

Before : B. C. Varma & Ashok Bhan, JJ.

HARBANS LAL AND ANOTHER,—Petitioners.

versus

STATE OF HARYANA,—Respondent.

Civil Writ Petition No. 15523 of 1989.

February 11, 1992.

Haryana General Sales Tax Act 1973 (as amended by Haryana Act 11 of 1984)—Ss. 2(J) (iv), 2(1) and 2(F)—Constitution of India, 1950—Arts. 366(29-A)—46th Amendment 1982—Entry 54 of List-II, Seventh Schedule of Constitution—Indian Contract Act, 1872—S. 148—1984 amendment providing for levying of Sales Tax on “Transfer of the right to use any goods for any purpose”—Concept of—Deemed sale—Extended definition of sale made following 46th amendment held to be constitutionally valid by Supreme Court in Builders Association of India Case (A.I.R. 1989 S.C. 1371)—Distinction between delivery of possession of a thing and its custody—Question of Transfer of right to use goods is one of fact to be determined in each case having regard to the terms of contract—Business of Tent Houses—Transfer of various items like chairs, tables, Crockery, tents, kanats etc. fall within the meaning of ‘goods’ and transfer of right to use them is exigible to Sales Tax under the amended law—Business of supplying shuttering to builders/contractors for construction purposes—Transfer is for consideration—Transferee being in effective control remains in its possession and will therefore amount to sale exigible to tax on turnover—Person doing such business is a “dealer”—Manufacturing and sale of Bone Dry purified Acetylene Gas in cylinders—Retention of cylinders beyond particular period liable to detention charges of Rs. 1 per day—Sale of gas in cylinders and the retention of the cylinder beyond a particular period falls within definition of goods—Since there is a right to transfer goods, such sales are exigible to tax—Business of hiring buses for transporting employees of Company—Where it is found that the effective or general control of the vehicle rests with the company through driver provided by owner—There is an acquisition of the possession of buses as defined from its custody by hiring company and consequent loss of possession of transporter—The transaction is a “sale” by way of transfer of right to use vehicle for valuable consideration and is exigible to Sales Tax.

Held, that in so far as the validity of 46th Amendment is concerned, the same has been upheld by the Supreme Court in Builders Association of India and others etc. etc. v. Union of India and others etc. etc. A.I.R. 1989 S.C. 1371. The challenge to the validity of 46th amendment in these petitions is, therefore, negatived.

(Para 7)

Held, that Entry 29A of the constitution of an inclusive definition which includes within its ambit "tax on the transfer of the right to use any goods for any purpose". Entry 54 deals with taxes on the sale or purchase of goods other than newspapers. If the extended definition, as given in clause 29-A of Article 366 is assigned to definition "sale and purchase of goods", which indeed it has to be then it was not necessary to amend Entry 54 of list II of the Seventh Schedule to enable the State Legislature to amend the definition of the word "Purchase or Sale" while dealing with the State legislation with regard to the Sales tax which is a State's subject.

(Para 9)

Held, that it can safely be deduced that delivery of possession of the goods to the transferee by the transferor is one of the essential ingredients where the transferee is put in effective and general control of the goods as distinguished from a mere custody or a licence to use the same. Whether there is a transfer of the right to use the goods or not is essentially a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be transfer of the right to use goods.

(Para 12)

Held, that Note-2 of section 2(1) of H.G.S. Act, 1973, does not make obligatory to the Assessing Authority to levy sales tax on the goods mentioned in Note-2, referred to above, without coming to a conclusion on facts that there is a transferee with a right to use the goods. Note-2 (supra) only makes it clear that sub-clause (iv) of section 2(1) so far as it relates to the goods mentioned in Note-2 shall come into effect from 1st April, 1987. In our view Note-2 (Supra) is for the benefit of the petitioners only because amendment in section 2(j) and (l) which define 'purchase' and 'sale' came into effect by virtue of Haryana Act 11 of 1984 and the petitioners would have been liable to pay sales tax on the item mentioned in Note-2 of section 2(1) from that date but for the fact that the same has been made applicable from 1st April, 1987 by Haryana Act 10 of 1987.

(Para 13)

Held, that possession of the goods, that is shuttering is transferred to the transferee for a specified period for use with consideration. The transferee is in effective control of the shuttering during the period it remains in his possession. Possession of the shuttering is transferred by the petitioners to the customers for use during the construction and the same shall fall within the definition of the word "sale" as there is a transfer of the right to use the goods as amended. The consideration received by the petitioners for providing shuttering for use to somebody shall be the amount of sale and shall be included within his 'turnover'. We have no hesitation in holding that the petitioners are "dealers" as they transfer the right to use the goods for consideration and the same would be included in their total "turnover" to make it exigible to sales-tax under the Act as per the amended definition.

(Para 14)

Held, that the gas is supplied to the Customers with cylinders and the price for right to use the cylinders is included in the total amount which is charged from the customers for supply to gas which would fall within the definition of the word "goods" which is supplied under an agreement of contract of sale. That contract further stipulated a condition that in case cylinders are not returned within a specified period then charge of Re. 1 per day per cylinder would be made which would be in continuation of sale and any money thus charge shall be included within the 'turnover' of the petitioner because sale of gas with cylinder as container and the retention of the cylinder beyond a particular period shall fall within the definition of "goods". As it involved the transfer of the right to use the goods, any charges made thereupon shall be included in the total 'turnover' of the petitioner.

(Para 16)

Held, that we do not think, it can be held that the effective control of the vehicle remains with its owner after the agreement is executed. There is acquisition of possession of the buses as distinguished from its custody by the Eicher Tractor Limited and the loss of possession so far as the petitioner is concerned, there is a transfer of possession of the buses as there is acquisition of the right by the transferee and loss of it by the transferor. A reading of the various clauses of Agreement Annexure P/1 clearly brings out that the effective possession and control of the buses passes to the constomers. In view of the above position, we are of the opinion that this is a case of 'sale' within the extended meaning of the word inasmuch as there was a transfer of the right to use the vehicle for valuable consideration and the sales-tax is exigible.

(Para 17)

Petition under Article 226 of the Constitution of India praying that :—

- (a) *that a Writ of Mandamus or any other writ or direction thereby directing the respondent not to levy the sales-tax on business transaction of providing service of installation of tents, because by giving the tents on rent, the tent dealers in no manner effect the transaction of sale ; and*
- (b) *that further the provisions of Section 2(j) (iv) and Section 2(1) (iv) of the Haryana General Sales Tax Act, 1973 may be declared as illegal, unconstitutional and ultravires of the powers of Legislature of Haryana ;*
- (c) *that a writ of Prohibition may be issued against the respondent restraining him from enforcing the provisions of Section 2(j) (iv) & 2(1) (iv) of the Haryana General Sales-tax Act, 1973 ; or*
- (d) *any other appropriate writ, order or direction as may be deemed fit under the circumstances of the case may be issued in favour of the petitioner No. 1 and other tent dealers and against the respondent ;*

- (e) that *ad-interim relief may be directed by this Hon'ble Court thereby directing the respondent not to enforce the provisions of Section 2(j) (iv) & Section 2(1) (iv) of the Haryana General Sales-tax Act, 1973, and to start the assessment proceedings on the basis of the said provisions of the Haryana General Sales-tax Act, 1973 ;*
- (f) *servng of advance notice upon the respondent may be dispensed with ;*
- (g) *that exemption may be granted from filing the writ petition on the Judicial papers/petition papers because the same are not available. The petition has been typed on Sunlit-bond papers.*
- (h) *that costs of the petition may be allowed in favour of the petitioners.*

K. B. Bhandari, Sr. Advocate with Miss Varuna Bhandari, and Pardeep Bhandari, Advocates, for the Petitioners.

D. D. Vasudeva, D.A.G. Haryana, for the Respondents.

JUDGMENT

Ashok Bhan, J.

(1) This judgment shall dispose of Civil Writ Petitions Nos. 11860, 11861 of 1988, 148, 12953, 13401, 14340 and 15523 of 1989. In these petitions question of law raised is regarding the constitutional validity of sub-clause (iv) of Section 2(j) and (1) of Haryana General Sales Tax Act, 1973 (as amended by Haryana Act 11 of 1984) in so far as it provides for levying of sales-tax on "transfer of the right to use any goods for any purpose."

(2) Petitioners in these writ petitions are doing the business of giving tents, Kanats, crockery, utensils, furniture, shuttering to the builders/contractors for the purpose of construction of buildings supply of gas in cylinders and cylinders on returnable basis and giving buses on hire belonging to the petitioners to the third parties. The petitions have been filed either on the issuance of the notices by the sales-tax authorities for levy of the proposed tax or where initial assessments have been framed by the Assessing Authority and the petitioners instead of challenging the assessment orders in appeal, have filed the writ petitions challenging the constitutional validity of the 46th Amendment of the Constitution of India, which came into force with effect from 2nd February, 1983, coupled with

the challenge to the constitutional validity of sub-clause (iv) of section 2(j) & (1) of the Haryana General Sales Tax Act (hereinafter referred to as the H.G.S.T. Act, 1973). We propose to deal with the legality and the constitutional validity of the various provisions of the H.G.S.T. Act, 1973 and the 46th amendment of the Constitution before dealing with the facts of each individual case separately.

(3) A brief history of the relevant constitutional and statutory provisions having a bearing on the amendment of the Haryana General Sales Tax Act in the year 1984 (by Haryana Act 11 of 1984), to be set out at this stage to appreciate the contentions of the parties. Prior to the commencement of the Constitution of India, the power to levy sales-tax had been conferred on the provincial Legislatures by Entry 48 of List II of Seventh Schedule to the Government of India Act, 1935. After the independence, the powers to levy sales-tax was conferred on the State Legislature by the Constitution by Entry 54 of List II of Seventh Schedule of the Constitution of India which as originally enacted reads thus :

“54 Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I of the VI schedule”.

Entry 92A in list I of the Seventh Schedule pertaining to the Union of India reads as follows :—

“92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of *inter state* trade and commerce”.

Sales-tax laws enacted in pursuance of the Government of India Act, 1935, as also the laws relating to the sales-tax passed after the coming into force of the Constitution proceeded on the footing that the expression “sale of goods” having regard to the rule as to the scope of broad interpretation of entries in the legislative lists would be given a wider connotation. However, in *State of Madras v. M/s Gannon Dunkerley and Co.* (1), the Supreme Court held that the expression “sale of goods”, as used in the entries in the Seventh Schedule to the Constitution has the same meaning as in the Sale of Goods Act, 1930. This decision related to works contracts. In a series of subsequent decisions, the law relating to this

aspect of the matter was considered by various High Courts of the Country and the Supreme Court of India such as *State of Himachal Pradesh and others v. M/s Associated Hotel of India Ltd.* (2), *Mst. Kharbuja Kuer v. Jangbahadur Rai and others* (3), *M/s Vishnu Agencies (Pvt. Ltd. v. Commercial Tax Officer and others etc. etc.* (4), and *M/s Northern India Caterers (India) v. Lt. Governor of Delhi* (5). In all these decisions the Supreme Court of India on the basis of the Judgment in *Gannon Dunkerley's* (supra) held various transactions which resemble, in substance, transactions by way of sales, to be not liable to sales-tax. As a result of these decisions and in order to subject any transaction to the levy of sales-tax under Entry 54 of the state List, Article 366 of the Constitution was amended by way of 46th Amendment of the Constitution of India.

(4) 46th Amendment was duly ratified by the requisite number of State Legislatures and this amendment came into force with effect from 2nd February, 1983 after having been assented to by the President of India. 46th Amendment to the Constitution of India, as is clear from the statement of objects and reasons of the Constitution (46th Amendment Act, 1982), was aimed at augmenting the State revenues and to reduce the scope for avoidance of taxes in various ways; it was also aimed at taking away the effect of various judgments of the Supreme Court of India, referred to in the earlier part of this judgment. This was done by amending the constitution to include in Article 366 a definition of 'tax on sale or purchase of goods' by inserting a new clause (29-A) in Article 366 which deals with definitions provides after its amendment as under :—

“366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(1) to (29) xx xx xx xx

(29A) “tax on the sale or purchase of goods” includes—

(2) A.I.R. 1972 S.C. 1131.

(3) A.I.R. 1963 S.C. 1203.

(4) A.I.R. 1978 S.C. 449.

(5) A.I.R. 1978 S.C. 1591.

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- (a) a tax on the transfer, otherwise than in pursuance of 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 of 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 (whather or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made." inserted by the Constitution (46th Amendment) Act, 1982.

(5) As a consequence of entry 29A in Article 366 of the Constitution, the ambit of entry 54 of List-II of the Seventh Schedule of the Constitution, was widened to a considerable extent which provides definition to the "tax on the sale or purchase of goods". The definition given in clause 29A in Article 366 brought within its ambit many legal but fictional sales including 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". Following the change of definition on "sale and purchase of goods" by 46th amendment regarding "transfer

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- (1) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration and includes—
- (i) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
 - (ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a work contract entered into on or after the 18th day of April, 1984;
 - (iii) delivery of goods on hire purchase or any system of payment by instalments;
 - (iv) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
 - (v) 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 to a person to whom such transfer, delivery or supply is made but does not include a mortgage, hypothecation, charge or pledge".

Note.—2 to section 2(1) was added by Haryana Act 10 of 1987.

(6) As has been indicated in the earlier part of this judgment, the petitioners in these writ petitions have challenged the validity of 46th Amendment as well as the Constitutional validity of sub-clause (iv) of section 2(j) and 2(I) of H.G.S.T. Act, 1973, in so far as it seeks to levy tax on "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." In so far as the validity of 46th Amendment is concerned, the same has been upheld by the

Supreme Court in *Builders Association of India and others etc. etc. v. Union of India and others etc. etc.* (6). The challenge to the validity of 46th amendment in these petitions is, therefore, negated.

(7) The question to be decided in this case is as to whether in the situation as stipulated in the petition there would be "transfer of the right to use any goods" Keeping in view clause 29A of Article 366 and Entry 54 of List II of Seventh Schedule and the subsequent amendments in the Haryana General Sales Tax Act, 1973. In the case of "sale" there is a transfer of the proprietary rights from the seller to the buyer but according to the amended definition which is inclusive by nature whenever there is transfer of right to use any goods for any purpose is made then that would also amount to 'sale'. The distinction between a contract of sale as defined in the Sales of Goods Act and a transfer of the right to use goods' is that in the case of transaction of sale of goods, the proprietary rights of the owner are transferred whereas in the case of transfer of the right to use, the proprietary rights in the goods remain with the owner. The owner of the property has a bundle of rights in it, namely; right to possess, right to use and enjoy, right to usufruct, right to consume, right to destroy, to alienate to transfer etc. In law, the owner of the property may create a charge on the property, mortgage it or lease it or sell it. Law in fiction makes it possible that the various rights and interests such as right to possess, right to use and enjoy, right to usufruct, right to consume, right to alienate or transfer may be vested in various persons. By the insertion of clause 29-A to Article 366 by virtue of the 46th Amendment in the Constitution and by bringing about a change in section 2(j) and 2(1) of H.G.S.T. Act, 1973, one of such rights i.e. "transfer of the right to use any goods for any purpose" is sought to be taxed; in other words we are concerned in these cases with the legal concept of "transfer of the right to use any goods for any purpose" and its being taxed by means of the amended provisions.

(8) Before dealing with the facts of each individual case, we propose to discuss the broad challenge which has been put by the learned counsel appearing for the petitioners in various cases which is common in all cases.

(9) The first submission of the learned counsel appearing for the petitioners is that without amendment of Entry 54 of List-II

(State List) the state legislature was not competent to amend section 2(J) and (I) of H.G.S.T. Act, 1973. We do not find any substance in this submission. Article 366 of the Constitution deals with the definitions whereby meanings have been assigned to the various expressions occurring in the Constitution. Entry 29A of Article 366 is an inclusive definition which includes within its ambit "tax on the transfer of the right to use any goods for any purpose". Entry 54 deals with taxes on the sale or purchase of goods other than newspapers. If the extended definition, as given in clause 29-A of Article 366 is assigned to definition "sale and purchase of goods", which indeed it has to be, then it was not necessary to amend Entry 54 of List II of the Seventh Schedule to enable the State Legislature to amend the definition of the word "purchase or sale" while dealing with the state legislation with regard to the sales-tax which is a State's subject.

(10) It was next argued that even if the amendment of sub-clause (iv) of clauses (j) and (I) of Section 2 of the H.G.S.T. Act, 1973, is held to be valid then in the alternative in the case in hand, there was no element of sale and the petitioners were only charging hiring charges and the transfer was not for the purpose of right to 'use' of the goods but the same was in the nature of charges for the services rendered. "Transfer of the right to use any goods for any purpose" is a species of the bailment. Section 148 of the Indian contract Act, 1872, defines 'bailment' in the following terms :—

"148. "Bailment" "bailor" and "bailee" defined. A "bailment" is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the "bailee".

Thus, in the 'bailment' there is a transfer of goods for a particular period and thereafter the goods are to be returned to the person delivering them. Only after the delivery of the goods the 'bailee' becomes legally possessed of such goods and becomes entitled to enjoy the use of the goods upon periodical payment or against other valuable consideration to the bailor. 'Bailor' gets the consideration whereas the 'bailee' gets the right to enjoy the goods and the same is complete only upon the delivery of goods. The transferee begins to exercise the right to use only after acquiring the possession of the goods hired. In order to determine as to whether a person is in

possession of the goods or not would depend as to whether he is notionally or in actual control of the same and the same is essentially a question of fact and at times legal inferences have to be drawn as to when hiring out a movable property would amount to sale by treating the same as transfer of the right to use. Transfer of the right to use goods has come under consideration before different High Courts of the country. These decided cases throw light at the controversy in hand. In *Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, Company Circle, Visakhapatnam* (7), a Division Bench of Andhra Pradesh High Court, held that transfer of the right to use is a species of bailment and for that purpose, delivery of possession of the goods is necessary. A distinction was drawn between the delivery of possession of a thing as against its custody. The subtle distinction between delivery of possession as distinguished from its custody was brought out by taking the example of hiring a taxi cab under "rent-a-car" scheme vis-a-vis a taxi which is hired for going for one place to another. The following paragraph, in order to bring home subtle distinction of the said judgment, is reproduced below :—

"The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word "transfer" due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference".

(11) In this case, the transaction was not regarded as sale inasmuch as the effective control of the machinery was held to be with the transferor and not the transferee. Another case of *Moder.n Decorators v. Commercial Tax Officer Manikotla and others* (8), (was cited with the permission of the Court) wherein the applicant was carrying on the business as decorators for over 50 years. The business of the applicant consisted; *inter alia*, of constructing, erecting and raising pandals, barricades, rostrums etc. in and upon land, earth, road, building, roof-top etc. according to and on the basis of orders placed by various customers with the help of bamboos, Sal Ballas, ropes, tarpaulins, decorating cloth and other materials. After the expiry of the specified period, the pandals, barricades rostrums or pavilions were dismantled by the decorators with their own man and labour and the material was taken back to the godown of the applicant for subsequent use according to the orders. The applicant also let on hire to its customers, chairs and tables etc. It was held that the applicant did not let out the material to his customers. So far as the erecting of pandals etc. was concerned, the applicant itself erected the pandals for a consideration and after the specified period dismantled the same and removed the articles to its godown; it was held that the material used in erecting the pendals was not transferred. The transaction of erecting the pandals and later it to be used did not pass any title of the goods in the transferee and that is why it was held that the same did not amount to "sale of the goods" in terms of the amended definition. However, various other items, which the decorators deal in the course of their trade were held to be "goods" within the meaning of the Act and were held that they fall within the definition of "sale" as per amendment. Summed up conclusion of the Tribunal was as under :—

".....We, however, do not consider it necessary to come to a positive finding whether a pandal *qua* pandal is "goods" or not. But, we find that the hiring of pandals erected by decorators at the instance of customers for a specified period, cannot come within the meaning of "sale" so as to be exigible to sale tax. The argument that the letting value of the different materials with which pandals are erected are "goods" in our view, makes no difference because it is not the materials that are transferred for use by the customers as such. It is the totality of the service rendered by the decorator, namely, the erection of pandals, etc. that falls for our consideration. We, however, make it clear that the various other items which decorators in course of their trade let out to their customers,

such as, tables chairs etc. are "goods" within the meaning of the Act and they may come within the definition of "sale" as amended.

12. In the circumstances, the application succeeds in part. A writ in the nature of prohibition be issued commanding the respondents to forbear from giving any effect to and/or taking any steps in pursuance of the notice dated 5th November, 1985, issued by the respondent No. 4 under section 14(1) of the Bengal Finance (Sales Tax) Act, 1941 and the Trade Circular No. 2/84 dated the 7th December, 1984 issued by the respondent No. 2 and prohibiting the respondents from charging any sales-tax for erection of pandals etc. by the applicant for their customers in connection with their business of decorating. Other items of goods let out by the decorators to the customers on hire, however, shall come within the meaning of "sale" and may be assessable to tax if the turnover exceeds the taxable limit. With the directions as above, the case is disposed of. There will be no order for costs."

In *Bank of India v. Commercial Tax Officer, Central Section, Calcutta and others* (9), a single Bench of Calcutta High Court did not regard the lease of a bank locker as sale of the bank locker within the extended definition of expression "sale" primarily because the hiring of the locker was not regarded as mere transfer of the right to use of the locker but rendering various services in addition thereto. The main reasons given for the same were that bank never gave actual possession of the locker to the customer. The bank had built a strong room, installed a steel cabinet with safety lockers with double locking system; one key was given to the customer and the other being retained by the bank. The locker could not be operated until and unless both the keys were used for opening the locker. Customer was only given admission to the vaults when the bank allowed it. The authorised customers was granted authority to use the locker after recording his presence in the books of the bank before-hand. It was held that the bank had a lien on the goods stored in the locker for the rent payable by the customer. The contention of the department to tax the lease of the locker was rejected. Similar view was taken by a Division Bench of Andhra Pradesh High Court in *State Bank of India v. State of Andhra Pradesh* (10). The basic ingredients for not regarding hiring of lockers as 'sale' in

(9) 67 S.T.C. 199.

(10) (1988) 70 S.T.C. 215.

this case however was that there was absence of delivery of the goods which was regarded as essential ingredient. In this connection clause 29-A of Article 366 of the Constitution, referred to cases where there was transfer of right to use goods delivered to the person concerned. Under the circumstances, it was held that the definition did not take within its fold the transaction which merely licences a person to use goods without securing possession; it was held that there was no delivery of possession of the locker to the hirer and, therefore, the transaction was not held to be a "sale" and, therefore, not exigible to sales tax.

(12) From the perusal of the case law, referred to above, it can safely be deduced that delivery of possession of the goods to the transferee by the transferor is one of the essential ingredients where the transferee is put in effective and general control of the goods as distinguished from a mere custody or a licence to use the same. Whether there is a transfer of the right to use the goods or not is essentially a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be transfer of the right to use goods. In this back-drop of facts, we proceed to deal with each case in the light of the facts of each particular case. It would have been more appropriate, if these facts were left to be determined by the authorities under the Act as this Court was called upon to determine only the questions of law arising out of those facts because in some of the cases, the assessment proceedings are pending before the various authorities but on the insistence of the learned counsel appearing for the petitioners, we proceed to determine these questions as lengthy arguments were addressed in each individual case.

C.W.P. Nos. 148/14340 and 15523 of 1989.

(13) In these cases the petitioners are running the business of tent houses which consists of providing services to the customers by installing tents at the places specified by the customers through their own servants and transport. The tents are erected at the premises of the customers and after the function is over, the tents are brought back to the business premises of the petitioners by the employees of the petitioners; it was further stated that at no stage, the tents are transferred by the petitioners to the customers. Similarly, petitioners also supply crockery, utensil and furniture for the purpose of holding function to the customers. Crockery and furniture is also transported by the employees of the petitioners to the premises of the customers; the bearers employed by the

petitioners serve food etc. to the guests and after the function is over, the same are brought back to the petitioners' business premises: it was argued, that at no stage the tents, crockery, utensils, furniture was sold by the petitioners. It was stated that tents, crockery, utensils and furniture used by the petitioners had been purchased after paying the sales-tax and, therefore, no sales-tax could be charged from the petitioners as the petitioners did not deliver possession of the goods or the right to use to the customers and the consideration charged was only for the services rendered. Another argument raised was that Note-2 of clause (1) of section 2 of H.G.S. Act, 1973 referred to in the earlier part of the judgment, which came into force with effect from 1st day of April, 1987 made it obligatory on the assessing authority to charge sales-tax so far as it relates to the goods, namely shuttering material (used in construction of buildings) tents, kanats, chholdari, crockery, utensils, furniture etc. irrespective of the fact as to whether the possession of the goods had been transferred from the transferor to the transferee or not, or as to whether there was transfer of the right to use goods or not as contemplated by sub-clause (iv) of section 2(1) of H.G.S.T Act, 1973. It was argued by the learned counsel appearing for the petitioners that the petitioners did not transfer any goods to the customers in the course of their business and the petitioners simply charged hiring charges for the services rendered. In the written statement filed, it was stated that the state legislature was fully competent to enact law for the levy of tax on sale or purchase of goods in the State of Haryana. In terms of Entry 54 of the State List to the Seventh Schedule of the Constitution of India and in exercise of these constitutional powers, the State Legislature had enacted section 2(j) (iv) and 2(1) (iv) of H.G.S.T. Act. These clauses were inserted by H.A. 11 of 1984 with effect from 1st April, 1984, after the powers have been conferred by way of 46th Amendment of the Constitution of India made effective from 2nd February, 1983 and levied tax on the hire charges recovered by the tent dealers from the customers from the transfer of the right to use goods like tents, kanats and furniture etc. On facts, it was stated that the petitioners are engaged in the business of giving on hire tents, kanats, furniture etc. to the customers and thus the charges fall within the ambit of 'sale' under sub-clause (iv) of Section 2(j) and 2(1) of H.G.S.T. Act, 1973 and as such are liable to tax. With regard to Note-2, which was added by Haryana Act 10 of 1987, it was stated that regarding the goods mentioned in the said note, the taxes become applicable with effect from 1st April, 1987 whereas regarding sub-clause (i) and (v) the amendment came into force with effect from 2nd February, 1983 as is clear from Note-1 and that

Notes 1 and 2 only give the dates with effect from which the sub-clause (1) of section 2 came into force and the Assessing Authorities were at liberty to come to its conclusions on facts as to whether there was a transfer of the right to use any goods which find mention in Note-2 of clause (1) of section 2. Whether or not the tents, kantas and other decorating material given by the petitioners to its customers would amount to transfer of the right to use would be dependent upon the facts of each case. If pandal only after having been erected is given to the customers for use then it may not be the transfer of the goods within the meaning of section 2(d) of H.G.S.T. Act, 1973 wherein the word "goods" has been defined but all the same where tents, kanats and furniture are given by the petitioners to the customers as such and the customers erect the same and pay hire charges for the tents, Kanats, chholdari crockery etc. then the same fall within the meaning of "goods" and any transfer of the right to use the same shall be exigible to the sales-tax. The transfer of various items such as chairs, tables and crockery etc. of course, would fall within the meaning of the word "goods" and transfer of the right to use on those goods shall be exigible to tax because the same shall come within the definition of "sale" as amended. We agree with the learned counsel appearing for the respondents that Note-2 of section 2(1) of H.G.S.T. Act, 1973, does not make obligatory to the Assessing Authority to levy sales-tax on the goods mentioned in Note-2, referred to above, without coming to a conclusion on facts that there is a transfer of possession with effective control to the transferee with a right to use the goods. Note-2 (supra) only makes it clear that sub-clause (iv) of section 2(1) so far as it relates to the goods mentioned in Note-2, shall come into effect from 1st April, 1987. In our view Note-2 (supra) is for the benefit of the petitioners only because amendment in section 2(j) and (1) which define 'purchase' and 'sale' came into effect by virtue of Haryana Act 11 of 1984 and the petitioners would have been liable to pay sales-tax on the item mentioned in Note-2 of section 2(1) from that date but for the fact that the same has been made applicable from 1st April, 1987 by Haryana Act 10 of 1987.

C.W.Ps. Nos. 11860 and 11861 of 1988.

(14) In these petitions, the petitioners are engaged in the business of supplying shuttering to the builders/contractors for the purpose of construction of buildings; the shutterings which the petitioners supply to the builders/contractors remain at all stages the property of the petitioners as there is no contract between the petitioners and the contractors for the transfer of the shutterings to the builders/contractors; that the transfer by way of supplying

of shutterings to the builders/contractors does not involve transfer of property; that the shuttering is a perishable item after using it for 10/12 times, it becomes completely unfit for use and that there cannot be a repeated sales-tax on the same item. The other pleadings were of the same nature as in the case of tents etc. regarding the applicability of Note-2 of clause (1) of section 2. Legal averments rebutted in the written statement were also in the same terms as in the case of tents etc. On facts, it was stated that shuttering would fall within the meaning of the word "goods" and its transfer with the right to use would be exigible to tax. We find substance in the submission of the learned counsel appearing for the respondents. Possession of the goods, that is shuttering is transferred to the transferee for a specified period for use with consideration. The transferee is in effective control of the shuttering during the period it remains in his possession. Possession of the shuttering is transferred by the petitioners to the customers for use during the construction and the same shall fall within the definition of the word "sale" as there is a transfer of the right to use the goods as amended. The consideration received by the petitioners for providing shuttering for use to somebody shall be the amount of sale and shall be included within his 'turnover'. We further find no substance in the submission of the learned counsel appearing for the petitioners that the petitioners shall not fall within the definition of the word "dealer" as defined in section 2(c) of H.G.S.T. Act, 1973. We have no hesitation in holding that the petitioners are "dealers" as they transfer the right to use the goods for consideration and the same would be included in their total "turnover" to make it exigible to sales-tax under the Act as per the amended definition.

C.W.P. No. 12953 of 1989.

(15) In this case, the petitioner has a factory at Faridabad and is engaged in the manufacturing and sale of bone dry purified acetylene gas for which it has got itself registered as a 'dealer' under the H.G.S.T. Act, 1973. The gas manufactured by the petitioner in his factory is filled in the cylinders which is sold to the customers, dealers, government departments with the condition that the cylinder has to be returned to the petitioner promptly to keep the plant running as the empty cylinders are required to fill in gas in the cylinders, as soon as the same is manufactured from the plant and the detention of cylinders by the customers would result in stoppage of the plant and consequently raise the cost of production of the petitioner; Gas cylinders being costly container of permanent nature, cannot be permitted to be detained by the customers at their will

and, therefore the aim and interest of the petitioner is not to allow the cylinder with the customers after using the gas for more than a reasonable period, which is 7 to 10 days which is dependent upon the distance of the customers from the plant; one of the stipulations in the contract of sale is that the customer is required to return the empty cylinders to the petitioner's company promptly after the use of the gas filled in but not beyond the period of 7 to 10 days failing which the customer would render itself liable to pay damages or penal charges at the rate of Re. 1 per cylinder per day; it has been further stated that it is clearly provided as a condition of sale that the petitioner's cylinder will be given on free loan to the customer on the strict stipulation that those cylinders would be returned to the petitioner's factory from where they were issued. It was argued that the petitioner's company is charging and paying tax on the goods sold to the customers and the same is duly reflected in the return but the Assessment Authorities have no right to charge sales tax on the detention charges of Re. 1 per day per cylinder which is charged by the petitioners from the customers who keep the cylinders beyond the specified period, it was further argued that the cylinders which are detained beyond a particular period are not 'goods' and the detention money charged by the petitioner should not be included in the total "turnover" of the petitioner to make it exigible to sales-tax. Other arguments regarding constitutional validity of the amended Act are similar in nature; in the written statement, all those allegations have been refuted. We have considered the arguments of the learned counsel appearing for the petitioners. We do not find any substance in the same. Admittedly, petitioner is a 'dealer'. Section 2(f) of Haryana General Sales Tax Act, 1973, defines "goods" as under :—

““goods”, means every kind of movable property other than newspapers, actionable claims, money, stocks and shares or securities but includes growing crops, grass, trees and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.”

(16) The case of the petitioner is that it cannot permit its customers to retain the cylinders beyond the specified period as the cylinders are required for refilling by the company and the same cannot be termed as "goods" and what the petitioner charges is detention charges beyond a particular period at the rate of Re. 1 per day per cylinder and the same can be termed as actionable claim which is exempted from the word "goods". We do not find any substance in this submission of the learned counsel appearing

for the petitioner. The gas is supplied to the Customers with cylinders and the price for right to use the cylinder is included in the total amount which is charged from the customers for supply to gas which would fall within the definition of the word "goods" which is supplied under an agreement of contract of sale. That contract further stipulated a condition that in case cylinders are not returned within a specified period then charge of Re. 1 per day per cylinder would be made which would be in continuation of sale and any money thus charge shall be included within the 'turnover' of the petitioner because sale of gas with cylinder as container and the retention of the cylinder beyond a particular period shall fall within the definition of "goods". As it involved the transfer of the right to use the goods, any charges made thereupon shall be included in the total 'turnover' of the petitioner.

C.W.P. No. 13401 of 1989.

(17) In this case, the petitioner's company is engaged in the business of touring, conducting tours and also enter into contract for hiring of its buses for the purpose of transportation of personnel of any company. Vide agreement Annexure P/1, the petitioner entered into a contract with M/s Eicher Tractor Limited, to make available its four buses to ferry the employees of M/s Eicher Tractor Limited from Delhi/New Delhi to Eicher Tractor Limited, Faridabad in the morning and back from Eicher Tractor Limited to Delhi/New Delhi in the evening. Constitutional validity of the amendng Act has been challenged in the same terms as in the other writ petitions. It has been stated that the petitioners are rendering services to its customers and did not transfer the right to use any goods and, therefore, not exigible to sales-tax even as per the amended definition. A perusal of the agreement Annexure P/1 would show that for all practical purposes, the effective or general control of the vehicle rest with Eicher Tractor Limited, though the owner has to provide a driver and a conductor and has to carry out the necessary repairs. We do not think, it can be held that the effective control of the vehicle remains with its owner after the agreement is executed. There is acquisition of possession of the buses as distinguished from its custody by the Eicher Tractor Limited and the loss of possession so far as the petitioner is concerned, there is a transfer of possession of the buses as there is a acquisition of the right by the transferee and loss of it by the transferor. A reading of the various clauses of Agreement Annexure P/1 clearly brings out that the effective possession and control of the buses passes to the customers. In view of the above position, we

are of the opinion that this is a case of 'sale' within the extended meaning of the word inasmuch as there was a transfer of the right to use the vehicle for valuable consideration and the sales-tax is exigible.

(18) In some of the cases, petitioners have filed writ petitions after the framing of the assessment by the Assessing Authorities whereas the appeal could have been filed before the first appellate authority. Learned counsel appearing for the petitioners stated that in some of the cases appeals have not been filed because of the challenge put to the constitutional validity of the amending Act. It would be in the interest of justice if those petitioners who did not file the appeals against the assessment orders, are permitted to file the same within a period of one month. Accordingly, it is directed that those petitioners who did not file the appeal earlier may file the appeal within one month from this date.

(19) In the light of the observations made above, the writ petitions stand dismissed but there would be no order as to costs.

R.N.R.