Bharat Heavy Electrical Limited Etc vs Union Of India And Others Etc on 18 April, 1996

Equivalent citations: 1996 AIR 1854, 1996 SCC (4) 230, AIR 1996 SUPREME COURT 1854, 1996 (4) SCC 230, 1996 AIR SCW 2165, (1996) 4 JT 427 (SC), 1996 BRLJ 153, 1996 ( ) UPTC 1001, 1996 ( ) STI 85, 1996 (4) JT 427, 1996 UPSTJ 23 61, 1996 UPTC 225, (1996) 102 STC 373, (1997) 1 KANTLJ(TRIB) 73

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Bench: B.P. Jeevan Reddy, K.T Thomas

PETITIONER:
BHARAT HEAVY ELECTRICAL LIMITED ETC.

Vs.

RESPONDENT:
UNION OF INDIA AND OTHERS ETC.

DATE OF JUDGMENT: 18/04/1996

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
THOMAS K.T. (J)

CITATION:
1996 AIR 1854 1996 SCC (4) 230
JT 1996 (4) 427 1996 SCALE (3)746

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T B.P.JEEVAN REDDY,J.

Leave granted in the Special Leave Petitions. The Constitution [Sixth Amendment] Acts 1956 re-cast Article 286 of the Constitution almost in its entirety. It inserted sub-clause (g) in clause (1) of Article

269 and introduced clause in Article 269. The Constitution [Forty Sixth Amendment] Act, 1982 substituted clause (3) of Article

286. As amended by Sixth and forty Sixth Amendment Acts, Article 286 reads:

> "286(1). No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-
>
> (a) outside the State; or
>
> (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).
>
> (3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,-
> (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or
>
> (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or
>
> (b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub clause
>
> (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

Clause (1) places a restriction upon the power of the State Legislatures to levy taxes on sale or purchase of goods; a State cannot levy tax on a sale which takes place outside that State nor can it tax a sale or purchase taking place in the course of import into or export out of India. Clause (2) empowers the Parliament to formulate principles for determining when a sale takes place outside a State or in the course of import or export, as the case may be. Clause (3) places certain restrictions on the State Legislatures in the matter of system of levy and rate etc. in respect of certain goods and transactions.

Article 269 specifies the duties and taxes levied and collected by the Government of India but assigned to the States in the manner provided therein. Among the several duties and taxes specified in clause (1) is the tax mentioned under sub-clause (g) - "taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of interstate trade or commerce". Clause (2) of Article 269 provides that the net proceeds in any financial year of any such duty or tax "Shall be assigned to the States within which that duty or tax is leviable in that year and

shall be distributed among those States in accordance with such principles of distribution, as may be formulated by Parliament by law". Clause (3) empowers the Parliament to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce. By Constitution [Forty Sixth Amendment] Act, the words "or consignment of" were added in clause (3). Clause (3) now reads:

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

Soon after the Commencement of the Sixth Amendment Act, the Parliament enacted the Central Sales Tax Act, 1956 [the Act] to effectuate the provisions of Articles 286 and 269. The Preamble to the Act reads:

> "An Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in the inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject."

(Emphasis supplied) Section 2 defines certain expressions occurring in the Act. Section 3 defines inter-State sale or purchase. This section is enacted pursuant to clause (3) of Article 269. An inter-State sale or purchase shall be deemed to take place if (a) the sale or purchase occasions the movement of goods from one State another or (b) the sale or purchase is effected by a transfer of documents of title to the goods during their movement from one State to another. Two Explanations are appended to this section which it is not necessary to note for the purposes of these appeals. Section 3 reads:

> "3. When is a sale or purchase of goods to take place in the course of inter-state trade or commerce.-- A sale or Purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-
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> (a) occasions the movement of goods from one State to another; or
>
> (b) is effected by a transfer of document of title to the goods during their movement from one State to another."

Section 4 specifies when does a sale or purchase take place outside a State. Sub-section (1) of Section 4 says that where a sale or purchase of goods is determined in accordance with subsection (2) [of Section 4] to have taken place inside a State, such sale or purchase shall be deemed to have taken place outside all other States. Sub-section (2) sets out when shall a sale or purchase of goods be deemed to have taken place inside a State. It is obvious that Section 4 has been enacted to give effect

to Article 286(1)(a) read with clause (2) of the said Article. Section 4 reads:

> "4. When is sale or purchase of goods to take Place outside a State.--(1) Subject to the provisions contained in Section 3, when a sale or purchase of goods is determined in accordance with sub- section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.
>
> (2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State-
>
> (a) in the case of specific or ascertained goods, at the time the contract of sale is made;
>
> and
>
> (b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation."

Section 5 specifies when shall a sale or purchase of goods be deemed to take place in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India, as the case may be. Section 5 it is equally evidents has been enacted to give effect to Article 286(1)(b) read with clause (2) of the said Article. Though we are not concerned herein with sub- section (3) of Section 5 we may yet set out Section 5 in full:

"5. When is a sale or purchase of goods to take place in the course of import or export.-- (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of document of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1) the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export if such last sale or purchase took place after, and was for the purpose of complying with the agreement or order for or in relation to such export."

Section 14 of the Act declares the goods mentioned therein to be goods of special importance in inter-State trade or commerce. Section 15 sets out the restrictions and conditions in regard to levy of tax on sale or purchase of declared goods within a State. These two sections are relatable to clause (3) of Article 286. It is not necessary for the purpose of these appeals to refer to these provisions.

Section 6 is the charging section. Tax is levied only upon inter-State sales; as on today, no tax is levied on inter-State purchases.

Clause (2) of Article 269 inter alia provides that "the net proceeds in any financial year of any such duty or tax...shall be assigned to the State within which that tax duty or tax is laviable in that year". It is, therefore, extremely important, from the States point of view, in which State is the Central Sales Tax leviable - for it is to that State that the tax so collected ultimately goes back, notwithstanding the fact that the tax is levied and collected by the Central Government. The Central Sales Tax Act has not created a machinery of its own to assess and collect the tax levied by it. It has entrusted the job in each State to the machinery created by the State Sales Tax enactment [Section 9(2)]. The Central Sales Tax leviable in that State will be collected by that machinery no doubt for and on behalf of the Central Government, which will, of Course, make it over to that State as contemplated by Article 269. The provision in the Central Sales Tax Act giving effect to the said provision in Article 269(2) of the Constitution is sub-section (1) of Section 9, as it stands now. The sub-section reads:

> "9. Levy and collection of tax and penalties,---(1) The tax payable by any dealer under this Act on sales of goods dealer under this Act on sales of goods effected by him in the course of inter-State trade or Commerce, whether such sales fall within clause (a) or clause (b) of Section 3, shall be levied by the Government of India, and the tax so levied shall be collected by that Government in accordance with the provisions of Sub-section (2), in the state from which the movement of the goods Commended:
>
> Provided that, in the Case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of Section 6, the tax shall be levied and collected-
>
> (a) where such subsequent sale has been effected by a registered dealer , in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes of clause (a) of sub-

section (4) of Section 8 in connection with the purchase of such goods, and

(b) where such subsequent sale has been effected by an unregistered dealer, in the State from which such subsequent sale has been effected."

[Emphasis added] We may pause here for a while and explain how the said idea was expressed initially and how it has evolved into the present provision Clause (a) in Section 2 defines the expression "appropriate State". As it stands now, it reads:

> "(a) 'Appropriate State' means--

(i) in relation to a dealer who has one or more places of business situate in the same State, that State;

(ii) in relation to a dealer which has places of business situate in different States, every such State with respect to the Place or Places of business situate situate within its territory;"

As originally enacted, however, the definition contained an Explanation defining the expression "place of business". It read thus:

<sLs> "'Place of business' means--- (i) in the case of a sale of goods in the course of inter-State trade or commerce falling within clause (a) of section 3, the place from which the goods have been by reason of such sale;

(ii) in the case of any such sale falling within clause (b) of section 3, the place where the sale is effected."

Sub-section (i) of Section 9, as originally enacted, read:

"9. Levy and collection of tax. -

(1) The tax payable by any dealer under this Act shall levied and collected in the appropriate State by the Government of India in the manner provided in subsection (2)."

[Emphasis added] It is thus clear that as originally enacted it was clause (a) in Section 2 and in particular, the Explanation appended thereto which specified the State in which the duty or tax was leviable within the meaning of Article 269(2). By Central Sales Tax (Second Amendment) Act, 1958, the Explanation to clause (a) in Section 2 was omitted with effect from October 1, 1958 and simultaneously Section 9 was substituted. Subsection (1) of Section 9, as substituted by the said Amendment Act, read:

"9.Levy and collection of tax and penalties-- (1) The tax payable by any dealer under this Act on sale of goods effected by him in the course of inter-State trade or commerce whether such sales fall within clause (a) or clause (b) of section 3 shall be levied and collected by the Government of India in the manner provided in sub-section (3) in the State from which the movement of the goods commenced.

Provided that, in the case of a sale of goods during their movement from one State to another being a sale subsequent to the first sale in respect of the same goods, the tax shall, where such sale does not fall within sub-

section (2) of section 6, be levied and collected in the State from which the registered dealer effecting the subsequent sale obtained the form prescribed for the purposes of

clause (a) of sub-

section (4) of section 8 in connection with the purchase of such goods."

[Emphasis added] Then again by Central Sales Tax (Amendment) Act, 1969, Section 9 was substituted with retrospective effect. It is this substituted Section 9 which is in force now. Sub- section (1) of Section 9 as it stands now has already been set out by us hereinabove. Thus, notwithstanding the legislative changes, the idea has remained the same, viz., that the State from which the goods have moved by reason of the sale is the State in which the Central Sales Tax is leviable, within the meaning of Article 269(2). We must make it clear that what we have said with respect to Section 9 is in the context of clause (a) of Section 3 of the Act which alone falls for consideration in these appeals. For this reason, we are not referring to the position under Section 3(b).

The aforesaid survey of the relevant provisions of the Act clearly shows that Sections 3,4,5,9(1), 14 and is pertain to and deal with distinct topics and different aspects of Articles 286 and 269. It follows that if a question arises whether a sale is an inter-State sale or not, it has to be answered with reference to and on the basis of Section 3 and Section 3 alone. Section 4, or for that matter Section 5, is not relevant on the said question

- See the Constitution Bench decision in Tata Iron and Steel Company Limited. Bombay v. S.R. Sarkar & Ors. [(1960) 11 S.T.C.655] and the decisions in Manganese Ore [India] Limited v. The Regional Assistant Commissioner (1976 (3) S.C.R.99) and Union of India v. K.S.Khosla & Company Limited [(1979) 43 S.T.C.457]. Similarly, where the question arises, in which State is the tax leviable, one must look to and apply the test in Section 9(1); no other provision is relevant on this question.

We may at this stage refer to the decision of the Bombay High Court in Commissioner of sale Tax v. Barium Chemicals Limited [(1981) 48 S.T.C. 121]. A particular transaction of inter-State sale was subjected to Central Sales Tax in Andhra Pradesh. The same sale was again sought to be taxed under Central Sales Tax Act in Maharashtra, which was questioned. The High Court adopted the following approach: Central Sales Tax is levied and Collected by the Central Government; it is immaterial in which State it is collected; it cannot be levied or collected twice over; the State Governments are merely agents of the Central Government in the matter of levy and collection of Central Sales Tax; if so, once levied and collected in one State, rightly or wrongly it cannot be levied and collected in another State. In our opinion, this may be an over- simplification of the matter. May be an from the point of view of the assesses, this approach is sound enough but from the point of view of the States [keeping Article 269 in mind] and the provisions of the Central Sales Tax acts this may not be correct. Section 9(1) specifies the State wherein Central Sales Tax shall be levied and collected'and the Central Sales Tax has to be levied and collected in that State and in no other State. The approach of the Bombay High Court makes Section

9(1) [which is enacted pursuant to Section 269(2), as pointed out hereinabove] otiose and superfluous. It would not be proper to says in the light of above constitutional and statutory provisions that the dispute as to in which State is a particular inter-State sale is to be taxed is a matter between the States and that so far as the assessee is concerned, it is enough if he pays the tax at one places whether it is really leviable in that State as per Section 9(1) or not. The law requires that it should be levied and collected in the State from which the movement of goods commences [Section 9(1) read with Section 3(a)]. If a dispute arises in which State is the tax lawfully leviable, the authorities under the Act have got to decide it. If, in a given case, an assessee says that the particular transaction which is sought to be taxed in State 'A' has already been tailed in State 'B', nothing prevents him from impleading the State 'E' in proceedings in State 'A' and have the matter decided in the presence of all parties. It must be remembered that while acting under Central Sales Tax Acts the State machinery acts as the machinery of the State Government and not as the machinery of the State Government; in law, it is as if it belongs to Central Government. This view of ours gets re-inforced if one keeps the provisions in Section 8(2A) of the Central Sales Tax Act in view.

It is necessary to bear these principles in mind while examining the facts of the appeals before us to which we now turn.

P A R T = II Bharat Heavy Electricals Limited [BHEL] is a major public sector corporations wholly owned by the Government of India. It has its units in several places viz., Haridwars Jhansi, Bhopal, Bangalore, Ramachandrapuram [Andhra Pradesh

- near Hyderabad], Ranipet and Tiruchi [Tamil Nadu] and so off. Each of these units appears to specialise in the manufacture of particular type or class of machinery - in the interest of avoiding duplication and enhancing efficiency. Generally speaking, BHEL is engaged in the manufacture of heavy electrical machinery including equipment and material necessary for setting up power plants. Its dead Office is at New Delhi. It appears that whenever it undertakes to set up a power-generation plant, it enters into two contracts, one for the supply of machinery and equipment called "the Supply Contract" and he other for installation or erection of the plant called "Service Contract". Once the job is undertaken, the Head Office sends instructions to relevant units to manufacture the appropriate machinery. for illustrating its method of working, we may take a concrete instance,viz., the setting up of five captive power plants [120 MW each] for the aluminium smelter complex at Angul, Orissa for the National Aluminium Company Limited, Bhuvaneshwar [NALCO], which too is a public sector undertaking. The facts relating to this contract are the following: on August 1, 1981, NALCO invited tenders the said work. BHEL also submitted its tender. It was accepted. NALCO issued a Letter of Intent [LOI] on June 3, 1982 specifying the time-schedule for the work. The units were to be made ready for commercial operation between March 1985 and November 1986. Pursuant

to the LOI, BHEL commenced the work. It instructed its several units to manufacture the requisite machinery and equipment. Formal contracts, viz., supply contract and service contract were entered into much later, i.e., on March 15, 1985. The contract price under the supply agreement is Rs.295.37 crores. The supply contract specifies the price of each of the major items of machinery/equipment separately. It also provides the manner in which the contracted price was payable by NALCO. Now, what happened is this: Tiruchi unit, it appears, is engaged mainly in the manufacture of boiler systems. It was designated as the executing agency for the job at Angul including the responsibility of manufacturing and supplying the boiler systems required for setting up the power plants at Angul. The boiler system comprises innumerable parts and components, some of which are manufactured at the Hyderabad unit. The Tiruchi unit accordingly called upon the Hyderabad unit to manufacture those components/parts. The Hyderabad unit manufactured them and sent some of those parts/ components to Tiruchi for being incorporated into the boiler system and sent the remaining directly to Angul Orissa] to be incorporated into the boiler system in at the work-site. according to the practice uniformly followed by BHELs and accepted by the Andhra Pradesh Governments the parts components manufactured by the Hyderabad unit for incorporation in the boiler systems were treated as branch transfers not involving an element of sale, irrespective of the fact whether such parts/components were sent to Tiruchi or to fingul. Conversely, if the Tiruchi unit manufactured any parts/components to be incorporated in the machinery or system, the manufacture of which was entrusted to Hyderabad units the despatch of such parts/components from Tiruchi to Hyderabad unit or the work-site were treated as branch transfers arid not as sales. The tax was levied by the State in which the main machinery system was manufactured. No tax was levied by the State wherein the parts components were manufactured and sent for incorporation into the main machinery or system manufactured in other States. From the year 1984, however, the State of Andhra Pradesh started levying and demanding Central Sales Tax upon the value of the parts and components which were manufactured at Hyderabad unit and sent to Tiruchi or Anguls as the case may be for incorporat on-into boiler system manufactured by Tiruchi unit. BHEL protested against the said levy. It submitted that it has been paying the Central Sales Tax upon the value of the entire boiler system manufactured by the Tiruchi unit in the Tamil Nadu State and that if Central Sales Tax is levied upon the parts and components which were manufactured at Hyderabad and sent to Tiruchi or Angul for incorporation into the boiler system], it would amount to double taxation insofar as the said parts and Components are concerned. According to it, they were merely branch transfers. The Andhra Pradesh State did not agree. Similar stand was taken by other States as well and assessment proceedings were in progress in various States. It is at that stage that BHEL approached this Court by way of Writ Petition (C) No.1608 of 1987 under Article 32 of the Constitution complaining that more than one State is taxing the same sale under the provision of the Act, which is making its functioning difficult. It submitted that such simultaneous taxing is Creating an uncalled for financial burden upon it. It requested the Court to give appropriate directions to

ensure that an inter State sale is not taxed by more than one State.

When the writ petition came up for hearing, it was brought to our notice that the Andhra Pradesh Sales Tax Appellate Tribunal has decided the said dispute [relating to certain assessment years] and that Tax Revision Cases preferred by BHEL were pending in the Andhra Pradesh High Court. The judgment of the Andhra Pradesh Tribunal was also placed before us. The Andhra Pradesh Tribunal had taken the view that insofar as the parts and components manufactured in the Andhra Pradesh unit and despatched to work-site at Angul were concerned, they must be treated as inter-State sales taxable in Andhra Pradesh State inasmuch as the said goods moved from Andhra Pradesh pursuant to the supply contract which was indeed a contract of sale. So far as the parts and components which were sent to Tiruchi are concerned, the Tribunal held that they cannot be treated to have been sold in the course of inter-State trade or commerce but that they represent merely branch transfers. While the State of Andhra Pradesh did not prefer any tax revisions against the judgment of the Tribunal, BHEL did, which meant that the decision of the Tribunal insofar as it held that the despatch of parts/components to Tiruchi constituted branch transfers became final. The only question in the said Tax Revision Cases before the Andhra Pradesh High Court, therefore, was whether the Tribunal was right in holding that the despatch of parts/components from the Andhra Pradesh Unit to Angul for incorporation into the boiler system at the work-site represented inter-State sales and whether they were taxable in the State of Andhra Pradesh. The High Court examined the said question at length and dismissed the Tax Revision Cases filed by BHEL agreeing with the view taken by the Tribunal, though on a different reasoning. Civil Appeals Nos. 5369-75 of 1996 are preferred against the judgment of the Andhra Pradesh High Court in the aforesaid Tax Revision Cases.

Civil Appeals Nos.5362-68 of 1996 arise from the judgment of the Andhra Pradesh High Court rendered in a batch of writ petitions filed by BHEL. The writ petitions raised the very same dispute as was involved in the Tax Revision Cases aforesaid with this difference: BHEL impleaded the States of Tamil Nadu, Uttar Pradesh, Karnataka Madhya Pradesh, Delhi and Union of India in addition to the State of Andhra Pradesh as respondents to the writ petitions an also claimed for a direction to the respondents to adjust the Central Sales Tax collected by them in such a manner that the amount is kept, or remitted to the State, which is lawfully entitled to levy it and the States no entitled to levy it do not keep the tax amounts collected by them. The batch of writ petitions have been disposed of by the High Court following its decision in the Tax Revision Cases. The High Court has, however, declined to give a direction for adjustment of tax as between the States as asked by BHEL] mainly on the ground that this Court was seized of the matter. it left the matter to this Court.

Whether a particular sale is an inter-State sale or an inter-State sale is essentially a question of fact. Perhaps, it may be more appropriative to say that it is a mixed question of face and law. it is, therefore, necessary to ascertain the factual position

first. In Civil Appeals Nos.5369-75 of 1996 and 5362-68 of 1996, it is this:

whenever BHEL enters into a supply contract with a party, it designates one of its units as the executing unit. That is treated as the main unit executing the work. sometimes this is not done and each unit is entrusted a particular job.] But it may happen that the executing unit does not manufacture all the parts and components which are required for completing the job entrusted to it. it, therefore, requests other units of BHEL to manufacture the parts and components required by it and to despatch the same. Some of the parts and components so manufactured by other units are sent directly to the executing unit for being incorporated into the main machinery/system while some parts and components are despatched directly to the work-site. To revert to NALCO project aforementioned, referred to hereinbefore, this is exactly what had happened. Tiruchi unit was supposed to be the executing unit. But some parts and components required for the boiler system and other equipment [which was the responsibility of the Tiruchi unit to manufacture] were being manufactured at the Hyderabad unit. At the request of the Tiruchi unit - or on the instructions of the Head Office, as the case may be - the Hyderabad unit manufactured those parts and components and despatched some of them to Tiruchi and some of them directly to Angul in Orissa [work-site]. The consideration stipulated in the supply contract was payable in the manner provided therein. The following factual position found recorded in the judgment of the High Court is of crucial relevance and may, therefore, be set out in full:

"Copies of invoices and photo copy of R.R./L.R. or Bill of Lading, Pre-despatch Clearance Certificate/Inspection report and test certificate, if any, shall be submitted to the Bank and various Departments of NALCO, Angul for the purpose of claiming payment through letter of credit vide Clause 8.1.0. As per Clause 8.2.0, the materials shall be consigned to the Materials Manager, NALCO Captive Power Plant, Angul and the original R.R./L.R. shall be sent by the supplier directly to the site office for arranging prompt delivery of materials from the carriers. Clause 3.3.0 enjoins that the 'title of all the plant and equipment and materials shall pass on to the purchaser in accordance with INCO Terms' and transfer of ownership to purchaser shall be simultaneous provided that such passing of title, risk and property to the purchaser shall not otherwise absolve or dilute the responsibility of the supplier under this contract. Other clauses in the agreement provide for guarantee bond, warranty, liquidated damages etc., which need not be adverted to.

Certain debit notes raised by the petitioner [Hyderabad unit] while despatching the materials/equipment to Trichy or direct to NALCO have been placed before us. One of the debit notes is raised soon after the despatch of one Bowl Mill to the Materials Manager, NALCO, Angul. The work Order No. L.R./R.R. number, Packing slip number, Despatch advice number are all mentioned in the debit note in addition to the value of the Bowl Mill. The excise duty payable is also shown in the debit note.

Some copies of loading advice, packing list, R.Rs./L.Rs. have also been placed before us. The invoices raised on NALCO by the Trichy unit which is the executing unit relating to Boiler components despatched by Hyderabad, Ranipet and other units with the price worked out on pro-rata tonnage basis are on record. Central Sales Tax is also included in those invoices. The certificates and details regarding payment of C.S.T. from time to time by Trichy unit in regard to the despatches from Hyderabad are also filed."

The High Court has also referred to another contract entered into by BHEL with NTPC for setting up a super- thermal power project at Farakka, West Bengal. In the case of this work, it appears that no one unit of BHEL is designated as the executing unit. The manufacture of machinery etc. appears to have been distributed among various units. The factual position in this behalf is stated in the following words by the Court:

"..... allocation of responsibility was in the nature of an internal arrangement made by the Head Office of the petitioner. But, the reasonable presumption that should be drawn in the light of correspondence and despatch documents, that NTPC must be well aware of the division of responsibility as regards S.G. and T.G. packages between the various units. The documents relating to despatch of Boiler/Steam Generator equipment such as Bowl Mills by Hyderabad unit as per the request of the Trichy Unit are filed. They include loading adviced packing list, debit note raised by the Hyderabad unit on Trichy unit and the invoice raised by Trichy unit on NTPC which covers the components/equipment sent by Hyderabad unit directly to Farakka.

The name of the consignee as per the Railway Receipt is Chief Erection Manager, NTPC, Farakka and the freight is pre-paid. The certificate regarding payment of CST confirms the payment of CST on the invoice value by the Trichy unit in respect of the components despatched by Hyderabad unit."

Coming hack. to the findings recorded by the Andhra Pradesh Tribunals it held, so far as the parts and components sent to Tiruchi that they do not constitute inter-State sales inasmuch as there was an interruption of the movement of the said parts/components and more particularly because the said parts/components lost their identity by incorporation into the main system before they were despatched by the executing unit to the work-site. This part of the Tribunal's Order has become finals not having been questioned by the State of Andhra Pradesh. So far as the parts/components sent by the Hyderabad unit directly to the work-site at Angul or for that matter, to Farakka in West Bengal are concerned the Tribunal has taken the view that they do not constitute inter-State sales and that Central Rules Tax is leviable thereon in the State of Andhra Pradesh. This conclusion of the Tribunal has been affirmed by the High Courts though on a some what different reasoning. The contention urged by Sri V.R.Reddy, learned Additional Solicitor General appearing for BHEL, is that even the direct despatches [i.e. parts/components/material sent by the Hyderabad unit directly to work-site at Angul] do not constitute inter-State sales and that they are not taxable in the State of Andhra Pradesh. His submission is that in principle, there is no difference between the material sent to Tiruchi for being incorporated and the material sent directly to Angul because both of them get ultimately incorporated into the main equipment/boiler system which was being manufactured by the Tiruchi unit, which happened to be the executing unit for the Angul project. be find it difficult to agree with the learned Additional Solicitor General in the light of the factual position set out

hereinabove. The parts/components, i.e., the goods in question, did move from the State of Andhra Pradesh to the State of Orissa - or West Bengal, as the case may be - and the said movement is occasioned by the supply contract entered into by BHEL which is in truth a contract of sale. The manner in which and the documentation under which these goods were sent to Angul - in particular, Clause 3.3.0 of the Supply Contract do clearly establish that it was not a case of branch transfer but one of sale of the said goods to NALCO, pursuant to the supply contract. Further, because the movement of the said goods has commenced in the State of Andhra Pradesh, it is in the State of Andhra Pradesh that the Central Sales Tax is leviable according to Section 9(1) of the Act. We therefore, agree with the view taken by the Andhra Pradesh High Court that in the facts and circumstances concerning NALCO and NTPC [Farakka] contracts and the terms thereof, the direct despatch of goods by the Hyderabad unit to Angul or Farakka constitutes an inter-State sale with in the leaning of Section 3(a) and that tax thereon is leviable in the State of Andhra Pradesh according to Section 9(1) of the Act.

The Andhra Pradesh Tribunal and High Court have stated that there are as many as forty eight contracts during the relevant assessment years and that though the contracts and other documents relating to these contracts have not been filed or have not been filed in full, the parties before them did not dispute that "the salient features of the contracts and the pattern of transactions ...are substantially similar to the two contracts, i.e., NALCO and NTPC contracts." The correctness of this statement has not been challenged by either party before us.

So far as Civil Appeals Nos.5362-68 of 1996 are concerned, the issues raised therein are identical to the issues raised in Civil Appeals Nos.5369-75 of 1996 except the direction asked for by BHEL far adjustment of tax amounts between the concerned States in such a manner that appropriate tax is collected in the State wherein it is lawfully leviable and the State which is not entitled to collect the tax but has yet collected it unlawfully, refunds the same to BHEL or sends it to the State wherein it is lawfully due and payable. We see no valid objection to making such a direction. In fact, such a direction was made by this Court in K.G. Khosla and Company Limited [supra]. Accordingly, there will be a direction to the above effect. All refunds and adjustments consequent upon the judgment of Andhra Pradesh High Court in Tax Revision Cases Nos.195-201 of 1989 shall be carried out and given effect to by the parties within three months from today. In case of disagreement or dispute, if any, in this regard, it is open to the parties in approach the Andhra Pradesh High Court for appropriate orders. If so approached, the High Court shall hear the affected parties and pass appropriate orders which shall be final and binding between the parties, subject to any orders to the contrary by this Court.

Accordingly, Civil Appeals Nos.5369 of 1996 are dismissed and Civil Appeals Nos.5362-68 of 1996 are disposed of with the aforesaid direction regarding adjustment/refund of taxes between the concerned States [who are parties to these appeals].

P A R T = I I I In this part, we shall deal with the controversy between BHEL and Orissa. Three batches of appeals, viz., civil appeals arising from Special Leave Petitions (C) Nos.5071-74 of 1991, 16840-49 of 1995 and Civil Appeals Nos.629-30 of 1994 are concerned with this controversy. Of these three batches of appeals, the third batch, Civil Appeals Nos.629-30 of 1994 pertaining to

Assessment Years 1983-84 and 1984-85 has become infructuous for the reason that the assessment orders questioned therein have been set aside by the Orissa High Court which has remanded the matters to the assessing officer. Accordingly, these appeals are dismissed as infructuous. Civil appeals arising from Special Leave Petitions 71-74 of 1991 are preferred against the judgment of the Orissa Sales Tax Tribunal and they pertain to Assessment Years 1984-85 and 1985-86. Civil appeals arising from Special leave Petitions (C) Nos.16840- 49 of 1995 pertain to Assessment Years 1988-89 to 1993-94. These appeals are directed against the orders of assessment made by the Orissa authorities under the Orissa Sales Tax Act and against certain notices issued under the said Act. The controversy between the State of Orissa and BHEL arises in the following circumstances: BHEL has undertaken a number of works in the State of Orissa for setting up power generation plants. In each case, there are two contracts, viz., a supply contract and a service contract. The pattern of all these contracts is practically the same as the NALCO contracts referred to hereinabove. The stand of the State of Orissa is that the sale of the machinery and equipment stipulated under the supply contracts is a sale within the State of Orissa and, therefore, exigible to tax under the Orissa Sales Tax Act. The learned counsel for the State of Orissa says that there is many a reason in support of the said stand - which he indeed wanted us to consider. According to the learned counsel, the terms and conditions of the supply contracts and other attendant circumstances do establish that the sale of the machinery and equipment [specified in the supply contracts] has taken place within the State of Orissa and not in the course of inter-State trade or commerce. We do not, however, think it necessary to refer to the said material in view of the Order we are proposing in these matters. It is enough if we deal with the reasoning of the Tribunal contained in the judgment [under appeal on the first batch of these appeals] upholding the stand taken by the Orissa State in these matters. The reasoning of the Tribunal, in short, is this: initially a Letter of Intent was issued by the Orissa State, or by the customer in the State of Orissa [to take a instance, NALCO], on the basis of which BHEL commenced the work. The formal contracts [supply contract and service contract] were entered into much later. Under the Letter of Intent and the formal contracts:

> "The assessee [BHEL] agreed to send goods from outside the State both in Railway and through lorries on road to the Materials Manager, NALCO who used to make endorsement of such goods in favour of the assessee and there after the assessee used to bring it from common carrier and keeps the same in their stock at the work site of the assessee at Angul where from such parts are assembled in manufacturing process of the Captive Power Plants and Smelter Division of the Plant of NALCO...
>
> The crux of the entire case hinges mainly on the decision of the ground Nos.1, 2 and 3. The settled law is that contract cf sale U/s.3(a) of the Central Act must itself cause, the movement of goods which must be occasioned in accordance with the forms of contract of sale. In the instant case, whether the goods despatched were the goods contracted has to be decided first before attracting the provisions of Section 3(a) of the Central Act. To determine on this point, the intentions of the parties as embodied in the letter of intent and the subsequent contract are most valuable material and as such require minute verification of the terms of contract."

The Tribunal then referred to the Letter of Intent issued on June 3, 1982 in respect of NALCO contract and the correspondence that passed between the parties and to the machinery and equipment mentioned in the annexures to the Letter of Intent and the formal contract - and then proceeded to observe:

> "So it is to be meticulously analysed whether the goods so despatched are embodied in the agreement of sale either in the letter of intent dated 2.6.82 or in the contract dated 15..3.85.....
>
> From the facts of the present case, it is seen that items agreed to be purchased have been enumerated in annexures 1 and 2 as stated above whereas the goods to be sold are not the DUs as claimed by the assessee. So their cannot be a sale of inter-state, i.e., the goods which actually moved in the instant case, i.e., with regard to the DUs (despatchable units). The contention of the learned standing counsel was verified with respect to the invoice found at page 40 of the paper book (Vol.3). It is seen from the said invoice that it relates to the supply generator which does not find place in the annexure A. So also at page 41 of the paper book (Vol.3) there is another invoice for supply of bearing pedestal (H&P) and at page 45 for supply of loose items and bearing pedestal and at page 53 Turbine components. Those D.Us do not find place in Annexure-I. So, the contention of the learned counsel for the assessee in this regard cannot be accepted."

Having thus ruled out Section 3, the Tribunal held that the matter has to he examined in the light of Section 4. It observed that inasmuch as on the date of Letter of Intent or the date of execution of formal contracts, much of the equipment/machinery agreed to be supplied was not in existences, It is a contract relating to unascertained or future goods. Purporting to apply the principles of the Sale of Goods Act, the Tribunal held, the property in the goods passed at Angul in the State of Orissa and not anywhere outside the State of Orissa. The Tribunal opined that the property in the goods passed to NALCO "inside the State of Orissa after they are prepared and got ready for sale", In this connection, the Tribunal took note of the fact that the Railway receipts and other documents in respect of goods sent by Rail or by Lorry to Angul were made out in the name of NALCO and that after receiving the said goods, NALCO endorsed them to the work-site. On the basis of these facts, the Tribunal held that the sale has taken place inside the State of Orissa and that being intra-State sale is exigible to Orissa Sales Tax.

We find it difficult to appreciate the reasoning and approach of the Tribunal. The first and main ground upon which it has been held that it is not an inter-State sale is that the goods sent [by rail or road] do not answer the description of the goods mentioned in the annexure to the LOI/supply contract. Obviously, the annexure mentions only the major items of machinery and equipment. These major items cannot be transported as such; transport has to be effected in sections and parts and assembled at the spot. For that reason, it cannot be said that the goods transported are not the goods agreed to be supplied. It is nobody's case that BHEL supplied some other goods than the goods agreed upon. Having thus erroneously excluded Section 3 of the Central Sales Tax Act, the Tribunal went to Section 4 and held that in the circumstances, the sales must be held to have taken

place inside the State of Orissa. The discussion about endorsement of goods by NALCO to BHEL in Orissa and so on is rather ambiguous. Indeed, we need not pursue this discussion further for the reason that both Sri Mohanty and Sri V.A.Mohta, appearing for the State of Orissa, stated frankly that they cannot support the reasoning of the Tribunal. The learned counsel,however, submitted that in view of the several facts and reasons mentioned by them, the conclusion of the Tribunal is correct. The learned counsel submitted that NALCO contract was a turn-key contract; that having regard to the terms and conditions of the Letter of Intent, the formal contracts and the correspondence which passed between the parties, it must be held that the sale of the said machinery and equipment has taken place within the State of Orissa. Learned counsel also submitted that the factual basis upon which the Andhra Pradesh High Court has rendered its decision is not admitted by or acceptable to the State of Orissa. They pointed out that State of Orissa was not made a respondent to the writ petitions filed by BHEL in the Andhra Pradesh High Court which are the subject-matter of Civil Appeals Nos.5362-68 of 1996 and that there are a number of facts and features upon which it has to be held that the conclusion arrived at by the Orissa Tribunal is correct though not its reasoning. Counsel further submitted that the question whether a particular sale is an inter-State sale or an intra-State sale is a question of fact and is not a matter to be adjudicated by this Court in a writ petition under Article 32 of the Constitution. They submitted that on this ground alone these appeals should be dismissed and BHEL should be asked to pursue the remedies provided by the Orissa Act. They pointed out that some of the appeals are preferred directly against the assessment orders or against the notices issued by the assessing authorities under the Orissa Act and that there is no reason why this Court should entertain those appeals. It is also submitted that as against the judgment of the Tribunal, BHEL could have approached the Orissa High Court and that there is no particular reason why the judgment of the Tribunal is sought to be challenged directly in this Court under Article 136 of the Constitution.

There can be no dispute about the proposition that the question whether a particular sale is an inter-State sale or an intra-State sale is essentially a question of fact. It must be said, at the same time, that it is not a pure question of fact inasmuch as the fact of a given case have to be examined in the light of the provisions contained in Section 3 of the Central Sales Tax Act. The main reason for entertaining the present appeals under Article 136 of the Constitution is the grievance of BHEL that the same transaction of sale is being subjected not only to Central Sales Tax more than one State that the Orissa State is treating the very same transaction of sale as an intras- State sale and levying the Orissa State Sales Tax thereon. The grievance cannot be said to be not justified. The dispute is not only between BHEL and the States, it is also, in a sense, a dispute between the States inter se.

For the reasons given above, Civil Appeals Nos 7353- 56/96 arising from S.L.P. (C) Nos 5071-74 of 1941 are allowed and the matter remitted to the Tribunal. It is made clear that we have not expressed any opinion on the merits of these appeals. All that we have done is to clarify the legal principles [Part-I] and indicate the errors in the approach of the Orissa Tribunal. The Tribunal shall now hear the parties and dispose of the appeals according to law. The Tribunal shall dispose of the appeals as early as possible preferably within four months from today.

So far as civil appeals arising from Special Leave Petitions (C) Nos.16840-49 of 1995 are concerned, it is enough to direct that the proceedings impugned in these appeals shall remain stayed for a

period of six months within which period we expect the Orissa State Sales Tax Tribunal to render its decision pursuant to our. Orders. The authorities will be entitled to proceed with the matter after the expiry the six months in accordance with law. These appeals are disposed with the above direction. We may mention that the learned Additional Solicitor General had also challenged the validity of Section 5(2)(AA) of the Orissa Sales Tax Act. The attack was based upon the ratio of the Constitution, Bench decision in Ganon Dunkerley and Company Limited v. State of Rajasthan (1993 (1) S.C.C.364). In view of the directions made by us in these matters, however, the said issue becomes academic. That may arise if and when the Orissa authorities include the inter-State sales in the turn-over of the assessee [BHEL] determined under the Orissa Sales Tax Act.

It may also he mentioned that no further orders are called for in Writ Petition (C) No.1608 of 1987 in the light of the directions and clarifications contained in this judgment.

There shall be no order as to costs in any of these matters.