installation of LIFT and Escalator. It will be profitable also to refer to Section 65(50), which defines 'goods' to mean what is assigned to it in clause (7) of Section 2 of the Sale of Goods Act, 1930. Section 2(7) of Sale of Goods Act defines it to mean every kind of movable property other than actionable claim, etc. Similar such

definitions are attributed to 'goods' under the Sales Tax Acts. Since Section 65 and the various subsections, namely, (29), (39a), (105), (zzd), (zzzza) put together only relatable to Service Tax, the question of importing the said definition of 'Works Contract' in the explanation to Section (65)(105)(zzzza) to the provisions of Sales Tax Acts cannot be made. Further, clause (i) of the Explanation to sub clause (zzzza) of Sub- section 105 to Section 65, distinctly refers to transfer of goods in any such contract to mean such goods leviable to tax as a sale of goods. It will have to be stated that such leviability by itself may independently attract tax liability under the relevant Sales Tax Statutes. However, it is not the concern in this case and it is to be left open for consideration as and when any need arrives to decide that question. Therefore, the reference to the above provisions under the Service Tax Act are of no assistance to the Petitioner to hold that its manufacture, supply and installation of a lift is a 'Works Contract'.

. 85. The above conclusion is de hors the position that sub-clause (zzzza) of Sub-section 105 of Section 65 came to be introduced under the Finance Act of 2007, which came into force w.e.f. 11.05.2007. It should also be noted that Section 65(29), 65(39a) and 65(105) (zzd) have nothing to do with manufacture and supply which is actually the activity of the Petitioner. It is regarding the erection/commissioning/installation simpliciter, even if the LIFT or Escalator is independently carried out by an Agency. According to me, by relying upon Section 65 (29), 65 (39a) and Section 105 (zzd), the case of the Petitioner cannot be comprehensively answered and he further cannot possibly contend that the contract should be construed as a works contract. Therefore, on the ground of any liability being cast on the Petitioner under the provisions of the Service Tax Act, it will be wrong to hold that the Petitioner cannot be called upon to comply with the provisions relating to Sales Tax. The said submission of the learned Counsel is, therefore, liable to be turned down.

. 86. On examination of the various decisions, which were relied upon by the learned Senior Counsel, the first case was the Division Bench decision of the Bombay High Court in OTIS Elevators Co. (India) Ltd. (supra). It is true that in the said decision the Bombay High Court dealt with the very same issue, namely, whether supply, erection, installation of LIFT by the Petitioner would fall within the definition of 'Works Contract' or a 'Sale'. The Division Bench of the Bombay High Court posed two questions for consideration. The questions were:

> "1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the contract dated 10.06.1958 between the applicants and M/s Tea Manak and Co. was a composite and divisible contract, one for the sale of goods in which the property has passed and the other for labour and service charges for the installation of the goods so sold.

2. Whether the said contract was one and indivisible contract for work and labour." . 87. While examining the above two questions apart from the various terms of the contract, the Division Bench has referred to a very vital term in the contract, which again related to the payment of consideration. The said term has been extracted at page 531, which reads as under:

> "531. We propose to furnish and erect the elevator, installation outlined in the foregoing specifications for the sum of price of two passenger lifts as above duly

delivered and erected at site @ Rs.28,156/- each." . 88. The Division Bench, thereafter, noted clause (iv) of the Agreement, which related to the payment of price. The said clause was as under:

"30% within 30 days of the builders accepting the proposal; 60% on receipt of shipping documents from the applicants' factories;

and the remaining 10% (+) or (–) any adjustments required on completion of erection or in any case within 6 months of delivery of equipment." . 89. After referring to the above clauses in the agreement and also the various decisions relied upon by the respective parties, the Division Bench noted the contention of the Department and the substance of the contention of the Department was as under:

"We have already referred to the contention of the Department that in view of the proportion of cost separately indicated for the material as against labour, and the use of the word 'price' in describing the consideration for the supply, erection and installation of the lifts the intention of the parties was to sell the goods." . 90. While dealing with the said contention, the Division Bench observed as under:

"In the ultimate analysis in this case the form in which services are rendered does not permit its severance into two compartments. In this connection, there are certain factors which have relevance in determining the intention of the parties. The time-

limit fixed for doing the work, the mention of and all-inclusive price for the totality of the materials and services rendered, the absence of an agreement for the sale of chattel as chattel, the point of time when, the property in the goods passed from the applicants to the opposite party, the nature of the contract undertaken by the Applicants under and the indivisibility of the contract, are all factors which would indicate what should be the proper construction of the contract entered into between the parties." . 91. The Division Bench then felt it necessary to examine the terms of the contract and the surrounding circumstances and ultimately reached its conclusion as under:

"In this connection the mode of payment set out in clause 4 is also pertinent. Under that clause 30% of the price was to be paid within 30 days from the date of the acceptance of the proposal, 60% was to be paid on receipt of shipping documents from the factories, and the remaining 10% had to be paid, subject to adjustments required, on completion of the erection, or, in any case, within six months of the delivery of the equipment, if the erection was delayed due to the reasons beyond their control.

This is more consistent with and all-inclusive price being fixed irrespective of the materials supplied from time to time with the building contractors." . 92. The answers to the questions were ultimately made at the end of the judgment to the

following effect:

"In the result, we answer the questions referred to us as follows:-

Question No.(1) in the negative.

Question No.(2) in the affirmative." . 93. The Division Bench ultimately held that the contract was a composite and indivisible contract for work and labour and, therefore, no sale of goods can be spelt out of the contract. As observed from the said judgment, the Division Bench has noted the agreed terms of the parties, which stated that the proposal was to manufacture/erect/install the elevator, for which the price was agreed upon. The payment term also made it clear that the entirety of the payment would be made on completion of the erection or in any case within six months of delivery of the equipment. It has further noted that the price was all inclusive for supply, erection and installation which were the specific terms of the contract. Therefore, the said judgment having regard to the special facts, namely, the specific terms contained in the contract as between the parties, can have no application to the facts of this case. In the case on hand, the payment has really nothing to do with the erection and installation. It has also got no relation to the delivery of the LIFT, either in its full form or in any semi-installed condition. The contractual terms between the Petitioner and its Purchaser have been explained in detail and have no relation to any service to be performed by the Petitioner by way of the agreed terms of the contract. The said decision is, therefore, of no assistance to the case of the Petitioner.

In any event, if it is argued that the contract involved in the said decision is identical to the case on hand, as it has been found and held that the terms of the contract is not persuasive enough to call it a 'Works Contract', the said decision will no longer hold good.

. 94. Before analyzing the various other decisions relied upon by either side, having regard to the above conclusion that the manufacture, supply and installation of LIFT by the Petitioner would constitute a 'Sale' and not 'Works Contract', a reference can be made to the reasoning, which weighed with the learned Judges in the judgment rendered in Kone Elevators (India) Pvt. Ltd. (supra). In the said judgment this very question which has been referred to this Constitution Bench directly arose for consideration. The present Petitioner when submitted its returns under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 for the period 1.04.1995 to 31.05.1995 and 01.06.1995 to 31.07.1995, provisional assessments were made by the Commercial Tax Officer by order dated 19.08.1995 and 05.09.1995, respectively. The claim of the Petitioner by way of deductions of labour charges for composition of Tax under Section 5G read with Section 5F of the said Act, on the ground that the nature of work undertaken by it constitutes a 'Works Contract', was rejected by the Assessing Authority holding that the same amounted to 'Sale'. The appeal preferred by the Petitioner was also rejected. The further appeal to the Tribunal was allowed in favour of the assessee holding that the activities of the Petitioner would fall within the expression 'Works Contract' and not 'Sale'. The Department's challenge in the High Court also ended in a failure. In an appeal preferred by the Department before this Court, after applying the effect of sub-article

(29A)(b) of Article 366 and also the decisions in Gannon Dunkerley (supra), Hindustan Shipyard Ltd. (supra) etc., and after making a detailed reference to the contractual terms it was held as under in paragraph 12:

> "12. On a careful study of the aforestated clause in the Delivery Schedule, it is clear that the customer was required to do the actual work at the site for installation of lift. On reading the above clause, it may be observed that the entire onus of preparation and making ready of the site for installation of lift was on the customer. It was agreed that under no circumstances would the assessee undertake installation of lift if the site was not kept ready by the customer. Under clause 4(g) of the "Customers' Contractual Obligations", the assessee reserved the right to charge the customer for delay in providing the required facilities. These facts clearly indicate that the assessee divided the execution of the contract into two parts, namely, "the work" to be initially done in accordance with the specifications laid down by the assessee and "the supply" of lift by the assessee. "The work" part in the contract was assigned to the customer and "the supply" part was assigned to the assessee. This "supply" part included installation of lift. Therefore, contractual obligation of the assessee was only to supply and install the lift, while the customer's obligation was to undertake the work connected in keeping the site ready for installation as per the drawings. In view of the contractual obligations of the customer and the fact that the assessee undertook exclusive installation of the lifts manufactured and brought to the site in knocked-down state to be assembled by the assessee, it is clear that the transaction in question was a contract of "sale" and not a "works contract". Moreover, on perusal of the brochure of the assessee Company, one finds that the assessee is in the business of manufacturing of various types of lifts, namely, passenger lifts, freight elevators, transport elevators and scenic lifts. A combined study of the above models, mentioned in the brochure, indicates that the assessee has been exhibiting various models of lifts for sale.

These lifts are sold in various colours with various capacities and variable voltage. According to the brochure, it is open for a prospective buyer to place purchase order for supply of lifts as per his convenience and choice. Therefore, the assessee satisfies, on facts, the twin requirements to attract the charge of tax under the 1957 Act, namely, that it carries on business of selling the lifts and elevators and it has sold the lifts and elevators during the relevant period in the course of its business. In the present case, on facts, we find that the major component of the end product is the material consumed in producing the lift to be delivered and the skill and labour employed for converting the main components into the end product were only incidentally used and, therefore, the delivery of the end product by the assessee to the customer constituted a "sale" and not a "works contract". Hence, the transactions in question constitute "sale" in terms of Entry 82 of the First Schedule to the said Act and, therefore, Section 5-G of the said Act was not applicable." . 95. It can be concluded that the reasoning of this Court in the above-referred decision is in tune with the law on the subject and it should be held that could be the only reasoning which can be assigned, having regard to the nature of the contract and the relevant provision of law that would apply to such a transaction as between the Petitioner and its customers. Therefore, the said decision should remain

as no other view other than what has been taken in the said decision is possible. I, thus, affirm the said decision and hold that the activity of the Petitioner in the manufacture, supply and installation of LIFT/ELEVATOR is a 'Sale' and not a 'Works Contract', having regard to the specific terms of the contract placed before this Court.

. 96. On behalf of the Petitioners, reliance was heavily placed upon the three Judge Bench decision of this Court in Larsen & Toubro Ltd. (supra). That decision came to be rendered pursuant to a reference by a two judge Bench of this Court in K. Raheja Development Corporation vs. State of Karnataka, (2005) 5 SCC 162. In the order of reference dated 19.08.2008, the two judge Bench after noticing the relevant provisions of the Karnataka Sales Tax Act, 1957 and the distinction between the 'contract of sale' and the 'Works Contract' felt it necessary to refer the question to a larger Bench. In the order of reference, it was held that prima facie it faced difficulty in accepting the proposition laid down in Raheja Development (supra), in particular, paragraph 20, inasmuch as Larsen & Toubro being a developer undertook the contract to develop the property of one Mr. Dinesh Ranka, owner of the land and subsequently, the show cause notice issued to the said assessee proceeded on the basis that the tripartite agreement was a 'Works Contract'. Further, it noted that in the show cause notice there was no allegation made by the Department that there was any monetary consideration involved in the first contract, which was the Development Agreement. The reference came before the three Judge Bench to which one of us was a party (Honble the Chief Justice of India, Mr. Justice R.M. Lodha).

. 97. Before referring to the various reasons in the said judgment, it will be appropriate to note the basic facts which were noted in the said judgment in paragraph 3, which reads as under:

> "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 Toubro. 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, Bengur 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." . 98. In the said case on behalf of Larsen and Toubro, it was argued that the Developer and the owner were on the one side, while the Purchaser was on the other side, that there was no monetary consideration so far as the contract

between the Developer was concerned and the owner and that the only transaction was by the Developer/Owner to the prospective Purchaser after the construction of the flat and, therefore, there was only a sale element of the Flat along with the undivided share of the land jointly by the Developer/Owner in favour of the prospective Purchaser. Hence, it was claimed that the agreement can only be construed as 'Sale' and not a 'Works Contract'. It was also contended on the above footing as under:

> "21. ....Conversely a suit by an owner/developer against the flat Purchaser would be for payment of consideration of the 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 Development does not lay down good law and deserves to be overruled." . 99. On the other hand, another learned counsel submitted that in a composite works contract transfer of immovable property will not denude it of its character of 'Works Contract' and that Article 366(29A)(b) takes care of such situations where the goods are transferred in the form of immovable property.

. 100. While dealing with the reference, the various contentions were noted in the first instance and while examining the implication of Article 366(29A)(b), it was observed in paragraph 60:

> "60.....in other words goods which have by incorporation become part of immovable property or deemed as goods the definition of Tax on the sale and purchase of sale includes tax on the transfer of the 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 works contract." . 101. Thereafter, in paragraph 61 it was further observed as under:

"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." . 102. In paragraph 63 while interpreting the effect of Article 366 (29A)(b), which was brought into the Constitution by the 46th Amendment, the Bench held that 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 was also held that it would be open to the States to divide the works contract into two separate contracts by legal fiction, namely:
>
> . (ii) Contract for Sale of Goods involved in the works contract and . (ii) For supply of the labour and service.
>
> . 103. It was then observed that by implication of the 46th 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 by holding it to be a deemed sale.

. 104. As far as the implication of Article 366(29A)(b) after the 46th Amendment as held above is concerned, the same cannot be faulted. However, at this juncture, it will have to be kept in mind that in that decision, this Court was dealing with a contract relating to development of land in which, the Developer and owner of the land and the prospective Purchaser after the development in the form of constructed building units were parties. By virtue of the nature of the contract and its terms, immovable property in the form of a building ultimately emerged in the land in question where substantial use of materials in the form of goods was involved for which equal amount of labour was also employed. It was in that context the said judgment came to be rendered. In fact, this court has noted that in the peculiar facts of that case, the goods employed became part of the immovable property and in the ultimate process lost its form as goods.

. 105. In the above-stated background of the said case, what is relevant to be examined is, in order to invoke Article 366 (29A)(b), it will have to be found out whether a contract will fall within the four corners of the expression 'Works Contract'. Therefore, the endeavour is to find out the principles that have been stated in the various decisions, including in the decision of Larsen & Toubro Ltd. (supra), so that such principles can be applied to the case on hand to ascertain the nature of the contract. Keeping the said perception in mind, a detailed reading of the decision in Larsen & Toubro Ltd. (supra) can be made.

. 106 In paragraph 65 of the said decision reference was made to Bharat Sanchar (supra), wherein sub-clause (d) of Clause 29A of Article 366 came to be considered. It was laid down therein that all the sub-clauses of Article 366(29A) 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 sale or purchase for the purposes of levy sales tax. The said proposition stated in Bharat Sanchar (supra) would only go to show that before invoking Article 366 (29A), the concerned transactions ought to be examined individually with particular reference to the essential ingredients contained therein to find out as to whether such ingredients would lead to a conclusion of a 'Sale' as defined in the Sale of Goods Act, 1930 are present or not. In the event of such element of 'Sale' not being present, then alone Article 366(29A)(b) would get attracted for the purpose of applying the principle of deemed sale. I find no relevance in paragraph 76 of the said decision where this Court laid down as to what nature of contract can be called as a 'Works Contract' falling under the said definition vis-a-vis Article 366 (29A)(b). Paragraph 76 reads as under:

> "76. In our opinion, the term 'Works Contract' in Article 366(29A)(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 29A in Article 366 was to enlarge the scope of the expression 'tax of sale or purchase of goods' and overcome Gannon Dunkerley-13. 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(29A)(b) limits the term 'Works Contract' to contract for labor 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(29A)(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 29A was inserted in Article 366." (Underlining is mine) . 107. While examining the above reasoning to ascertain a contract as to whether it is 'Works Contract' or 'Sale', it is stated that the characteristics of 'Works Contract' would be satisfied in a contract irrespective of any additional obligations. In other words, while applying Article 366(29A)(b), it should not be limited to a contract for labour and service only. It was further held that it could not be confined to a contract to provide labour and services, but if a contract is for undertaking and bringing into existence some element of 'works', though the contract may be for supply of goods, it will become a 'Works Contract'. With great respect, it will have to be held that such a sweeping interpretation may not be appropriate for invoking Article 366(29A)(b). I say so because if a contract can be ascertained based on its definite terms and can be held to be a contract for supply of goods, then in the course of implementation of the said contract, namely, supply of the goods certain services are to be rendered, it will have to be held that insignificant services rendered alone, cannot be the basis to hold the entire contract to be a 'Works Contract'.

. 108. In this context, it will be relevant to note that in the execution of the present contract, the property in the goods would not loose its form as 'goods' as compared to a contract for development of a land into flats. What would be available after the ultimate conclusion or implementation of the contract would be an immovable property in the form of a building and the goods employed in the course of execution of such contract, might have lost its character as goods such as bricks, cement, sand, steel, fittings etc. Therefore, as a general proposition of law, it will not be appropriate to hold that wherever an element of works is involved irrespective of its magnitude, all contracts should be held to be 'Works Contract'. Since the argument made by the Advocate General of Maharashtra, which weighed with the learned Judges in the said decision does not appear to be an appropriate reasoning, it will have to be held that such a proposition laid in paragraph 76 to hold every contract as 'Works Contract' based on a minuscule element of 'works' involved cannot be accepted.

. 109. In paragraph 66 of Larsen & Toubro Ltd. (supra), it was observed that in Bharat Sanchar (supra), this Court reiterated what was stated earlier in Associated Cement Companies Ltd. vs. Commissioner of Customs (2001) 4 SCC 593 that 'Dominant Nature Test' has no application to a composite transaction covered by the Clauses of Article 366(29A). Therefore, it was concluded that there was no ambiguity in stating that after the 46th Amendment the sale element of those contracts which are covered by six sub-clauses of Clause 29A 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' being applied. With great respect, it will have to be stated that what was

omitted to be considered, was as to in the first instance, whether a contract would fall within the four corners of 'Works Contract' by virtue of the essential ingredients of that very contract. Even by referring to Bharat Sanchar (supra), before finding out the application of Article 366(29A), it will have to be seen whether the transaction and essential ingredients of 'Sale' as defined in the Sale of Goods Act are present or absent for the purpose of levy of sales tax. In other words, if the essential ingredients of 'Sale' as defined in the Sale of Goods Act are present, then going by the ratio laid down in Bharat Sanchar (supra), the application of Article 366(29A) will not be available. Therefore, in every contract what is to be seen in the first instance is the relevant terms of the contract and finding out as to whether the essential ingredients of those terms would lead the Court to hold whether the element of 'Sale' that would fall within the definition of 'Sale' under the Sale of Goods Act is present. In this event, the question of construing the said contract as a 'Works Contract' covered by Article 366(29A) cannot be made. In fact, in the earlier part of this judgment a detailed reference has been made to the various terms of the contract to find out as to whether the element of sale was present or not. It has been held that by virtue of the essential ingredients of the contract, what was agreed between the parties was only sale of the LIFT and for that purpose the Petitioner also agreed to carry out the installation exercise.

. 110. In Larsen & Toubro Ltd. (supra), this Court rightly noted in paragraph 72 that to attract Article 366(29A)(b) there has to be a 'Works Contract' and what is its meaning should also be found out. It was further held that the term 'Works Contract' needs to be understood in a manner that the Parliament had in its view at the time of introducing the 46th Amendment and which is more appropriate to Article 366(29A)(b). Reference can be made to paragraph 76, which has been extracted in paragraph 102 of this judgment.

. 111. In fact, I find that in the abovesaid paragraph in Larsen & Toubro Ltd. (supra), it was ultimately held by accepting the argument of the learned Advocate General of Maharashtra that the term 'Works Contract' cannot be confined to a contract to provide labour and services alone. The said conclusion having regard to the nature of contract which was dealt with in the said judgment could not be in any way contradicted since as noted earlier, in Larsen & Toubro Ltd. (supra) the contract related to development of a property which consisted of the developer, the owner and the prospective Purchasers of the ultimate building units constructed. In that context, whatever held in paragraph 76 to the effect that a contract which was undertaken to bring into existence some element of works, would be sufficient to hold the said as a 'Works Contract', would be perfectly in order. The question is as to whether such a ratio can be applied universally to every other contract where some miniscule or insignificant element of works is involved. In fact, in the case on hand when the very contract itself was for supply of LIFT to its Purchaser, simply because there was some work element involved for the purpose of installation of the LIFT, it cannot be held that the whole contract is a 'Works Contract' falling within the ambit of Article 366(29A). Therefore, the principle stated in paragraph 76 of Larsen & Toubro Ltd. (supra) would apply in the peculiar facts relating to that case where it related to construction of a building by virtue of the contract between the developer and owner on the one side and the prospective Purchaser on the other side. It is difficult to apply the said ratio rendered in the context of the said contract as applicable universally in all sorts of contracts where some element of work is involved and state that such contract would also fall within the definition of 'Works Contract'.

. 112. The said conclusion is also fully supported by the reasoning in Larsen & Toubro Ltd. (supra), as held in paragraph 94, which is to the following effect:

> "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. (Underlining is mine) . 113. A reading of the above paragraph, thus discloses three conditions and that at the foremost a contract must be a 'Works Contract' and in that contract in the course of its execution, goods must have been applied and the property in those goods ultimately gets transferred either as goods or in some other form. If the said condition is not fulfilled, the other two conditions will have no application. Therefore, the above principles stated in paragraph 94 of Larsen & Toubro Ltd. (supra) are applied to the contract-necessarily an exercise has to be carried out to find out whether the contract was a 'Works Contract' or not. Having regard to the essential ingredients of the contractual terms, it is difficult to hold that the supply of LIFT by the Petitioner to its Purchaser can be called as a 'Works Contract' and, therefore, since the very first condition is not fulfilled, the other conditions are of no consequence in order to invoke Article 366(29A)(b) to the case on hand.

. 114. Even when the ultimate conclusion as noted in paragraph 101(x) is applied, the supply of LIFT by the Petitioner to its Purchaser satisfies the definition of 'Sale' as defined under the Sale of Goods Act, and, therefore, the question of deemed sale does not arise. Analyzing the decision from all frontiers it can be concluded that the ratio laid down in Larsen & Toubro Ltd. (supra) which related to a construction contract, cannot be applied to the case on hand, and therefore, would not be a sufficient reasoning to hold the present contract as 'Works Contract'.

. 115. Once the application of Larsen & Toubro Ltd. (supra) judgment to the facts of this case has been steered clear, next it is to be found out as to whether the other judgments relied upon by the learned Senior Counsel for the Petitioner support his submission, claiming that the transaction, namely, manufacture, supply and installation of LIFT is a 'Works Contract' or not. Reliance was placed upon the decision of this Court in Richardson Cruddas Ltd. (supra). In order to note the distinction as to the nature of the contract in that case as compared to the present one, the relevant paragraph in page 249 can be usefully extracted which reads as under:

> "249.There is no formal contract in the present case for fabrication and erection of the steel structures required by the society. The agreement between the parties has to

be ascertained from the correspondence between them. The correspondence may be briefly referred to. By letter dated December 4, 1956 the Corporative Society informed the Respondents that they had placed an order for a sugar plant and machinery for manufacture of sugar and they had to design the factory." (Underlining is mine) . 116. Therefore, the above passage in the said judgment itself discloses that the contract itself had to be understood based on the correspondence as between the parties. There was no formal contract in any event. What was required to be fulfilled by the Respondent was setting up of a sugar plant and machinery for the manufacturing of sugar and that too to be decided by the contractor. It is difficult to understand as to how the conclusion reached in the said case based on the above contract could be applied to the case on hand. In the present case, the contract was put into writing containing various clauses and conditions which were elaborate and definite to the effect that the Petitioner should manufacture, supply and then erect a product, namely, the LIFT. Apart from setting up of a sugar plant in Richardson Cruddas (supra), the parties also agreed for supply of fabrication and installation of bottle cooling equipment at the premises of the customer. While describing the said contract, it was held in page 251 that the contractor fabricated the component parts according to the requirements and specification of the customer and installed the same on a suitable base and foundation at the premises of the customer. It was held that the installation of the bottle cooling unit in the premises of the customer was not merely ancillary or incidental to the supply of the unit. Here again it was noted that for the installation of bottle cooling equipment also, there was no formal written contract and the terms of the contract had to be gathered from the correspondence. Having regard to such a nature of contract which was dealt with in that decision, it will have to be held that it will not be safe to apply the said ruling to the facts of this case where the contract is definite and the terms of the contract sufficiently demonstrate that it is one for supply of LIFT and not a contract for works.

. 117. Mr. Dwivedi, learned Senior Counsel appearing for State of Orissa in support of his submission relied upon the Constitution Bench decision of this Court in M/s. Patnaik and Company (supra). In paragraph 28 as a proposition of law, the Constitution Bench has held as under:

"28. In Commissioner of Sales Tax, U.P. v. Haji Abdul Majid [1963] 14 STC 435 (All), the Allahabad High Court arrived at the conclusion that in the circumstances of the case the transaction was a contract for the sale of bus bodies and not a contract for work and labour. Desai, C.J., rightly pointed out at p. 443 that "since it makes no difference whether an article is a ready- made article or is prepared according to the customer's specification, it should also make no difference whether the assessee prepares it separately from the thing and then fixes it on it or does the preparation and the fixation simultaneously in one operation." . 118 Thereafter, while repelling the contention made on behalf of the Appellant in that case, it was held as under:

"31. To constitute a sale there must therefore be an agreement and in performance of the agreement property belonging to one party must stand transferred to the other

party for money consideration.

Mere transfer of property in goods used in the performance of a contract is, however, not sufficient: to constitute a sale there must be an agreement — express or implied — relating to sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. It is of the essence of the transaction that the agreement and sale should relate to the same subject-matter i.e. the goods agreed to be sold and in which the property is transferred." (Emphasis Added) . 119. Going by the above dictum of the Constitution Bench of this Court, the contract as a whole will have to be examined to see as to what was the real intention of the parties. In my opinion, the said legal principle will continue to apply even after the 46th Amendment while examining each case to find out as to whether the contractual terms would persuade the Court to hold that the said contract as a whole would fall within the definition of 'Works Contract'. This Court in paragraph 31 rejected the submission of the counsel for the Appellant and clearly pointed out the distinction as between a building contract and a contract for supply of a chattel as a chattel. I am in full agreement with the proposition of law laid down in the said decision, which fully supports my conclusion.

. 120. The learned Senior Counsel also relied upon the decision in M/s. T.V. Sundaram Iyengar (supra). Paragraph 7 is relevant for the case on hand where the principle has been laid down, which reads as under:

"7. The question with which we are concerned, as would appear from the resume of facts given above, is whether the construction of the bus bodies and the supply of the same by the assessees to their customers was in pursuance of a contract of sale as distinguished from a contract for work and labour. The distinction between the two contracts is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. 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. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the 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." (Emphasis Added) . 121. When the above principles are applied to the facts of this case, it can be aptly held that the present contract is nothing but a contract for 'Sale' and not a 'Works Contract'.

. 122. A profitable reference can also be made to another Constitution Bench decision of this Court in Commissioner of Commercial Taxes Mysore, Bangalore (supra). The question that arose for consideration was as to whether construction of railway coaches from the materials belonging to railways under a contract is a sale or works contract. Dealing with the said question, this Court held

as under in paragraphs 12 and 13:

> "12. On these facts we have to decide whether there has been any sale of the coaches within the meaning of the Central Sales Tax Act. We were referred to a number of cases of this Court and the High Courts, but it seems to us that the answer must depend upon the terms of the contract. The answer to the question whether it is a works contract or it is a contract of sale depends upon the construction of the terms of the contract in the light of the surrounding circumstances. In this case the salient features of the contract are as follows:
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> '(1) .....
>
> (2) ..... (3) ..... (4) ..... (5) ..... (6) ..... (7) .....'
>
> 13. On these facts it seems to us that it is a pure works contract.

We are unable to agree that when all the material used in the construction of a coach belongs to the Railways there can be any sale of the coach itself. The difference between the price of a coach and the cost of material can only be the cost of services rendered by the assessee. If it is necessary to refer to a case which is close to the facts of this case, then this case is more in line with the decision of this Court in State of Gujarat v. Kailash Engineering Co. than any other case." (Emphasis Added) . 123. It can be discerned from the abovementioned case that having regard to the specific terms of the contract, which inter alia states that the material used for construction of coaches before its use was the property of the railways and the contract substantially related to the service or works to be rendered by the contractor for the construction of the coaches, it was, therefore, held that it was a 'Works Contract' and not a 'Sale'. However, it was categorically held that the question whether a contract is a 'Works Contract' or a contract of 'Sale' depends upon the conception of the terms of the contract in the light of the surrounding circumstances. Therefore, applying the above principle to the case on hand, I am convinced that by virtue of the terms as has been noted in the earlier part of this judgment, the manufacture, supply and installation of a LIFT is a contract for 'Sale' and not a 'Works Contract'.

. 124. Mr. Dwivedi, learned Senior Counsel also placed reliance upon the three Judge Bench decision of this Court in The Central India Machinery Manufacturing Company Limited (supra). An identical question has arisen for our consideration, namely, whether manufacture and supply of wagons by way of a contract between Union of India and Central India Machinery Manufacturing Company Limited was a contract of 'Sale' or 'Works Contract'. Dealing with the said question, this Court after making a detailed reference to the various terms of the contract as between the Appellant and Respondent therein, held as under in paragraphs 31 and 32:

> "31. The upshot of the above discussion is that with the exception of wheelsets (with axle boxes and couples), substantially all the raw materials required for the construction of the wagons before their use belong to the Company and not to the President/Railway Board. In other words with the exception of a relatively small

> proportion of the components supplied under Special Condition 6, the entire wagons including the material at the time of its completion for delivery is the property of the Company. This means that the general test suggested by Pollock and Chalmers has been substantially albeit not absolutely satisfied so as to indicate that the contract in question was one for the sale of wagons for a price, the Company being the seller and the President/Railway Board being the buyer. It is true that technically the entire wagon including all the material and components used in its construction cannot be said to be the sole property of the Company before its delivery to the Purchaser. But as pointed out by Lord Halsbury in the above quoted passage from his renowned work neither the ownership of the materials nor the value of the skill and labour as compared with the value of the materials used in the manufacture is conclusive. Nevertheless, if the bulk of the material used in the construction belongs to the manufacturer who sells the end product for a price that will be a strong pointer to the conclusion that the contract is in substance one for the sale of goods and not one for work and labour.

32. Be that as it may clause (1) of Standard Condition 15 dispels all doubt with regard to the nature of the contract. This clause stipulates in unmistakable terms that as soon as a vehicle has been completed, the Company will get it examined by the Inspecting Officer and submit to the Purchaser an "On Account" Bill for 90% of the value of the vehicle and within 14 days of the receipt of such bill together with a certificate of the Inspecting Officer, the Purchaser will pay 90% bill and on such payment, the vehicle in question will become the property of the Purchaser. There could be no clearer expression of the intention of the contracting parties than this clause that the contract was, in substance, one for the sale of manufactured wagons by the Company for a stipulated price." (Emphasis Added) . 125. I find that the ratio laid therein mutatis mutandis apply to the facts of this case. In fact, in the said decision the Constitution Bench decision of this Court in M/s. Patnaik and Company (supra) was followed. Therefore, it has now become clear to the effect that such contract for manufacture, supply and installation of LIFT is nothing but a 'Sale' and not a 'Works Contract'.

. 126. Mr. Salve, learned Senior Counsel in his submissions placed reliance upon a Division Bench judgment of this Court in M/s Vanguard Rolling Shutters and Steel Works (supra). That was a case where the question of law was as to 'whether under the circumstances of the case and under the terms of the contract the supply of shutters related and iron gats worth Rs.1,08,633.08/- was sale or amounted to 'Works Contract'. The Appellant therein was a contractor dealing in fabrication of rolling shutters and steel works who used to manufacture iron shutters according to specifications given by the parties and fix the same at the premises of the customers. This Court after considering the terms of the contract took the view that the same would amount to a 'Works Contract' and not 'Sale'. However, in paragraph 2, the principle to be applied to find an answer to such a question has been set out as under:

> "2.....The question as to under what circumstances a contract can be said to be a work contract is not free from difficulty and has to depend on the facts of each case. It is difficult to lay down any rule of universal application, but there are some well recognised tests which are laid down by decided cases of this Court which afford

> guidelines for determining as to whether a contract in question is a work contract or a contract for supply of goods. One of the important tests is to find out whether the contract is primarily a contract for supply of materials at a price agreed to between the parties for the materials so supplied and the work or service rendered is incidental to the execution of the contract.

If so, the contract is one for sale of materials and the sale proceeds would be eligible to sales tax. On the other hand where the contract is primarily a contract for work and labour and materials are supplied in execution of such contract, there is no contract for sale of material but it is a work contract.....” (Emphasis Added) . 127. Therefore, even as per the above principle stated in the said decision and applying the same to the facts of this case, it is found, based on the contractual terms as between the Petitioner and its Purchaser that the value of the LIFT upto the extent of 90% is payable, under certain contingencies, even when such materials are made ready and available for dispatch at the premises of the Petitioner. It has also been found based on the terms of the contract that the value of the labour content referable to the remaining 10%, becomes payable after the installation of the LIFT. That apart in the said decision the Constitution Bench decision of this Court in M/s. Patnaik and Company (supra) and Commissioner of Commercial Taxes Mysore, Bangalore (supra) were not brought to the notice of the learned Judges. Therefore, the reliance placed upon the said decision is of no assistance to the Petitioner except to the general proposition of law propounded in paragraph 2 referred to above.

. 128. The learned Senior Counsel also relied upon a three Judge Bench decision of this Court in Purshottam Premji (supra). That was also a case where the assessee was to quarry stones from the quarries belonging to the South-Eastern Railways and thereafter break those stones into pieces and convert them into ballast of a specified size and thereafter, supply them to the South-Eastern Railway. Dealing with the said contract, it was held that it was a ‘Works Contract’ and not a ‘Sale’. In paragraph 7, the principle was stated as under:

> “7. The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto 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.....” (Emphasis Added) . 129. Even applying the above principle to the case on hand, I find that the whole of the materials manufactured for the installation of the LIFT belong to the Petitioner and after the installation of the LIFT and after receipt of the full payment, the title to the LIFT passes on to the Purchaser. Hence, it will have to be held that the contract as between the Petitioner and the Purchaser was nothing but a ‘Sale’ and not a ‘Works Contract’.

. 130. Dr. Singhvi, learned Additional Advocate General for Rajasthan in his submissions contended that to find out an answer to the question whether the present contract for supply of LIFT and its installation is a sale or works contract, the test which were invoked prior to the 46th Amendment continue to remain. In support of the said submission the learned Additional Advocate General relied upon a three Judge Bench decision of this Court in Bharat Sanchar (supra). Paragraph 43 of the said judgment is relevant for the case on hand, which reads as under:

> "43. Gannon Dunkerley 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. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax." (Emphasis Added) . 131. I am in full agreement with the proposition of law stated in the said paragraph as regards the tests to be applied even after the introduction of Article 366(29A) into the Constitution. Therefore, I am convinced that the various tests laid down in the earlier Constitution Bench decisions, in particular, the ones which have been relied upon, namely, M/s. Patnaik and Company (supra), Hindustan Aeronautics Ltd.

(supra), The Central India Machinery Manufacturing Company Limited (supra) still hold good. Consequently the ultimate conclusion is that the present contract between the Petitioner and its Purchaser is one for 'Sale' and not 'Works Contract', is justified.

. 132. Dr. Singhvi, learned Additional Advocate General also relied upon the decision of this Court in Hindustan Shipyard Ltd. (supra) wherein reference to Halsbury's Laws of England (4th Edn. Vol.41, para 603) has been noted to understand the distinction between contract of sale and contract for work and labour. The said paragraph as extracted in paragraph 8 of the said judgment can be usefully referred to, which reads under:

> "8. We will shortly revert back to analysing the abovesaid terms and conditions of the contract and in between try to find out the tests which would enable determination of the nature of the transactions covered by such contracts. The distinction between

contract of sale and contract for work and labour has been so stated in Halsbury's Laws of England (4th Edn., Vol. 41, para

603):

"603. Contract of sale distinguished from contract for work and labour.—A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract the main object of which is the transfer of the property in, and the delivery of the possession of, a chattel as such to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel as such, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale.

Neither the ownership of the 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." . 133. It must be stated that when the said principle to ascertain a contract of 'Sale' and 'Works Contract' is applied to the case on hand, it can be held that under the contract of the Petitioner with its Purchaser, what was agreed was to ultimately supply its product of LIFT/ESCALATOR to its customers. Therefore, after execution of the installation part of it, what is transferred by the Petitioner to its Purchaser is the LIFT as a chattel and this contract is nothing but a contract of 'Sale'.

. 134. Mr. K.N. Bhatt, learned Senior Counsel appearing for the State of Karnataka submitted that the question posed for consideration before this Bench no longer survives in the light of the 46th Amendment, as well as, the judgment of this Court in Larsen & Toubro Ltd. (supra). The learned Senior Counsel relied upon Builders' Association of India and others v. Union of India and others, (1989) 2 SCC 645, which is also a Constitution Bench judgment, wherein in paragraph 41 it was held as under:

"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." (Underlining is mine) . 135. The learned Senior counsel, fairly brought to our notice paragraph 94 of the judgment in Larsen & Toubro Ltd. (supra), which has been dealt with in paragraph 112 of this judgment, wherein it has been concluded as a case dealing with building contracts and hence is inapplicable to the case on hand.

. 136. While considering this submission of Mr. Bhatt, learned Senior Counsel for Karnataka, it can be found in paragraph 94 of Larsen & Toubro Ltd. (supra), that the first condition stated therein is that it must be a 'Works Contract'. Therefore, while all building contracts have been held to be 'Works Contract' by virtue of the Constitution Bench decision in Builders' Association of India (supra), when it comes to the question of other contracts, if the ingredients of Article 366(29A) are to be applied, the first exercise to be carried out is to find out as to whether such contract would fall within the definition of 'Works Contract'. It must be stated at the risk of repetition that simply because some element of work is involved in a contract, it cannot be straight away concluded that such contract would become a works contract, irrespective of the nature of contract, which if probed into would show that it is a contract for sale. Therefore, even going by the decision reported in Builders Association of India (supra), as well as, the conditions set out in paragraph 94 of the Larsen & Toubro Ltd. (supra), it shall be ascertained whether the contract of the Petitioner with its Purchaser falls within the definition of 'Works Contract', in order to apply the implication of Article 366(29A). Hence, the said submission of the learned Senior Counsel therefore, does not appeal to us.

. 137. A useful reference can also be made to one other decision of this Court in Commissioner of Sales Tax, Gujarat vs. M/s. Sabarmati Reti Udyog Sahakari Mandali Ltd. reported in (1976) 3 SCC 592. In paragraph 6, this Court has laid down as to how to find an answer to a question whether a particular transaction is a contract of sale or a works contract. The said paragraph is as under:

> "6. It is well-settled that whether a particular transaction is a contract of sale or a works contract depends upon the true construction of all the terms and conditions of the document, when there is one. The question will depend upon the intention of the parties executing the contract. As we have observed in our judgment in Civil Appeal Nos. 1492 and 1493 of 1971 which we have just delivered there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. The question is not always easy and has for all time vexed jurists all over. The distinction between a contract of sale of goods and a contract for work and labour is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. (Halsbury's Laws of England, 3rd edn., Vol. 34, p. 6) (Emphasis Added) . 138. The above paragraph sufficiently demonstrates that the question will depend upon the intention of the parties executing the contract and that there can be no standard formula by which one can distinguish a contract of sale from a contract of work and labour. The said principle stated in the above said paragraph can be applied under all situations and since after the 46th Amendment as held in Larsen & Toubro Ltd. (supra), the first condition to be found out is as to whether a contract is a 'Works Contract'. It has to be necessarily examined based on the terms agreed between the parties as to what is the intention of the parties. Therefore, applying the above tests, since it is found that the present contract is a contract for sale, it cannot be held to be a 'Works Contract'.

. 139. In support of my conclusion, reliance can also be placed upon the majority view of the judgment of this Court in Govt. of Andhra Pradesh vs. Guntur Tobaccos Ltd. reported in AIR 1965 SC 1396. Paragraph 18 is relevant for the case on hand, which reads as under:

> "18. The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials.

A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price: it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work: or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances: if it is of the first; it is a composite contract for work and sale of goods: where it is of the second category, it is a contract for execution of work not involving sale of goods." The above ratio also demonstrates as to how to find out whether a contract is a 'Works Contract' or one for 'Sale'.

140. In light of the above discussions, it will have to be held that even after the 46th Amendment, if Article 366 (29A)(b) is to be invoked, as a necessary concomitant, it must be shown that the terms of the contract would lead to a conclusion that it is a 'Works Contract'. In other words, unless a contract is proved to be a 'Works Contract' by virtue of the terms agreed as between the parties, invocation of Article 366 (29A)(b) of the Constitution, cannot be made. Alternatively, if the terms of the contract disclose or lead to a definite conclusion that it is not a 'Works Contract', but one of outright sale, the same will have to be declared as a 'Sale' attracting the provisions of the relevant sales tax enactments. Therefore, based on the conclusions arrived at and having applied the above principles to the case on hand, and having regard to the nature of the terms of the contract displayed, it will have to be held that the manufacture, supply and installation of LIFTS/ELEVATORS comes under the definition of 'Sale' and not 'Works Contract' and the decision in Kone Elevators (India) Pvt. Ltd. (supra) has been correctly decided. The Reference is, therefore, answered on the above terms.

.....J.

[Fakkir Mohamed Ibrahim Kalifulla] New Delhi May 06, 2014 IN THE SUPREME COURT OF INDIA CIVIL ORIGINAL/APPELLATE JURISDICTION WRIT PETITION (C) NO. 232 OF 2005 M/S. Kone Elevator India Pvt. Ltd. ... Petitioner Versus State of Tamil Nadu and Ors. ... Respondents WITH Writ Petition (Civil) Nos. 298/2005, 487/2005, 528/2005, 67/2006, 511/2006, 75/2007, 519/2008, 531/2008, 548/2008, 569/2008, 186/2009, 23/2010, 62/2010, 232/2010, 279/2010, 377/2010, 112/2011, 137/2011, 181/2011, 207/2011, 278/2011, 243/2011, 372/2011, 398/2011, 381/2011, 468/2011, 547/2011, 107/2012, 125/2012, 196/2012, 263/2012, 404/2012, 567/2012, 145/2013, 241/2013, 454/2013, 404/2013, 723/2013, 440/2012, 441/2012, 156/2013, 533/2013, 403/2012, 824/2013, 428/2009, 1046/2013, 1047/2013, 1048/2013, 1049/2013,

1050/2013, 1051/2013 1052/2013, 1098/2013, WITH Civil Appeal Nos. 5116-5121 of 2014 (Arising out of SLP (C) Nos. 14148-14153/2005) WITH Civil Appeal Nos. 5135-5141 of 2014 (Arising out of SLP (C) Nos. 14961-14967/2005) WITH Civil Appeal Nos. 5142-5147 of 2014 [Arising out of SLP (C) Nos. 17842-17847/2005 WITH Civil Appeal No. 5152 of 2014 [Arising out of SLP (C) No. 5377/2006 WITH Civil Appeal No. 5153 of 2014 [Arising out of SLP (C) No. 7037/2006 WITH Civil Appeal No. 5154 of 2014 [Arising out of SLP (C) No. 30272/2008 WITH Civil Appeal No. 5156 of 2014 [Arising out of SLP (C) No. 30279/2008 WITH Civil Appeal No. 5157 of 2014 [Arising out of SLP (C) No. 5289/2009 WITH Civil Appeal Nos. 5159-5160 of 2014 [Arising out of SLP (C) Nos. 6520-6521/2009 WITH Civil Appeal Nos. 5162-5164 of 2014 [Arising out of SLP (C) Nos. 4469-4471/2010 WITH Civil Appeal No. 5165 of 2014 [Arising out of SLP (C) No. 11258/2010 WITH Civil Appeal No. 5166 of 2014 [Arising out of SLP (C) No. 17228/2010 WITH Civil Appeal Nos. 5167-5168 of 2014 [Arising out of SLP (C) Nos. 17236-17237/2010 WITH Civil Appeal Nos. 5170-5172 of 2014 [Arising out of SLP (C) Nos. 23259-23261/2010 WITH Civil Appeal No. 5174 of 2014 [Arising out of SLP (C) No. 15732/2011 WITH Civil Appeal No. 5175 of 2014 [Arising out of SLP (C) No. 16466/2011 WITH Civil Appeal No. 5178 of 2014 [Arising out of SLP (C) No. 16137/2011 WITH Civil Appeal No. 5179 of 2014 [Arising out of SLP (C) No. 5503/2011 WITH Civil Appeal No. 5180 of 2014 [Arising out of SLP (C) No. 11147/2011 WITH Civil Appeal Nos. 5181-5192 of 2014 [Arising out of SLP (C) Nos. 11227-11238/2012 WITH Civil Appeal No. 5193 of 2014 [Arising out of SLP (C) No. 19901/2013 WITH Civil Appeal Nos. 5195-5206 of 2014 [Arising out of SLP (C) Nos. 36001-36012/2013 and WITH Civil Appeal No. 6285/2010 O R D E R Keeping in view the conclusions of the majority, expressed in the judgment of Dipak Misra, J., it is held that the decision rendered in State of A.P. v. Kone Elevators[46] does not correctly lay down the law and it is accordingly overruled.

2. It is directed that the show-cause notices, which have been issued by taking recourse to reopening of assessment, shall stand quashed. The assessment orders which have been framed and are under assail before this Court are set aside. It is necessary to state here that where the assessments have been framed and have attained finality and are not pending in appeal, they shall be treated to have been closed, and where the assessments are challenged in appeal or revision, the same shall be decided in accordance with the decision rendered by us.

3. The writ petitions and the civil appeals are disposed of with no order as to costs.

.....CJI.

[R.M. Lodha] .....J.

[A.K. Patnaik] .....J.

[Sudhansu Jyoti Mukhopadhaya] .....J.

[Dipak Misra] .....J.

[F.M. Ibrahim Kalifulla] New Delhi;

May 06, 2014.

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[1] (2010) 14 SCC 788

[2] (2005) 3 SCC 389
[3] (1969) 1 SCC 567
[4] (1970) 26 STC 268 (SC)
[5] (1977) 2 SCC 250

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[8] (1969) 24 STC 525 (Bom)

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[10] (1965) 2 SCR 782
[11] (1975) 3 SCC 424
[12] (1977) 2 SCC 847
[13] (1953) 1 All ER 15
[14] (1944) 1 All ER 618
[15] (2007) 3 SCC 533
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[17] (2003) 9 SCC 133
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[19] (2001) 7 SCC 525
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[22] (1979) 1 SCC 487
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[26] (1989) 3 SCC 634

[27] (2000) 6 SCC 579

[28] AIR 1958 SC 560

[29] AIR 1961 SC 1615
[30] AIR 1967 SC 547

[31] (1968) 21 STC 245 (SC)
[32] (1843) 11 M & W. 243
[33] (1972) 1 SCC 472

[34] Halsbury's Laws of England 3rd Ed., Vol. 34, 6-7. [35] (1976) 3 SCC 500 [36] (1970) 2 SCC 287 [37] (1984) 2 SCC 16 [38] (1993) 1 SCC 364 [39] (2001) 4 SCC 593 [40] (2005) 13 SCC 37 [41] (2000) 2 SCC 385 [42] (2005) 5 SCC 162 [43] (2007) 7 SCC 320 [44] (1875) LR 10 CP 271 [45]

(1989) 1 SCC 172 [46] (2005) 3 SCC 389