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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2022 OF 2007
WITH
NOTICE OF MOTION NO.598 OF 2007
AND
NOTICE OF MOTION NO.280 OF 2011

Maharashtra Chamber of Housing Industry
and ors. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO. 2568 OF 2007

Nirmal Lifestyle Limited
and ors. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.1725 OF 2011

M/s.Swan Energy Ltd.
and ors. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.1726 OF 2011

M/s.Peninsula Land Ltd.
and ors. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.2089 OF 2011

Balaji Developers and anr. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.2197 OF 2011

M/s.Atul K Arkade Associates ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.680 OF 2012

Damask Ifracon Prvt.Ltd.
and ors. ... Petitioners

Versus

State of Maharashtra ... Respondents

WITH

CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1152 OF 2011

The Promoters and Builders Association
and ors. ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

WITH
WRIT PETITION NO.1864 OF 2011

Promoters and Builders Association,
Nashik ... Petitioners

Versus

State of Maharashtra and ors. ... Respondents

Mr.Milind Sathe, Senior Advocate with Mr.Parimal Shroff, Mrs.Anjana Chheda, Mr.D.V. Deokar, Mr.Medhavin Bhatt and Ms. Rashmi Jha i/b. Mrs. A.H. Chheda for petitioners in Writ Petition No.2022 of 2007.

Mr.V.Sridharan, Senior Advocate with Ms.Beena Pillai for petitioners in Writ Petition No.2089 of 2011

Mr.Swanand Ganoo with Mr.Amit Mehta i/b. Mahimtura & Co. for petitioners in W.P.Nos.2568 of 2007 and 680 of 2012.

Mr.C.B.Thakar with Mr.V.P.Patkar and Mr.M.M.Vaidya for petitioners in Writ Petition Nos.1725 of 2011 and 1726 of 2011.

Mr.S.P.Kanuga with Mr.Hitesh Vyas for petitioners in W.P.No.2197 of 2011.

Mr.Milind Sathe, Senior Advocate with Mr.Hitesh Jain, Ms.Stuti Gupta and Mr.Zoeb Cutlerywala i/b. ALMT Legal for petitioners in Appellate Side W.P. No.1864 of 2011.

Mr.Hitesh Jain with Ms.Stuti Gupta and Mr.Zoeb Cutlerywala i/b. ALMT Legal for petitioners in Appellate Side W.P. No.1152 of 2011.

Mr.Darius J. Khambata, Advocate General with Ms.Naira Jejeebhoy and Mr.B.B.Sharma, AGP for respondent in Writ Petition Nos.2022/2007, 2089/2011, 2197/2011 and 680/2012.

Mr.Darius J. Khambata, Advocate General with Ms.Naira Jejeebhoy and Mr.D.A.Nalawade, G.P. For respondents in W.P.No.2568/2007.

Mr.Darius J. Khambata, Advocate General with Ms.Naira Jejeebhoy and Mr.Vinay A. Sonpal, A Panel Counsel for respondents in W.P.No. 1725/2011, Appellate Side W.P.Nos.1152/2011 and 1864/2011.

Mr.Darius J. Khambata, Advocate General with Ms.Naira Jejeebhoy and Mr.S.K.Nair, A Panel Counsel for respondents in W.P.No.1726/2011.

CORAM: DR.D.Y. CHANDRACHUD &
R.D.DHANUKA, JJ.

April 10, 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD,J.)

1. Rule in Writ Petition Nos.2089 of 2011 and 680 of 2012. Respondents waive service. By consent all the petitions have been taken up for final hearing since common questions are involved.

The nature of the challenge

2. In this batch of petitions under Article 226 of the Constitution there is a challenge to the constitutional validity of Section 2(24) of the Maharashtra Value Added Tax Act, 2002 as amended initially by Maharashtra Act XXXII of 2006 and thereafter by Maharashtra Act XXV of 2007 on the ground that the amendments transgress the limitations contained in Article 366(29A)(b) of the Constitution. The challenge of the petitioners is that by amending the provisions of Section 2(24) the State Legislature has brought within the ambit and purview of the expression "sale", an agreement for the building and construction of immovable property which is not a works contract. Consequently, the legislative competence of the State Legislature is questioned on the ground that the Legislature by and as a result of the amendment has sought to impose a tax on a transaction which does not involve a sale of

goods within the meaning of Entry 54 of the State List to the Seventh Schedule to the Constitution and has hence transgressed the limitations on its legislative power under Article 246(3) of the Constitution. There is also a challenge in consequence to the provisions of Rule 58(1A) of the Maharashtra Value Added Tax Rules, 2005 which were introduced by a State Notification dated 1 June 2009. The batch of petitions also involves a challenge to a Circular dated 7 February 2007 issued by the State Government purporting to clarify the scope of the amendment. The petitioners also seek to question a Notification dated 9 July 2010 issued by the State Government under the Act notifying a composition scheme and the legitimacy of certain notices which have been issued by the State Tax Authorities.

Maharashtra Value Added Tax Act, 2002 and the Rules

3. The Maharashtra Value Added Tax Act, 2002, as it was originally enacted, defined the expression "sale" in Clause (24) of Section 2 as follows:

> "(24) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase" with all their grammatical variations and cognate expressions, shall be construed accordingly."

Clause (b) of the Explanation to the Section defined what would be a sale for the purpose of the clause and brought in its ambit the following transactions:

> “(b) (i) the transfer of property in any goods, otherwise than in pursuance of a contract for cash, deferred payment or other valuable consideration;
>
> (ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of' a works contract;
>
> (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
>
> (iv) the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v) the supply of goods by any association or body of persons incorporated or not to a member thereof or other valuable consideration;
>
> (vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration.”

With effect from 20 June 2006 the provisions of Explanation (b)(ii) to Section 2(24) were amended by the insertion of the following words after the words “works contract”:-

> “namely, an agreement for carrying out for cash, deferred payment or other valuable consideration the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property”

This amendment was initially made by an Ordinance, which was followed by the enactment of Amending Act XXXII of 2006. Subsequently by Maharashtra Act XXV of 2007 the word “namely” came to be substituted by the word “including” with effect from 20 June 2006.

4. Rule 58(1) of the Rules framed under the Maharashtra Value Added Tax Act, 2002 provides that the value of the goods at the time of the transfer of property in goods involved in the execution of a works contract may be determined by effecting the following deductions from the value of the entire contract, in so far as the amounts relating to the deduction pertain to the said works contract:

> “(a) labour and service charges for the execution of the works;
>
> (b) amounts paid by way of price for sub-contract, if any, to sub-contractors;
>
> (c) charges for planning, designing and architect’s fees;
>
> (d) charges for obtaining on hire or otherwise, machinery and tools for the execution of the works contract;
>
> (e) cost of consumables such as water, electricity, fuel used in the execution of works contract, the property in which is not transferred in the course of execution of the works contract;
>
> (f) cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;
>
> (g) other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to the said transfer of property;

> (h) profit earned by the contractor to the extent it is relatable to the supply of said labour and services.”

The Proviso to sub-rule (1) stipulates that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as above or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear or intelligible, the contractor, or, as the case may be, the Commissioner may in lieu of the deductions as aforesaid provide a lump sum deduction as enunciated in the table annexed to the Rule. Sub-rule (1A) was inserted into Rule 58 by a Notification dated 1 June 2009 and reads as follows:

> "(1A) In case of a construction contract, where alongwith the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods or in some other form) involved in the execution of the construction contract is also transferred to the purchaser such transfer is liable to tax under this rule. The value of the said goods at the time of the transfer shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value.
>
> The cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995, as applicable on the 1st January of the year in which the agreement to sell the property is registered :
>
> Provided that, deduction towards cost of land under this sub-rule shall not exceed 70% of the agreement value."

5. On 7 February 2007 a Trade Circular was issued by the Commissioner of Sales Tax following the decision of the Supreme Court in the case of **M/s. K. Raheja Development Corporation**[1]**.** The Circular adverts to the judgment of the Supreme Court and clarifies that any transfer of property after 20 June 2006 irrespective of whether an agreement was signed prior to that date would be governed by the amended definition of "sale" under Section 2(24) of the Act. The circular clarifies that tri partite agreements between land owners, developers and prospective buyers would also be covered by the amendment. The Trade Circular also contains a clarification that an earlier determination made by the Commissioner of Sales Tax on 28 June 2004, which was prior to the amendment to Section 2(24) would not govern subsisting contracts in view of the amended provisions. Finally the Circular draws attention to the decision of the Supreme Court in **K.Raheja** (Supra) that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract, but so long as an agreement is entered into before the construction is complete, it would constitute a works contract. Finally, the Circular states that it is only clarificatory in nature and cannot be used as such for interpretation of the provisions of law.

6. On 9 July 2010 the Government of Maharashtra provided for a scheme of composition under Section 42(3A). The composition scheme applies to registered dealers who undertake the construction of flats, dwellings, buildings or premises and transfer them in pursuance of an agreement along with land or interest underlying the land. The

1. 141 STC 298 (SC)

composition amount is prescribed at one percent of the agreement amount specified in the agreement or the value specified for the purpose of Stamp Duty under the Bombay Stamp Act, 1958 whichever is higher. The composition scheme is subject to certain conditions.

Submissions of the Petitioners:

7. In assailing the constitutional validity of the provisions of Section 2(24) as amended, the following submissions have been urged before the Court on behalf of the Petitioners:

1. The Forty Sixth Amendment to the Constitution which led to the insertion of Article 366(29A) was to overcome the judgments of the Supreme Court, inter alia in **State of Madras Vs. Gannon Dunkerley & Co.**[2] The Supreme Court held that where an indivisible works contract was entered into involving both a transfer of goods or materials on the one hand and a component for the supply of labour and services on the other, it would not be open to the State Legislatures to impose a tax on the sale of goods involved in the execution of such a contract under Entry 54 of the State List to the Seventh Schedule. The State Legislatures could, however, do so where the contract was a divisible contract in the sense that there were two independent contracts involving supply of goods and materials and another contract involving supply of labour and services;

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2. AIR 1958 SC 560

2. In order to attract the application of Article 366(29A)(b) in relation to a works contract the following conditions must be fulfilled:
   (i) There has to be a transfer of property in goods;
   (ii) The expression “goods” is as defined in Article 366(12); and
   (iii) Such transfer has to be in the execution of a works contract.

3. As a result of the Forty Sixth Amendment an indivisible works contract is by legal fiction made divisible into a contract for supply of materials and a contract for supply of labour and services. However, even after the enactment of the Forty Sixth Amendment, what can be brought to tax by the State Legislatures under Entry 54 of List I is a transfer of property in goods involved in the execution of a works contract. A contract for the sale of immovable property is not a works contract. A contract which involves the sale of immovable property cannot be split by the State Legislatures, even if there is an element of a works contract. In other words the State Legislature cannot locate a sale of immovable property and then attempt to trace out what are the goods involved in the execution of the contract;

4. The amendment to Section 2(24) is beyond the Legislative competence of the State Legislature. What the State Legislature has attempted to do by the amendment and by the insertion of Rule 58(1A) is to split a contract for the sale of immovable properties into three parts: (i) a contract for supply of goods and materials; (ii)

a contract for supply of labour and services; and (iii) the cost of the immovable property. A contract for the sale of immovable property does not fall within any of the sub-clauses of Article 366(29A) and consequently it is not open to the State Legislature to expand the ambit of the deeming fiction that is created by the Forty Sixth Amendment;

5. A works contract involves only two elements viz. (i) the transfer of property in goods; and (ii) supply of labour and services. If a third element is involved in the contract viz. the sale of immovable property it does not constitute a works contract and hence to such a contract, the legal fiction which is created by Article 366(29A) would not apply. The amendment to Section 2(24) has the effect of expanding the definition of the expression sale of goods under Article 366(29A) and is, therefore, beyond the legislative competence of the State Legislature. The Trade Circular dated 17 February 2007, the amendment to Rule 58 and the Notification dated 9 July 2010 indicate the agreements which are contemplated to be brought within the purview of Section 2(24). Those agreements are simplicitor agreements for the sale of immovable property;

6. A contract which is governed by the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (**MOFA**) cannot be regarded as a works contract. Such a contract is an agreement for the purchase of

immovable property in its complete sense. An agreement which is governed by the MOFA is an agreement simplictor for transfer of immovable property. The right of the purchaser of a flat is to ensure that the construction is carried out in accordance with the contract and that the land and building is conveyed by the developer to the co-operative society. Such a transaction is only one for the transfer of a flat and does not constitute a works contract. An agreement under the MOFA does not confer any title to or interest in the purchaser of the flat until a conveyance is executed under Section 11 by the promoter in favour of the co-operative society.

In support of the principal submissions which have been urged as noted above by Mr.Milind Sathe and Mr. V. Sridharan, Learned Senior Counsel, the other counsel appearing on behalf of the petitioners in the batch of petitions have urged the following submissions:

1. Where there is a transfer of a building by a deed of conveyance or a transfer of immovable property that was never intended to constitute a transfer of goods involved in the execution of a works contract. Such a contract is not and cannot be a works contract. In a works contract property gets transferred as a result of accretion during the course of the execution of the contract and there is no transfer of immovable property simplicitor. The essence of a works contract is the transfer of property by accretion. Consequently, where a contract involves sale of immovable property, it can never be regarded as

involving a works contract;

2. The Maharashtra Value Added Tax Act, 2002 ignores the concept of plurality of deemed sales. Where the developer is the owner of the land, the promoter is both the owner and developer. Alternately a developer may enter into a development agreement with the owner of the land. When a promoter appoints a sub contractor and gets a building constructed, that contract is a works contract under Article 366(29A) and a transfer of the property in the goods involved in the execution of the works contract takes place to the developer. That would be the first deemed sale. When the developer enters into an agreement with a purchaser under the MOFA thereafter, this does not involve a sale of goods since that would amount to a second deemed sale of the same goods which cannot be brought to tax. Once a promoter has appointed a sub contractor the property passes to him as a promoter owner or to the owner as the case may be, where there is only a developer. Property has already passed on accretion and the same transaction of deemed sale cannot be taxed twice;

3. An executory contract does not fit into the conception of a sale of goods within the meaning of Entry 54 of the State List to the Seventh Schedule. Section 2(ja) of the Central Sales Tax Act, 1956 has brought in the definition of the expression “works contract” with effect from 13 May 2005. This should be held to constitute a law within the meaning of Article 286(3)(b) and to that extent the definition contained in the State Legislation would stand overridden.

8. On the other hand, the learned Advocate General appearing on behalf of the State Government submitted that :

(a) The provisions of Section 2(24) which defines the expression “sale” fall within the compass of Article 366(29A);

(b) A works contract is a contract to execute works and encompasses a wide range of contracts. The expression works contract is not restricted to building contracts having only two elements viz. the sale of material and goods and the supply of labour and services;

(c) The well settled connotation of the expression works contract is that a building contract may also involve in certain situations a sale of land;

(d) An unduly restrictive or contrived meaning should not be given to the provisions of Article 366(29A) otherwise the object underlying the Constitutional amendment would be defeated;

(e) The purpose underlying the enactment of the deeming fiction in Article 366(29A) was to override the limited definition of the expression sale in the Sale of Goods Act, 1930 and to isolate the sale of goods element involved, inter alia, in a contract which is a works contract;

(f) A works contract is one where there is a contract to do works and it does not cease to be such merely because any other obligation exists.

2. In an agreement which is governed by the MOFA, a conveyance of the interest in the flat or at any rate an interest therein is created at the stage of the execution of an agreement under Section 4. The doctrine of accretion is always subject to a contract to the contrary. The provisions of the MOFA contain a statutory stipulation to the contrary where the accretion to the property enures to the benefit of the flat purchaser; and

3. The Trade Circular and the amendment to Rule 58(1A) are only clarificatory in nature.

9. The rival submissions now fall for consideration.

Gannon Dunkerley

10. The position in Indian law prior to the enactment of the Forty Sixth Amendment to the Constitution was elaborated upon in the judgment of the Supreme Court in **State of Madras Vs. Gannon Dunkerley & Co.** (Supra). By an Amending Act of 1947 the State Legislature enlarged the definition of the expression sale in the Madras General Sales Tax Act to include a transfer of property in goods involved in the execution of a

works contract. The Supreme Court, while interpreting the provisions of Entry 48 in List II of Schedule VII of the Government of India Act, 1935, which dealt with taxes on the sale of goods held that since those words had in law acquired a definitive and precise meaning, it was that meaning which would have to be adopted. The expression sale of goods in Entry 48 of List II was hence required to be construed in the sense which it has in the Sale of Goods Act. The Supreme Court held that in order that there should be a sale of goods, there must be an agreement between the parties for the sale of the very goods in which the property passes eventually. In a building contract the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement in consideration of payment to be made and in such an agreement there is neither a contract to sell materials used in the construction nor does property pass as movables. However, it was asserted on behalf of the States that even if the supply of materials under a building contract cannot be regarded as sale of goods under the Sale of Goods Act, the contract is nonetheless a composite agreement, to contribute labour and produce the construction and it would be open to the State to split up that agreement into its constituent parts to impose tax on the component involving supply of materials. The Supreme Court rejected that contention holding that if in a works contract there is no sale of materials as defined under the Sale of Goods Act, then a disintegration of the building contract cannot yield a sale element which could be taxed under Entry 48. Moreover, property in the execution of a building contract does not pass to the other party to the contract as movable property and the materials which are used in the execution of the

construction become the property of the other only on the theory of accretion. In this view of the matter the Supreme Court held as follows:

> "34. To sum up, the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible – and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

The judgment in **Gannon Dunkerley**, therefore, emphasised that where a building contract is one and indivisible, no sale of goods as such would be involved which could be the subject matter of a tax on the sale of goods. However, the Court clarified that if the parties entered into distinct and separate contracts, one for the transfer of materials for money consideration and the other for the payment of remuneration for services and for the work done, there would in such a case be really two agreements. In such a situation it was open to the State to separate the agreement for sale from the agreement to do work and render service and to impose tax on the sale of goods and materials.

<u>The Report of the Law Commission and the Forty Sixth Amendment</u>

11. The Law Commission in the course of its Sixty First Report dealt with the judgment of the Supreme Court in **Gannon Dunkerley** and in its recommendations suggested that there were several courses of action

open to deal with the situation which had arisen following the judgment. The Law Commission was of the view that the judgment in **Gannon Dunkerley** adopted an unusually restricted interpretation of the expression “sale”. Before the judgment of the Supreme Court was pronounced, “sale” was usually regarded as including works contracts which would fall within the power of the States to levy a tax under Entry 54 of the State List. Taxes on that basis were being levied and recovered. The Law Commission recommended that Entry 54 of the State List may be amended; or a fresh entry may be inserted in the State List. Alternately it was suggested that a wide definition of the expression “sale” may be introduced in Article 366 so as to include works contracts.

12. Following the Report of the Law Commission the Forty Sixth Amendment to the Constitution was introduced. As a result of the Forty Sixth Amendment, Article 366(29A) was inserted into the Constitution. Clause (29A) as inserted reads as follows:

> (29A) "tax on the sale or purchase of goods" includes--
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,
>
> and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

The validity of the Forty Sixth Amendment : Builders' Association

13. In **Builders Association of India Vs. Union of India**[3] the validity of the Forty Sixth Amendment was upheld by a Constitution Bench of the Supreme Court. The Supreme Court rejected the contention which was urged on behalf of the States to the effect that in the case of a works contract the transfer of property in goods passes as a conglomerate and that it would not be possible to disintegrate the contract into a contract for sale of goods and a contract for work and labour. A submission was made on behalf of the States that consequently the State should not be subjected to the discipline of Article 286 of the Constitution. The Supreme Court

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3. (1989) 2 SCC 645

noted that as a result of the judgment in **Gannon Dunkerley** where a contract was entered into in two parts viz. a part for the sale of goods and materials and another for supply of labour and services, sales tax was leviable on goods which were agreed to be sold under the first part. But no sales tax could be leviable where the contract in question was an indivisible works contract. After the Forty Sixth Amendment a works contract which was an indivisible contract is, by legal fiction, a contract which is divisible, one for sale of goods and another for supply of labour and services. Prior to the Forty Sixth Amendment the Revenue could not have contended that when the goods and materials were supplied under distinct and separate contracts, an assessment of sales tax could be made ignoring Article 286. Consequently, even after the Forty Sixth Amendment, it would not be open to the States to contend that they were not subject to the restriction imposed by Article 286 of the Constitution. The Supreme Court, in the course of its judgment, held as follows:

> “...Ordinarily unless there is a contract to the contrary in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed, when the goods or materials used are incorporated in the building. The contractor becomes liable to pay the sales tax ordinarily when the goods or materials are so used in the construction of the building and it is not necessary to wait till the final bill is prepared for the entire work.”

Gannon Dunkerley II

14. The effect of the Forty Sixth Amendment fell for consideration by a

Constitution Bench of the Supreme Court in **Gannon Dunkerley Vs. State of Rajasthan**[4]**.** The Supreme Court held that as a result of the Forty Sixth Amendment a contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for the sale of goods and another for the supply of labour and services. As a result, a contract which is single and indivisible has been brought on par with a contract containing two separate agreements. If the legal fiction in Article 366(29A)(b) has to be carried to its logical end, it would follow that even in the case of a single and indivisible contract there is a deemed sale of goods involved in the execution of the works contract. Such a deemed sale, according to the Supreme Court, has all the incidents of a sale of goods involved in the execution of the works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services.

15. In the decision in **Gannon Dunkerley** (Supra) where the Forty Sixth Amendment was construed, the Supreme Court accepted the contention of the States that in order to determine the value of goods involved in the execution of works contracts, it would be open to the States to adopt a convenient mode for such determination by taking the value of a works contract as a whole and to deduct therefrom the cost of labour and services rendered by the contractor during the course of the execution of the works contract. The Supreme Court indicated that a deduction would have to be made from the value of the entire works contract of charges towards labour and services which would cover the

4. (1993) 1 SCC 364

following:

> “a) Labour charges for execution of the works;
>
> b) amount paid to a sub-contractor for labour and services;
>
> c) charges for planning, designing and architect's fees;
>
> d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
>
> e) cost of consumables such as water, electricity, fuel etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
>
> f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
>
> g) other similar expenses relatable to supply of labour and services;
>
> h) profit earned by the contractor to the extent it is relatable to supply of labour and services;
>
> The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.”

The Supreme Court has also emphasised that there could be cases where a contractor has not maintained proper accounts or the accounts are not found to be worthy of credence by the assessing authority. The Supreme Court held that in such cases it would be permissible for state legislation to prescribe a formula for determining charges for labour and services by fixing a particular percentage of the value of the works contract and to

allow a deduction of the amount which is determined from the value of the works contract for the purpose of determining the value of the goods involved in its execution. However, the amount deductible under the formula towards charges of labour and services should not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract.

BSNL

16. In **Bharat Sanchar Nigam Ltd. Vs. Union of India**[5]**,** the Supreme Court, inter alia, considered as to what would constitute goods in the case of telecommunications contracts, for the purposes of Article 366(29A)(d). The Supreme Court also dealt with whether there is a transfer of a right to use any goods by providing access or a telephone connection by a telephone service provider to a subscriber. Related to this was whether the nature of the transaction involved a composite contract of service and sale of which the sale element could be taxed. The judgment of the Supreme Court notes that all the sub-clauses of Article 366(29A) bring transactions where one or more of the essential ingredients of sale under the Sale of Goods Act, 1930 are absent within the ambit of purchase and sale for the purpose of levy of sales tax. The principle in **Gannon Dunkerley** would only to that extent stand modified. The Constitutional Amendment allows by a legal fiction certain specific composite contracts to be made divisible where a sale element could be isolated and be

5. (2006) 3 SCC 1

subjected to sales tax. Where a composite contract falls within the description of one of the specific clauses covered by Article 366(29A), the legal fiction would come into operation. In such cases, as a consequence of the legal fiction, the contract would have to be construed as being divisible where the sale element could be isolated and brought to tax. For composite contracts other than those mentioned in Article 366(29A), the test would continue to be whether the parties intended separate rights arising out of the sale of goods. If there was no such intention, there is no sale even if the contract could be disintegrated. The judgment in **BSNL** is authority for the principle that after the enactment of the Forty Sixth Amendment, the sale element of those contracts which are governed by any of the six sub-clauses of Clause (29A) of Article 366 is made severable and that it is by a fiction of law isolated and subjected to sales tax by the State Governments under Entry 54 of List II.

The content of a works contract

17. The foundation of the submission which has been urged on behalf of the petitioners is that in the case of a works contract a transfer of property in the goods takes place only as a result of accretion. Hence, it has been urged that where a contract involves a transfer of immovable property it is not a works contract. The submission of the petitioners is premised on the hypothesis that a works contract is a contract for works which involves only two elements: (i) a contract for the supply of goods and materials; and (ii) a contract for labour and services. If a transfer of immovable property takes place, the contract would in this submission

involve a third element and would cease to be a works contract.

18. Now, in order to consider the tenability of the submission, it would be necessary to have regard to the decided cases on the subject. Many of them shed light on the genesis of the distinction between a contract for work and services and a contract for the sale of goods. In **Commissioner of Sales Tax Vs. Purshottam Premji**[6] the Supreme Court dealt with a point of distinction between a contract for work or services and a contract for the sale of goods. That distinction finds elaboration in the following observations:

> "The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. Ultimately the true effect of an accretion made in pursuance to a contract has to be judged, not by an artificial rule that the accretion may be presumed to have become by virtue of affixing to a chattel, part of that chattel, but from the intention of the parties to the contract."

6. 1970 (2) SCC 287

19. In **Ram Singh & Sons Engineering Works Vs. Commissioner of Sales Tax**[7] the Supreme Court held as follows:

> "Now, the distinction between a contract of sale and a contract for work and labour has been pointed out in Halsbury's Laws of England, 3rd Edn., Volume 34, para 3 at page 6 in the following words:
>
> > A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel.
>
> The primary test is whether the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale or it is carrying out of work by bestowal of labour and service and materials are used in execution of such work. This test has been recognised and approved in a number of decisions of this Court and it may now be regarded as beyond controversy, but the real difficulty arises in its application as there are a large number of cases which are on the border line and fall within what may be called grey area. To resolve this difficulty, the courts have evolved some subsidiary tests and one of such

7. (1979) 1 SCC 487

> tests is that formulated by this Court in **Commissioner of Sales Tax, Madhya Pradesh v. Purshottam Premji**....”

The principal test, therefore, which was accepted by the Supreme Court, is whether the contract is principally for the transfer of a property in a chattel as a chattel to the buyer or whether it is for carrying out work by the bestowal of labour and service and materials are used in the execution of the work. The subsequent judgment of the Constitution Bench of the Supreme Court in **Builders’ Association of India** (Supra) adverts to the infinite variety of the manifestation of works contracts. The judgment in **Builders Association** also takes note of the principle that ordinarily unless there is a contract to the contrary, in the case of a works contract the property in the goods used in the construction of a building passes to the owner of the land on which the building is constructed when the goods or materials used are incorporated in the building. Hence, even the principle of accretion, which ordinarily applies, is subject to a contract to the contrary.

20. The judgment of the Supreme Court in **Builders’ Association** underlines the principle that the ambit of the expression “works contract” cannot be restricted to a particular category of works contracts. The judgment of the Supreme Court in **Builders’ Association** emphasises this principle in the following observations:

> “...We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of 'works-contracts'. The case-book is full of the illustrations of the infinite variety of the manifestation of 'works-contracts'.

> Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing-power of the State as are applicable to 'works-contracts' represented by "Building-Contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366(29-A), would equally apply to other species of 'works contracts' with the requisite situational modifications."

21. In **Hindustan Shipyard Ltd. Vs. State of A.P.**[8] the Supreme Court noted that it is difficult to lay down an inflexible rule to distinguish between a contract for sale and a contract for labour. The tests which the Supreme Court laid down, inter alia, were as follows:

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

8. (2000) 6 SCC 579

> main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour....”

The Supreme Court has noted that there may be three categories of contracts: (i) The contract may be for work to be done for remuneration and for supply of materials used in the execution of the work for a price; (ii) It may be a contract for work in which the use of the materials is accessory or incidental to the execution of the work; and (iii) It may be a contract for supply of goods where some work is required to be done as incidental to the sale. The first contract is a composite contract consisting of two contracts one for the sale of goods and the other is for work and labour. The second is a contract for work and labour not involving sale of goods. The third is a contract for sale where the goods are sold as chattels and the work done is merely incidental to the sale.

22. Hudson’s Building and Engineering Contracts[9] contains an instructive elucidation of a building or engineering contract:

> “A building or engineering contract may be defined, for the purposes of this book, as an agreement under which a person, in this book called variously the builder or contractor, undertakes for reward to carry out for another person, variously referred to as the building owner or employer, works of a building or civil engineering character. In the typical case, the work will be carried out upon the land of the employer or building owner, though in some special cases obligations to build may arise by contract where this is not so, for example, under building leases, and contracts for the sale of land with a house in the course of erection upon it.”

9. Eleventh Edition, Page 3.

The extract from **Hudson** is indicative of the fact that in a typical case work will be carried out upon the land of the employer or building owner though in some special cases an obligation to build may arise by contract where this is not so. The author cites the illustration of building leases and contracts for the sale of land with a house in the course of erection upon it. The elaboration of the concept in **Hudson** is indeed on the same lines as the judgment of the Supreme Court in **Builders' Association** which notes the variations implicit in the notion of works contracts. Therefore, as a matter of first principle, it cannot be postulated that a contract would cease to be a works contract if any more than only two elements are involved in its execution viz. (i) a supply of goods and materials; and (ii) performance of labour and services. In the modern context and having regard to the complexity of work, it would be simplistic to reduce the connotation of works contracts to contracts only involving the aforesaid two elements. When the Forty Sixth Amendment was enacted, no decided case had reduced the substratum of a works contract only to contracts involving the aforesaid two elements. As a matter of principle it would not be permissible to constrict or restrict the scope of works contracts and to exclude from their purview contracts involving situational modifications. Indeed, as Hudson's treatise notes, a works contract may even involve a factual situation of a building lease or a contract for the sale of land with house in the course of erection upon it.

23. An illustrative example of a situational variation is a judgment of the Allahabad High Court in **Radha Raman v. State of U.P.**[10]**,** albeit in

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10. AIR 1953 Allahabad 700

the context of Land Acquisition Act, 1894. The expression "work" was indicated to have the following connotation:

> "...the word "work" has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural, the word certainly means some outstanding or important result of the labour that has been bestowed, and large industrial and scientific establishments are called works; but in the singular the meaning is not confined in the field of construction to only large or important establishments. If a mason has constructed a wall, it is the work of that mason, and if an engineer has constructed a house it is the work of that engineer. The word really gets its colour and complexion from the nature of the work, and when used in singular with reference to constructions it is not confined to only big industrial or scientific constructions...."

The connotation of the expression "works" in Section 9-A of the Representation of the People Act, 1951 has been construed by the Supreme Court in **Kartar Singh Bhadana Vs. Hari Singh Nalwa[11].**

24. Works contracts have varying connotations. The scale and complexity of commercial transactions in modern times has increased on a scale that has been unprecedented before. The need to structure an efficient business organisation and to achieve economies of scale in business transactions has not only led to cost cutting in business. Negotiations have become complex before contracts are settled. Contractual conditions and stipulations display a high degree of sophistication as promoters of business work themselves around meeting

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11. (2001) 4 SCC 661

the requirements of legal and regulatory regimes. The modern complexity of business is as much a product of as it is a cause for the complexity of regulatory mechanisms. Traditional forms of contract undergo a change as business seeks to meet new requirements and expectations from service providers in an increasingly competitive market environment. Increasing competition, following the opening up of the Indian economy to increased private investment has had consequences for the land market and the business of building and construction. The nature and complexity of building contracts has changed over time. The obligations which business promoters assume under works contracts may vary from situation to situation and contractual clauses are drafted to meet the demands of the trade, the needs of consumers of services and the requirements of regulatory compliance. So long as a contract provides obligations of a contract for works, and meets the basic description of a works contract, it must be described as such. The assumption of additional obligations under the contract will not detract from the situation or the legal consequences of the obligations assumed.

MOFA

25. Now it would be necessary to consider the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (the **MOFA**). The Act is, “An Act to regulate in the State of Maharashtra, the promotion of the construction of the sale and management, and the transfer of flats on ownership basis.” The Act was enacted upon the

report of an Expert Committee constituted by the State Government. Section 2(a-1) defines the expression “flat” as follows:

> “(a-1) “Flat” means a separate and self contained set of premises used or intended to be used for residence, or office, or show-room or shop or godown or for carrying on any industry or business (and includes a garage), the premises forming part of a building and includes an apartment.”

Clause (c) of Section 2 defines the expression “promoter” thus:

> ““promoter” means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both.”

Section 3 has imposed liabilities on promoters. A promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, is required to produce information and documents mentioned in the provision. The information which is required to be disclosed by the promoter includes a disclosure about the nature of the title to the land, of encumbrances on the land, inspection of plans and specifications of the building, the nature of the fixtures, fittings and amenities, prescribed particulars as respects the design and materials to be used in the construction of the building and the date by which possession would be handed over. A promoter is also required to disclose the outgoings inclusive of ground rent and municipal

taxes, the carpet area of flats, the price of the flat including the proportionate price of the common areas and facilities and the nature, extent and description of the common areas and facilities. Under Section 4 the promoter is required, before accepting any money as advance payment, to enter into a registered agreement in the prescribed form. The agreement is required to contain the particulars specified in clause (a) of sub-Section (1A). The liability of the promoter to construct a building according to the plans and specifications approved by the local authority; the date by which possession of the flat would be handed over; the extent of the carpet area of the flat; the price of the flat including the proportionate price of the common areas and facilities and the nature, extent and description thereof have to be incorporated. The model form of agreement is prescribed in Form V to the Act. Under the statutory form it is, inter alia, prescribed, that the payment of the price shall be made by the purchaser to the promoter in a phasewise manner according to the progress of the construction. Under clause 18(h) the flat purchaser is required to bear and pay for the increase in local taxes, water charges and other levies. Under clause 20 it has been stipulated that the agreement would not be construed as a grant, demise or assignment in law of the said flats or plot and building and the flat purchaser shall have no claim save and except in respect of the flat agreed to be sold to him. The open spaces, parking spaces and common areas remain the property of the promoter until the land and building is transferred to a co-operative society. Under Section 7, after the plans and specifications of the building as approved by the local authority are disclosed or furnished to a person who agrees to take one or more flats, the promoter is precluded

from making any alterations in the structures without the previous consent of the persons who have agreed to take flats in the building. Under Section 9, a promoter upon executing an agreement for sale of any flat is prohibited from creating any mortgage or charge in the flat or in the land without the previous consent of the purchasers. Section 9 further stipulates that, if any such mortgage or charge is made or created without such previous consent, after the agreement under Section 4 is registered, it shall not affect the right and interest of such persons. Under Section 11 a promoter is required to take all necessary steps to complete his title and to convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company or association, his right, title and interest in the land and building. Under Section 12 every person who has executed an agreement to take a flat is required to pay at the proper time and place the price and his proportionate share of the municipal taxes, water and electricity charges, ground rent and other public charges in accordance with his agreement with the promoter.

26. Two decisions of learned Single Judges of this Court have adverted to the special nature of the obligations which are cast upon the promoter under the MOFA. In **Vrindavan (Borivali) co-operative Housing Society Ltd. Vs. Karmarkar Brothers**[12], a learned Single Judge of this Court noted that an agreement under the MOFA is not an ordinary agreement like a contract of sale because it is required to be executed in conformity with the provisions of Section 4 and has to be registered. The agreement involves a statutory compulsion to provide certain terms.

12. 1983(2) Bom.C.R. 267

Consequently the learned Single Judge noted that an agreement under the MOFA cannot be equated with an ordinary contract of sale and a suit seeking enforcement of those obligations could not be regarded as an ordinary suit for specific performance of a contract of sale. A similar view was taken in a subsequent decision of this Court in **Maria Philomina Pereira Vs. Rodrigues Construction**[13] :

> "...under the Ownership Flats Act, if the promoter does not comply with these obligations, there are other serious consequences to follow, including a prosecution. Ordinarily such considerations would not arise when a simple contract entered into between two individuals is broken. Therefore, it must necessarily be held that whenever a builder enters into an agreement with any flat purchaser, containing provisions which are to be incorporated as provided under the said Act, all such agreements must necessarily be held to be special agreements which can be enforced by filing suits where the valuation would be a notional valuation under Section6(iv)(j) of the Bombay Court-fees Act, 1959."

27. In the judgment in **Jayantilal Investments Vs. Madhuvihar Co-op. Housing Society**[14], the Supreme Court has noted that the State Legislature has sought to regulate the activities of promoters in Sections 3 and 4. An agreement between the promoter and flat purchaser is mandatorily required to comply with the prescribed Form V. The Supreme Court held that Clauses 3 and 4 of the prescribed Form are declared to be statutory and mandatory by the Legislature because the

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13. AIR 1991 Bombay 27

14. (2007) 9 SCC 220

promoter is not only obliged statutorily to give particulars of land, amenities and facilities among other things, but he is obliged to make a full and true disclosure of the development potential of the plot which is the subject matter of the agreement. The Supreme Court noted that at the time of execution of the agreement with the flat taker, the promoter is obliged statutorily to place the entire project / scheme. In that context the Supreme Court held as follows:

> "In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA *vide* Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc."

28. The nature of an agreement under the MOFA came up for consideration before a Division Bench of this Court, in the context of the provisions of the Bombay Stamp Act, 1958 in **The State of Maharashtra Vs. Mahavir Lalchand Rathod**[15]. The Division Bench dealt with a batch of petitions where agreements for sale were executed in terms of Section 4 of the MOFA. These agreements were impounded by the registering authority and the issue which was raised before the Division Bench was whether they were liable to stamp duty under the Act. The

15. 1992(2)Bom.C.R.1

Division Bench, after adverting to the terms of the agreement and to Section 2(g), came to the conclusion that though the agreements were described as agreements to sell, they were in effect and for all purposes conveyances falling under Section 2(g) in as much as the right, title and interest in the flat would stand transferred in favour of the purchaser on the payment of installments. The Division Bench noted that there is no clause in the agreement which required the developer to execute any other deed of conveyance at a later stage. The Division Bench held that it was difficult to accept that the agreement was a mere agreement to sell and that it did not create any right, title and interest in favour of the flat purchaser. The document, the Division Bench held, would be liable to the payment of stamp duty under Article 25 on the ground that it is a conveyance and whether or not possession was given on that date was not a relevant and decisive factor. The view taken by the Division Bench was affirmed by the Supreme Court in appeal in **Veena Hasmukh Jain Vs. State of Maharashtra**[16].

29. In enacting the provisions of the MOFA, the State Legislature was constrained to intervene, in order to protect purchasers from the abuses and malpractices which had arisen in the course of the promotion of and in the construction, sale, management and transfer of flats on ownership basis. The State Legislature has imposed norms of disclosure upon promoters. The Act imposes statutory obligations. The manner in which payments are to be made is structured by the Legislature. As a result of the statutory provisions, an agreement which is governed by the MOFA is

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16. (1999) 5 SCC 725

not an agreement simplicitor involving an ordinary contract under which a flat purchaser has agreed to take a flat from a developer but is a contract which is impressed with statutory rights and obligations. The Act imposes restrictions upon a developer in carrying out alterations or additions once plans are disclosed, without the consent of the flat purchaser. Once an agreement for sale is executed, the promoter is restrained from creating a mortgage or charge upon the flat or in the land, without the consent of the purchaser. The Act contains a specific stipulation that if a mortgage or charge is created without consent of purchasers, it shall not affect the right and interest of such persons. There is hence a statutory recognition of the right and interest created in favour of the purchaser upon the execution of a MOFA agreement. Having regard to this statutory scheme, it is not possible to accept the submission that a contract involving an agreement to sell a flat within the purview of the MOFA is an agreement for sale of immovable property simplicitor. The agreement is impressed with obligations which are cast upon the promoter by the legislature and with the rights which the law confers upon flat purchasers. It is in that background that the Division Bench, though in the context of the provisions of the Stamp Act, recognised that an interest is created in favour of a flat purchaser by execution of the agreement. The agreement is impressed with a statutory character and flavour as held by the Supreme Court in **Jayantilal Investments.** Agreements governed and regulated by the MOFA are not agreements to sell simpiciter, as construed in common law. The legislature has intervened to impose statutory obligations upon promoters; obligations of a nature and kind that are not traceable to the ordinary law

of contract. Correspondingly, the rights which are conferred upon flat purchasers transcend those which prior to the enactment of the legislation would have been available under ordinary contractual conditions. The legislation now defines the content of the contract, by mandating the form of the contract and the stipulations which it must contain. The legislature has created rights in purchasers and imposed obligations upon promoters. The Act regulates promotion and construction. The work which the promoter carries on is regulated to protect the interests of the purchasers. Every stage, including the disclosure of plans and specifications, the execution of work in accordance with the plans and specifications disclosed, the creation of charges in or upon the flat agreed to be sold and the land, and the eventual transfer of title to a co-operative society is governed by statutory obligations.

30. The foundation of the submission of the Petitioners is based on the provisions of the MOFA. Those provisions have been analysed earlier. But it is necessary to note here that the MOFA is not the only regulatory enactment governing the promotion, sale and transfer of flats in the State. The Maharashtra Apartment Ownership Act, 1970 was enacted to provide for the "ownership of an individual ownership apartment in a building and to make such apartment heritable and transferable property." Section 2 provides that the Act applies only to property, the sole owner or all of the owners of which submit it to the provisions of the Act by executing and registering a declaration as provided in the Act. Section 4 stipulates that every apartment together with its undivided interest in the common areas and facilities appurtenant to the apartment shall for all purposes

constitute heritable and transferable immovable property within the meaning of any law for the time being in force. Section 6 stipulates that each apartment owner shall be entitled to an undivided interest in the common areas and facilities in a percentage expressed in the declaration. Sub-section (2) of Section 6 provides that the percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners expressed in an amended declaration. Section 9 stipulates that once a declaration has been made, as provided in the Act, no encumbrance of any nature shall thereafter arise or be effective against the property. An encumbrance can be created only against each apartment and the percentage of undivided interest in the common areas and facilities appurtenant thereto. Under the second proviso to sub-section (1) of Section 9, it has been provided that no labour performed or material furnished with the consent or at the request of an apartment owner or his agent or his contractor or sub-contractor shall be the basis for a charge or any encumbrance under the provisions of the Transfer of Property Act, 1882, against the apartment or any other property of any other apartment owner not expressly consenting to it. Section 11 provides for the contents of a declaration. A declaration is inter alia required to contain the description of the building, the number of storeys and basements, the number of apartments and the principal materials of which it is or is to be constructed. The words “is to be constructed” are indicative of the fact that a declaration is contemplated even before the construction is complete. An interest in the flat and in the common areas and facilities

arises under the law even at that stage. The declaration is also to provide for the value of the property and of each apartment and percentage of undivided interest in the common areas and facilities. Section 12 provides for contents of a Deed of Apartment. The provisions of the Apartment Ownership Act, 1970 hence recognize an interest of the purchaser of an apartment, not only in respect of the apartment which forms the subject matter of the purchase, but an undivided interest, described as a percentage in the common areas and facilities.

31. The constitutional validity of the provisions of the MVAT Act, 2002, as amended, is not contingent upon any other statutory regulation of apartments under cognate legislation in the State of Maharashtra. We have, however, considered the effect of the provisions of the MOFA since they were pressed in aid on behalf of the Petitioners. The constitutionality of the MVAT Act, 2002 must be determined by interpreting the statutory provisions of that Act as they stand. Having considered the issue of constitutional validity, the Petitioners have been unable to displace the presumption of constitutionality that must ordinarily apply to all legislation.

32. We find ourselves unable to accept the submission which has been urged on behalf of the petitioners that the Legislature, in the provisions of Section 2(24) as amended, has transgressed the limitations on its legislative power by bringing what were not in their substance works contracts within the field of the amended definition. The submission which has been urged on behalf of the petitioners proceeds on the

foundation that a works contract is a contract for the purpose of work which involves only two elements viz. a supply of goods and material and a supply of labour and services. Works contracts have numerous variations and it is not possible to accept the contention either as a matter of first principle or as a matter of interpretation that a contract for work in the course of which title is transferred to the flat purchaser would cease to be a works contract. As the Supreme Court noted in its judgment in **Builders' Association**, the doctrine of accretion is itself subject to a contract to the contrary. The provisions of the MOFA, enacted in the State of Maharashtra, evince a legislative intent to protect the interest of flat purchasers by creating an interest in the property which is agreed to be acquired, in terms of the statutory provisions.

33. The effect of the amendment to Section 2(24) is to clarify the legislative intent that a transfer of property in goods involved in the execution of works contract including an agreement for building and construction of immovable property would fall within the description of a sale of goods within the meaning of the provision. Under Article 366(29A), the Constitution provides the constitutional content of the expression "tax on the sale or purchase of goods" in terms of an inclusive definition. The expanded content of that expression now provides the constitutional ambit of the legislative entry, Entry 54 of List II, which deals with taxes on the sale or purchase of goods, other than newspapers. All the instances of taxes which fall within clauses a to f of Article 366 (29A) fall within the ambit of Entry 54. State legislation which meets the description of Article 366 (29A) is hence legislation which would fall

within Entry 54 of List II. In order to meet the description contained in clause b, State legislation must provide for 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. Such a transfer shall be deemed to be a sale by a person making the transfer and a purchase of those goods by the person to whom the transfer is made. The amendment made by the State Legislature does not transgress the limitations which have been imposed by Article 366(29A)(b) of the Constitution.

34. The amended definition of the expression sale in clause b(ii) of the Explanation to Section 2(24) brings within the ambit of that expression transactions of that nature which are referrable to Article 366(29A)(b). The transactions which the legislature had in mind involve works contracts. What the state legislatures can tax under the expanded definition contained in clause b of Article 366(29A) must meet the governing requirements of that clause. There must be a transfer of property in goods involved in the execution of a works contract. The relevant clause in Section 2(24) is valid because it does not transgress the boundaries set out in Article 366(29A). Indeed, after the 46th Amendment, State legislation must confine itself to the limits set out even in the expanded concept of what constitutes a sale or purchase of goods in Article 366(29A). State legislation cannot expand the ambit of what constitutes a tax on the sale or purchase of goods beyond the constitutional frontiers. In order that Section 2(24) remains within constitutional boundaries, in the context of works contracts, it must be read to cover those cases which fall within the expanded definition as

elaborated after the 46th Amendment. Whether there is a works contract in a given case is for assessing authorities to determine. As noted earlier, it is not possible to provide a comprehensive or all encompassing list of what contracts constitute works contracts. Section 2(24) properly construed, even after its amendment, reaches out to those cases which fall within the ambit of Article 366(29A). Explanation b(ii) to Section 2(24) in other words covers those transactions where there is a transfer of property in goods, whether as goods or in any other form, involved in the execution of a works contract. Once those parameters are met, the amended definition in the State legislation in the present case provides a clarification or clarificatory instances. When constitutional norms govern state legislation such as those provided in Article 366(29A) in this case, the legislation must be construed in the context of those norms which it cannot transgress. The law is valid because it does not breach those boundaries. There is no breach of constitutional boundaries.

35. The challenge to Rule 58(1A), may now be considered. The Rule has provided that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property involved in the execution of the construction contract is also transferred, it is the latter component which is brought to tax. The value of the goods at the time of transfer is to be calculated after making the deductions which are specified under sub-rule (1). The judgment in the second **Gannon Dunkerley** specifies the nature of such deductions which can be made from the entire value of the works contracts. This was permitted to the States as a convenient mode for

determining the value of the goods in the execution of the works contract. Similarly, the cost of the land is required to be excluded from the total agreement value. Sub-rule (1A) stipulates that the cost shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 as applicable on 1 January of the year in which the agreement to sell the property is registered. The Proviso stipulates that deduction towards the cost of land under the sub-rule shall not exceed 70% of the agreement value. The petitioners have not brought on the record any material to indicate that the proviso to sub-rule (1A) of Rule 58 is arbitrary. Rule 58(1A) provides for the measure of the tax. The measure of the tax, as held by the Supreme Court in its decision in **Union of India Vs. Bombay Tyre International Ltd.**[17], must be distinguished from the charge of tax and the incidence of tax. The Legislature was acting within the field of its legislative powers in devising a measure for the tax by excluding the cost of the land.

36. In so far as the Trade Circular dated 7 February 2007 is concerned, the Commissioner of Sales Tax has only adverted to the decision of the Supreme Court in **K. Raheja Development Corporation** (Supra). The Circular, however, clarifies by way of abundant caution, that it cannot be used for legal interpretation and was only intended as a clarificatory guide. A trade circular is only meant for the guidance of the trade. A circular cannot override a legislative provision or an exercise in the nature

17. (1984) 1 SCC 467

of subordinate legislation. The constitutional validity of a legislative provision or of subordinate legislation cannot be determined by a circular. In its decision in the case of **K. Raheja Development Corporation Vs. State of Karnataka**[18], the Supreme Court dealt with the provisions of the Karnataka Sales Tax Act, 1957. The constitutional validity of the provision was not in issue. Section 2(1)(v-i) defined a works contract to include any agreement for carrying out for cash, deferred payment or other valuable consideration, inter alia, the building and construction of immovable property. The Supreme Court in the course of its judgment adverted to the wide definition of the expression. In paragraph 20 of the judgment, the Supreme Court held as follows:

> “Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various instalments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property. Of course, under clause 7 they have right to terminate the Agreement and to dispose of the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete it would be a works contract.”

18. (2005) 5 SCC 162

The attention of the Court has been drawn to the fact that the decision in **K.Raheja** has now been placed for consideration before a larger Bench. The judgment in **K.Raheja** did not involve a challenge to the Constitutional validity of the provisions of the Karnataka Act and the proceedings before the Supreme Court arose from the proceedings for assessment. We have independently considered the constitutional challenge to the provisions of Section 2(24) of the Maharashtra Value Added Tax Act and the Rules and hold it to be lacking in substance.

37. As regards the challenge to the Notification dated 9 July 2010, it may be noted that the Notification which has been issued in exercise of power conferred by Section 42(3A) provides for a composition scheme. A composition scheme is made available at the option of the registered dealer. There is no compulsion or obligation upon a registered dealer to settle. The Court may in an extreme instance interfere in the exercise of its powers of judicial review only where the terms of a composition scheme are ex facie arbitrary and extraneous so as to be violative of Article 14. That has not been established before the Court in this case. There is no merit in the challenge to the Constitutional validity of the composition scheme.

38. Finally we may also deal with the submission as regards the plurality of deemed sales. The submission as regards plurality of deemed sales is based on the decision of the Supreme Court in **State of A.P. Vs. Larsen & Toubro Ltd.**[19] In that case, the issue before the Supreme Court

19. (2008) 9 SCC 191

was whether a turnover of Rs.111.53 crores of the sub contractors was liable to be added to the turnover of L. & T. The Supreme Court noted that once the work is assigned by L. & T. to its sub contractor, the former would cease to execute the works contract in the sense contemplated by Article 366(29A)(b) because the property would pass on accretion and there was no property in the goods with the contractor which was capable of re-transfer whether as goods or in some other form. In that context the Supreme Court held that if the submission of the Revenue were to be accepted, that would result in a plurality of deemed sales which would be contrary to Article 366(29-A)(b) of the Constitution and may also result in double taxation. In the present case, in the State of Maharashtra, the Legislature has specifically incorporated the provisions of Section 45(4) in the MVAT Act, 2002. The effect of Section 45(4) is to preclude the possibility of a double taxation of the kind that the Supreme Court noted would arise in that case. Consequently, in view of the specific statutory provision contained in Section 45(4), no issue of plurality of deemed sales would arise.

39. The definition of the expression “works contract” in Section 2(ja) of the Central Sales Tax Act, 1956, which has been introduced by Act 18 of 2005 with effect from 13 May 2005 is only for the purposes of that Act. The State law in the present case does not infringe the provisions of clauses a and b of Article 286(3), for the aforesaid reason.

40. The notices which were issued by the State Sales Tax authorities calling for disclosure of information fell within the purview of Sections

64 and 66 of the MVAT Act.

41. For the aforesaid reasons, we are of the view that there is no merit in the challenges addressed in this batch of petitions. No other submission has been urged. The Rule is discharged. The Petitions are dismissed. There shall be no order as to costs.

42. The Notices of Motion do not survive and stand disposed of.

(DR.D.Y. CHANDRACHUD,J.)

(R.D.DHANUKA, J.)