M/S NEW INDIA SUGAR MILLS LTD.

v.

COMMISSIONER OF SALES TAX, BIHAR

1962

November, 26.

(J. L. KAPUR, M. HIDAYATULLAH and SHAH, JJ.)

Sales Tax—Sugar Control—Allotment by Controller—Supply of Sugar under allotment order—If amounts to sale—Bihar Sales Tax Act 1947 (Bihar 19 of 1947), s. 2 (g)—Sugar and Sugar Products Control Order 1946—Sale of Goods Act, 1930 (3 of 1930), s. 4—Government of India Act, 1935 (26. Geo. 5 Ch. 2), Seventh Schedule, List II, Entry 48.

Under the Sugar and Sugar Products Control Order, 1946, the consuming States intimated to the Sugar Controller of India their requirements of sugar and the factory owners sent statements of stocks of sugar held by them. The Controller made allotments to various States and addressed orders to the factory owners directing them to supply sugar to the States in question in accordance with the despatch instructions from the State Governments. Under such allotment orders, the assesses, a sugar factory in Bihar, despatched sugar to the State of Madras. The State of Bihar treated these transactions as sales and levied sales tax thereon, under the Bihar Sales Act, 1947. The assesses contended that the despatches of the sugar pursuant to the directions of the Controller did not amount to sales and that no sales tax was exigible on such transactions.

Held (per Kapur and Shah, JJ, Hidayatullah, J., *dissenting*), that the transactions did not amount to sales and were not liable to sales tax. Under Entry 48, List II of Government of India Act, 1935, the Provincial Legislature had no power to levy sales taxes on a transaction which was not of the nature of a sale of goods, as understood in the Sale of Goods Act. To constitute a sale of goods, property in the goods must be transferred from the seller to the buyer under a contract of sale. A contract of sale between the seller and the buyer is a prerequisite to a sale. Despatches of sugar under the directions of the Controller were not the result of any such contract of sale. There was no offer by the assesses to the State of Madras and no acceptance by the latter; the assessee was, under the Control Order, compelled to carry out the directions of the Controller and it had no volition in the matter. Intimation by the State

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of its requirement of sugar to the controller or communication of the allotment order to the assesses did not amount to an offer. Nor did the mere compliance with despatch instructions issued by the Controller, which the assessee could not decline to carry out, amount to acceptance of an offer or to making of an offer. A contract of sale postulates exercise of volition on the part of the contracting parties.

State of Madras v. *Gannon Dunkerley & Co.*, [1959] S. C. R. 379, relied on.

The Tata Iron & Steel Co. Ltd. v. *The State of Bihar*, [1958] S. C. R. 1355, explained.

Per Hidayatullah, J.—In these transactions there was a sale of sugar for a price and sales tax was payable in respect thereof. Though consent is necessary for a sale, it may be express or implied, and it cannot be said that unless the offer and acceptance are in an elementary direct form there can be no taxable sale. The controller permitted the assesses to supply sugar of a stated quality and quantity to the State of Madras; thereafter the two parties agreed to "sell" and "purchase" the sugar. So long as the parties trade under controls at fixed price they must be deemed to have agreed to such a price; there was an implied contract with an implied offer and an implied acceptance. The same is the position with respect to the quality and quantity fixed by the Controller. When the State, after receiving the permit, sent instructions to the assesses to despatch sugar and the assesses despatched it, a contract emerged and consent must be implied on both sides though not expressed antecedently to the permit.

State of Madras v. *Gannon Dunkerley Co.*, [1959] S.C.R. 379 and *The Tata Iron and Steel Co. Ltd.* v. *The State of Bihar*, [1958] S. C. R. 1355, explained.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 237 of 1961.

Appeal by special leave from the judgment and order dated September 30, 1958, of the Patna High Court in M.J.C. No. 5 of 1956.

S. T. Desai and *B. P. Maheshwari*, for the appellant.

S. P. Varma, for the respondent.

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1962. November 26. The Judgment of Kapur and Shah, JJ., was delivered by Shah, J. Hidayatullah, J., delivered a separate judgment.

SHAH, J.—M/S. New India Sugar Mills Ltd.—hereinafter called 'the assessees'—own a factory at Hasanpur in the State of Bihar. During the assessment period April 1, 1947, to March 31, 1948, the assessees who were registered as dealers under the relevant Sales Tax Acts despatched sugar valued at Rs. 6,89,482/- to the authorised agents of the State of Madras in compliance with the directions issued by the Controller exercising powers under the Sugar and Sugar Products Control Order, 1946. The Sales Tax Officer, Darbhanga rejected the plea of the assessees that despatches of sugar to the Province of Madras in compliance with the instructions of the Controller were not liable to be included in the taxable turnover, and ordered the assessees to pay sales tax on a taxable turnover of Rs. 27,62,226/. The order of assessment was confirmed by the Deputy Commissioner, but the Board of Revenue exercising jurisdiction in revision set aside the order, in so far as it related to the inclusion into the taxable turnover the value of sugar despatched to the Province of Madras. The Board of Revenue observed that the "Controller passed orders in exercise of statutory powers, which, as a result of mere compliance, could not create a contract in law," and there was no evidence justifying the view that there could "possibly be any contract between the assessees and some dealers in Madras or between the assessees" and the Sugar Controller. The Board of Revenue under the direction of the High Court of Judicature at Patna submitted under s. 25(3) of the Bihar Sales Tax Act, 1947, the following question for the opinion of the High Court :

> "Whether in the facts and circumstances of the case, the disposal of sugar to the Province of Madras is liable to be taxed."

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The High Court answered the question in the affirmative observing that the sugar despatched by the assessees to different Provinces including the Province of Madras under orders of the Controller was liable to be taxed under the provisions of the Bihar Sales Tax Act, 1947. With special leave the assessees have appealed to this Court against the judgment of the High Court.

The only question arising in the appeal is whether there was a *sale* by the assessees of sugar despatched by them to the Provincial Government of Madras in compliance with the directions issued by the Controller in exercise of authority under the Sugar and Sugar Products Control Order, promulgated on February 18, 1946, by the Central Government under powers conferred by sub-rule (2) of r. 81 of the Defence of India Rules. The material clauses of the Order concerning sugar are these. By cl. 3 of the Order producers of sugar were prohibited from disposing of or agreeing to dispose of or making delivery of any sugar except to or through a recognised dealer or persons specially authorised in that behalf by the Controller to acquire sugar on behalf of the Central Government or of a Provincial Government or of an Indian State. Clause 5 enjoined upon every producer or dealer duty to comply with such directions regarding production, sales, stocks or distribution of sugar as may from time to time be issued by the Controller. By cl. 6 the Controller was authorised to fix the price at which sugar may be sold or delivered, and upon fixation of the price all persons were prohibited from selling or purchasing or agreeing to sell or purchase sugar at a price higher than the fixed price. By sub-clause (1) of cl. 7 the Controller was authorised, *inter alia*, to allot quotas of sugar for any specified province, or area or market and to issue directions to any producer or dealer to supply sugar to such provinces, areas or markets or such persons or organisations, in such

quantities, of such types or grades, at such time, at such prices and in such manner as may be specified by the Controller, and sub-clause (2) provided that every producer shall, notwithstanding any existing agreement with any other person, give priority to, and comply with directions issued to him under sub-clause (1). Clause 11 provided that against a person contravening the provisions of the Order without prejudice to any other punishment to which he may be liable, an order of forfeiture of any stocks of sugar in respect of which the Court trying the offence was satisfied that the offence was committed may be passed. By sub-rule (4) of Rule 81 of the Defence of India Rules, 1939, contravention of orders made under the Rule was liable to be punished with imprisonment for a term which may extend to three years or with fine or with both.

The course of dealings between the assessees and the State of Madras to which sugar was, under the directions of the Controller, supplied by the assessees is stated by the High Court as follows :—

> "The admitted course of dealing between the parties was that the Government of various consuming States used to intimate to the Sugar Controller of India from time to time their requirement of sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government. A copy

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of the allotment order was simultaneously sent to the State Government concerned, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the draft should be sent to the State Bank and it should be drawn on Parry and Company or any other party which had been appointed as stockist importer on behalf of the Madras Government."

The assessees contend that sugar despatched pursuant to the directions of the Controller was not *sold* by them to the Government of Madras, and sales-tax was therefore not exigible in respect of those dispatches under the relevant Sales Tax Acts of the province of Bihar. The assessment period in respect of which the dispute is raised is one year—April 1, 1947, to March 31, 1948—for the first three months the relevant law imposing liability to pay tax was Bihar Act 6 of 1944 and from July 1, 1947, to March 31, 1948, liability to pay tax had to be determined under Bihar Act 19 of 1947. It is common ground that the scheme of the two Acts for levy of tax was similar and the definition of "sale" on which primarily the dispute centred under the two Acts was identical. We will therefore refer in dealing with this appeal as if the liability arose under Act XIX of 1947. The expression "sale" as defined under s. 2(g) of the Bihar Sales Tax Act, at the material time stood as follows :—

> "Sale means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment

or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge :

Provided that a transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have been made in Bihar."

Apparently in the first paragraph of the definition a transaction (other than a transaction expressly specified) in which there is a transfer of property in goods for valuable consideration, was included as a sale within the meaning of the Act. By the first proviso transfer of goods on hire purchase or other instalment system of payment are to be deemed sales. The second proviso (which has since been repealed) dealt with the *situs* of the sale and was not in truth a part of the definition of sale. What constituted a sale, the second proviso did not purport to say : it merely fixed for the purpose of the Bihar Sales Tax Act the place of sale, in the circumstances mentioned therein.

Tax is leviable under the Bihar Sales Tax Act on the gross turnover (exceeding a prescribed minimum) on sales "which have taken place in

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Bihar". Counsel for the assessees says that the value of sugar despatched in compliance with the directions of the Controller is not liable to be included in the taxable turnover, for there was no sale of sugar, despatched by the assessees, and that in any event the sale did not take place in Bihar. In elaborating his submission counsel says : Under the Government of India Act, 1935 the Provincial Legislature had power to legislate for levy of tax on "sale of goods" under Entry 48 of List II of the Seventh Schedule; that the expression "sale of goods" in the Entry was used not in the popular but in the narrow and technical sense in which it is used in the Indian Sale of Goods Act, 1930; that power under the entry could be exercised for taxing only those transactions in which by mutual assent between parties competent to contract property in goods was transferred absolutely from one person to another, in consideration of price paid or promised, and the transactions in which there was no mutual assent as a result of negotiations express or implied are not sales within the meaning of the Sale of Goods Act and therefore not sales within the meaning of the Bihar Sales Tax Act. Counsel alternatively submits that even if the despatches resulted in sales, as the sales did not take place in Bihar, the same were not liable to be taxed under the Bihar Sales Tax Act.

In popular parlance 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But that is not the meaning of 'sale' in the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act provides by its first sub-section that a contract of sale of goods is a contract where the seller agrees to transfer the property in goods to the buyer for a price. "Price" by cl. (10) of s. 2 means the money consideration for sale goods, and "where under a contract of sale property in the goods is transferred from the seller to the buyer,

the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulled, the contract is called an agreement to sell" (sub-section (3) s. 4). It is manifest that under the Sales of Goods Act a transaction is called sale only where for money consideration property in goods is transferred under a contract of sale. Section 4 of the Sale of Goods Act was borrowed almost *verbatim* from s. 1 of the English Sale of Goods Act 56 & 57 Vict. c. 71. As observed by Benjamin in the 8th Edn. of his work on 'sale', "to constitute a valid sale there must be a concurrence of the following elements viz. (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised".

The Provincial Legislature by Entry 43 List II of the Seventh Schedule of the Government of India Act, 1935 was invested with power to legislate in respect of "Taxes on sale of goods". The expression "sale of goods" was not defined in the Government of India Act, but it is now settled law that the expression has to be understood in the sense in which it is used in the Sale of Goods Act, 1930. In *the State of Madras* v. *Gannon Dunkerley & Co.* (1) this Court in considering whether s. 2 (i) Explanation I (i) of the Madras General Sales Tax Act IX of 1939 as amended by the Madras General Sales Tax Amendment Act XXV of 1947 was *intra vires* the Provincial Legislature, has decided that the expression 'sale of goods' in Entry 48, List II, is used not in the popular but in the restricted sense of the Sale of Goods Act, 1930. The primary question which fell to be determined in that case was whether in a "building contract which was one, entire and indivisible" there was sale of goods of the building materials used in the execution, liable to be taxed under the Madras General Sales Tax Act

(1) [1959] S.C.R. 379.

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which by s. 2 (c) defined 'goods' as meaning all kinds of movable property (except certain kinds which are not material in this case) and included all materials, commodities and articles including those to be used in the construction, fitting out, improvement or repair of immovable property, and by s. 2 (h) defined the expression 'sale' as meaning every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract. Power of the Provincial Legislature of Madras to legislate in respect of a levy of tax on the value of goods used in the execution of a works contract was challenged by a firm of building contractors, and this Court held that the power under Entry 48, List II, Seventh Schedule, did not include power to legislate for levying tax on the value of goods used "in the course of a building contract which was one, entire and indivisible". The Court held that the expression "sale of goods" in Entry 48 List II was used not in the popular sense but in the strictly limited sense in which it was defined in the Sale of Goods Act and that the Madras Provincial Legislature had no power to legislate under the power derived under Entry 48 in List II for taxing transactions other than those of sales strictly so called under the Sale of Goods Act. It was observed "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." In *Gannon Dunkerley & Company's case* (1) the Court was

(1) [1959] S.C.R. 379.

concerned to adjudicate upon the validity of the provisions enacted in acts of Provincial Legislatures imposing liability to pay sales tax—on the value of goods used in the execution of building contracts, and the judgment of the Court proceeded on the ground that power conferred by Entry 48 List II was restricted to enacting legislation imposing tax liability in respect of sale of goods as understood in the Sale of Goods Act, 1930, and that the Provincial Legislature under the Government of India Act, 1935 had no power to tax a transaction which was not a sale of goods, as understood in the Sale of Goods Act. The *ratio decidendi* of that decision must govern this case. According to s. 4 of the Sale of Goods Act to constitute a sale of goods, property in goods must be transferred from the seller to the buyer, under a contract of sale. A contract of sale between the parties is therefore a pre-requisite to a sale. The transactions of despatches of sugar by the assessees pursuant to the directions of the Controller were not the result of any such contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirement to the Province. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the State to purchase goods: he acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province, and no acceptance of any offer by the manufacturer. The manufacturer was under the control Order left no volition: he could not decline to carry out the order; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate, and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government.

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The High Court observed "as soon as an application for allotment is made, there is an implication of an offer to purchase the quantity of sugar at the price fixed by the Controller from the producer to whom the allotment order is to be made by the Controller. It is also clear that if the allotment order is communicated by the Controller to the assessee and the latter appropriates the sugar in accordance with the allotment order and in accordance with the despatch instructions of the competent officer appointed by the Madras Government, there is in the eye of law an acceptance of the offer by the assessee and a contract is immediately brought into existence between the parties". We are with respect unable to hold that this view is correct. The Provincial Government of Madras gave intimation of its requirements of sugar to the Controller and applied for allotment of sugar : thereby the Government was not making any offer to purchase sugar. Evidently the offer could not be made to the Controller because the Controller was not a manufacturer of sugar or his agent. The communication of the allotment order to the assessees was again not of any offer made by the State which it was open to the assessees to accept or decline. Mere compliance with the dispatch instructions issued by the Controller, which in law the assessees could not decline to carry out, did not amount to acceptance of an offer. A contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessees. By the Indian Contract Act 9 of 1872 a proposal or an offer is defined as signification by one person to another of his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence. When the person to whom the proposal is made or signified assents thereto, the proposal is said to be accepted. The person making the proposal is called the

promisor and the person accepting the proposal is called the promisee, and every promise or every set of promises, forming the consideration for each other is an agreement. These provisions of the Contract Act are by s. 2 (15) of the Sale of Goods Act, incorporated therein. There was on the part of the Province of Madras no signification to the assessees of their willingness to do or to abstain from doing anything, with a view to obtaining the assent of the assessees to such act or abstinence, and the Controller did not invite any signification of assent of the assessees to the intimation received by them. He did not negotiate a sale of sugar : he in exercise of his statutory authority, ordered the assessees to supply sugar to the Government of Madras. We are unable to hold that from the intimation of order of the Controller, and compliance therewith by the assessees any sale of goods resulted in favour of the State of Madras.

Mr. Varma appearing for the State of Bihar contended that even if there was no offer and no acceptance when intimation was sent by the Government of Madras to the Controller, and the Controller directed the assessees to deliver specified quantities of sugar, still by the conduct of the assessees in despatching sugar to Madras in pursuance of the directions of the Controller and acceptance of price by them, a contract of sale resulted. But the action on the part of the assessees in despatching the goods was not voluntary : they were compelled to send the goods. They could not be deemed by despatching sugar to have made any offer to supply goods and in the absence of any offer, no contract resulted by the acceptance of goods by the Provincial Government. To infer a contract from the compulsory delivery of sugar and acceptance thereof would be to ignore the true position of the parties, and the circumstances in which goods were delivered. Mr. Varma contended that in any event the

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Legislature had by the definition included in the expression 'sale of goods' all transfers of property in goods for consideration and the transactions which are sought to be taxed by the State of Bihar fell within that definition. Counsel submitted that a literal meaning should be given to the words of the Act without any pre-disposition as to what the expression 'sale' means under the Sale of Goods Act. But if the Bihar Legislature had under the Government of India Act, 1935 no power to legislate in respect of taxation of transactions other than those of sale of goods as understood in the Sale of Goods Act, a transaction to be liable to pay sales-tax, had to conform to the requirements of the Sale of Goods Act, 1930. Attributing a literal meaning to the words used would amount to imputing to the Legislature an intention deliberately to transgress the restrictions imposed by the Constitution Act upon the Provincial Legislative authority. It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid. If the narrow and technical concept of sale is discarded and it be assumed that the Legislature sought to use the expression sale in a wider sense as including transactions in which property was transferred for consideration from one person to another without any previous contract of sale, it would be attributing to the Legislature an intention to enact legislation beyond its competence. In interpreting a statute the Court cannot ignore its aim and object. It is manifest that the Bihar Legislature intended to erect machinery within the frame-work of the Act for

levying sales tax on transactions of sale and the power of the Legislature being restricted to imposing tax on sales in the limited sense, it could not be presumed to have deliberately legislated outside its competence. In the definition of the expression 'sale' in s. 2 (g) of the Bihar Sales Tax Act it must be regarded as implicit that the transaction was to have all the elements which constitute a sale within the meaning of the Sale of Goods Act. Use of the expression "including a transfer of property in goods involved in the execution of the contract" in the first paragraph of the definition also does not justify the inference that the transfers of property in goods under the earlier part of the definition were not to be the result of a contract of sale. If any such intention was attributed to the Legislature, the legislation may, for the reasons already stated, be beyond the competence of the Legislature. The *non-obstante* clause in the second proviso is in truth in the nature of an explanation to the charging section : it merely fixes the *situs* of sale. If there is no sale the second proviso will have no application.

Mr. Varma finally contended that in the *Tata Iron & Steel Co. Ltd.* v. *The State of Bihar* (1) by implication it was decided that the definition of 'sale' in s. 2(g) of the Bihar Sales Tax Act included transactions in which goods were supplied in compliance with directions which left no volition to the manufacturers. But this argument is not borne out by what was actually decided in that case. The Tata Iron & Steel Company Ltd., which carried on the business of manufacturing iron and steel in its factory at Jamshedpur in Bihar was assessed to sales tax under the Bihar Sales Tax Act, 1947. The company sent its goods from its factory to different Provinces and Indian States by rail, the railway receipts being obtained by the company in its own name as consignor and consignee. The Branch Offices of the company or its Bankers at the destination handed

(1) [1958] S.C.R. 1355.

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over the railway receipts to the purchasers against payment of the price. The Sales Tax Officer of the State of Bihar included in the gross turnover of the Company the value of goods manufactured in Bihar but delivered and consumed outside the State of Bihar in the manner already stated. The contention of the company that the goods delivered were not liable to be included in the taxable turnover was negatived by the taxing authorities and the High Court of Patna. The matter was then carried in appeal to this Court, and it was held that the provisions of s. 4(1) read with s. 2.(g) proviso 2 of the Bihar Sales Tax Act was within the legislative competence of the Province of Bihar. It was pointed out that the second proviso to the definition of sale in s. 2(g) of the Act did not extend the meaning of sale so as to include therein a contract of sale: what it actually did was to lay down certain circumstances in which a sale, although completed elsewhere, was to be deemed to have taken place in Bihar. Those circumstances did not constitute a sale, but only located the *situs* of such sale. The Court in that case was not called upon to consider whether a transaction to be a sale must be preceded by a contract of sale : the Court was merely considering the *vires* of the second proviso to s. 2(g) of the Bihar Sales Tax Act. Das, C. J., in delivering the judgment of the majority of the Court observed "the basis of liability under s. 4(1) remained as before, namely, to pay tax on 'sale'. The fact of the goods being in Bihar at the time of the contract of sale or the production or manufacture of goods in Bihar did not by itself constitute a 'sale' and did not by itself attract the tax. The taxable event still remained the 'sale' resulting in the transfer of ownership in the thing sold from the seller to the buyer. No tax liability actually accrued until there was a concluded sale in the sense of transfer of title. It was only when the property passed and the 'sale' took place that the liability for paying the sales tax under the 1947 Act arose. There

was no enlargement of the meaning of 'sale' but the proviso only raised a fiction on the strength of the facts mentioned therein and deemed the 'sale' to have taken place in Bihar. Those facts did not by themselves constitute a 'sale' but those facts were used for locating the *situs* of the sale in Bihar. It follows, therefore, that the provisions of s. 4(1) read with s. 2(g), second proviso, were well within the legislative competency of the Legislature of the Province of Bihar". In *Tata Iron & Steel Company Ltd's case* (1) the question as to the true content of the expression 'sale' in the Bihar Sales Tax Act did not fall to be determined, and the principle of the case can have no application in deciding the present case.

It would be fruitless to enter upon a detailed discussion of the two decisions of the House of Lords cited at the Bar : *The Commissioner of Inland Revenue* v. *New Castle Breweries Ltd.*(2) and *Kirkness (Inspector of Taxes)* v. *John Hudson & Company Ltd.* (3). It may be sufficient to observe that in the first of these cases goods belonging to the assessee were taken over by order of the Admiralty, acting under the relevant regulations, and in compliance with the order of a Compensation Court, the assessee was paid an amount exceeding £5000/- being the difference between the amount originally paid and the amount settled as due under the order of the Compensation Court. The House of Lords held that the transaction under which the Admiralty took over the goods was a sale in the business, and although no doubt it affected the circulating capital of the assessee it was none the less proper to be brought into the profit and loss account arising from the assessee's trade for the purpose of computation of liability to pay Excess Profits duty. In *Kirkness (Inspector of Taxes)* v. *John Hudson's case* (3) it was held by the House of Lords that the vesting of a company's railway wagons in the Transport Commission under s. 29 of the Transport Act, 1947, with compensation fixed in

(1) [1958] S.C.R. 1355. (2) [1927] 12 T.C. 927.
(3) [1955] A.C. 696.

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the form of transport stock under the relevant sections of that Act did not constitute a sale for the purpose of s. 17 of the Income-tax Act, 1945 so as to render the company liable to a balancing charge under that section. The cases turned upon the meaning of 'sale' for the purposes of the Excess Profits Tax legislation and the Income-tax Act, 1945 (8 & 9 Geo. 6, c. 32) and observations made therein have little relevance in determining the limits of the legislative power of the Provincial legislature under the Government of India Act, 1935, and the interpretation of statutes enacted in exercise of that power.

The second contention raised by counsel for the assessees requires no elaborate consideration. If it be assumed that the intimation of the requirement by the State of Madras to the Controller amounted to an offer, delivery of sugar by the assessee pursuant to such an order would constitute a sale within the meaning of s. 2(g) of the Bihar Sales Tax Act, by the second proviso which has been held *intra vires* by this Court in *Tata Iron & Steel Company Ltd.'s case* (1) the assessees would be liable to pay sales tax, for it is not in dispute that at the time when the orders were received from the Controller the goods were within the State of Bihar and the condition prescribed by s. 2(g) second proviso for locating the *situs* of the sale is fulfilled.

But the intimation by the Province of Madras of its requirements did not amount to an offer, and the supply of goods pursuant thereto could not amount to a sale; consequently liability to pay sales tax under the Bihar Sales Tax Act on the amounts received by the assessees from the Government of Madras for sugar supplied did not arise.

Hidayatullah, J.

HIDAYATULLAH, J.—I regret my inability to agree that *Gannon Dunkerley's case* (2) can be

(1) [1958] S.C.R. 1355, (2) [1959] S.C.R. 379.

extended to cover the facts here. I would confirm the decision of the High Court and dismiss these appeals for the reasons I proceed to give. These reasons are applicable to all the appeals in today's group.

This case is concerned with the levy of sales tax under the Bihar Sales Tax Act 1944 (VI of 1944) for a period of three months—April 1, 1947, to June 30, 1947, and another of the nine months following, under the Bihar Sales Tax Act, 1947 (XIX of 1947). The assessee companies in all these appeals run sugar mills and are admittedly dealers under these Acts and the commodity on the sale of which tax was sought to be levied was sugar. The disputed tax relates to supplies of sugar made by the assessee companies under the orders of the Sugar Controller of India to certain Provincial Governments in the relevant periods. There is only one contention of the assessee companies in these appeals and it is that in the circumstances of the case there was no 'sale' of sugar, regard being had to the decision of this Court in *Gannon Dunkerley's case* (1) and the amounts received from the Provincial Governments should not be included in the taxable turnover.

I have already mentioned that the assessment period in this case is one whole year—April 1, 1947 to March 31, 1948, and that it is divided into two parts of three months and nine months respectively governed by the Acts. There was however no difference in the mode of dealing in this case in the two periods. In the other cases the assessment periods were different but there was no other difference. The transactions were stereotyped being under the Sugar and Sugar Products Order, 1946, which was passed by the Government of India on February 18, 1946, in the exercise of powers conferred by sub-rule (2) of Rule 81 of the Defence of India Rules. The mode, which has been accepted by the

(1) [1959] S.C.R. 379.

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parties, as correctly summarised was as follows :—

"The admitted course of dealing between the parties was that the Governments of various consuming States used to intimate to the Sugar Controller of India from time to time their requirement of Sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch intructions received from the competent office of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the draft should be sent to the State Bank and it should be drawn on Party and Company or any other party which had been appointed as stockist importer on behalf of the Madras Government. It should be added that in this case the assessee was called upon to produce necessary documents relating to the transactions in question, but the assessee did not produce the documents. The assessee, however, admitted

that general arrangement between the parties was the one set out in this paragraph."

Two typical documents in this connection may be read and they are the permit by the Controller and the despatch order sent by the Provincial Government. They were not produced in this case but can be seen in the record of C.A. No. 633 of 1961 at pages 15, 16. First the permit :

No. 78 p (1)/46/7132

Office of the Sugar Controller for India
GOVERNMENT OF INDIA
Department of Food.

Dated Simla, the 12-11-56

ORDER

In exercise of the power conferred by clause 7 of the Sugar and Sugar Products Control Order, 1943.

1. Shashi Kiran, Assistant Sugar Controller for India, having been duly authorised in this regard under clause 2 of the said order by the Sugar Controller for India hereby direct you to supply 1200 tons/maunds of Sugar by 31-1-47 to Bengal in accordance with the despatching instructions of the Director of Civil Supplies Bengal, Calcutta.

2. A permit No. 1988 to enable you to despatch sugar in compliance with this order is attached.

(Sd.) Shashi Kiran,
Asstt. Sugar Controller for India.

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To the Motilal Padampat Sugar Mills Co. Ltd., Majhawlia, District Champaran.

And now the despatch order :—

EXPRESS STATE

MOTIPAT

MAJHOWALIA

UNDERSTAND SUGAR CONTROLLER ISSUED PERMIT FOR 600 TONS SUGAR THIS PROVINCE FULLSTOP DESPATCH IMMEDIATELY 300 TONS MANGALORE DRAFTS ON ME THROUGH CENTRAL BANK CALICUT 300 TONS COIMBATORE DRAFTS OF ME THROUGH CENTRAL BANK MADRAS FULLSTOP SEND RAIL RECEIPTS FOR EACH WAGON LOAD OR 100 BAGS LOAD WAGONS FULL CAPACITY FULLSTOP BOOK AT RAILWAY RISK IF NO SPECIAL RATES IN FORCE.

PRICES

T.R.L. Narsinmhan,
Assistant Secretary.

Post copy in confirmation to Motilal Padampat Sugar Mills Ltd. Majhowlia, Champaran District.

Forwarded/By Order,

(Sd.) Illegible,
Supdt. Board of Revenue,
(Civil Supplies) Chepauk, Madras.

Kitta 10-5-47.

These documents between them disclose that free trading in sugar was not possible. All Provinces intimated their requirements to the Controller who was kept informed by the Mills about the supplies available. The price was controlled and the Controller directed the supply of a certain quantity from a particular Mill to an indenting Province. After giving his permit and sending a copy of this permit to each party, the Controller passed out of the picture and the Mill supplying and the Province receiving the supply (I am avoiding the words seller & buyer since that is the point to decide) arranged the rest of the affair including the issue of despatch instructions regarding the quantity and the quality to be sent to different areas and the payment of price.

The question is whether there was a 'sale' in the circumstances and the price should be included in the turnover for purposes of Sales tax under the Bihar Sales Tax Act for the time being in force. The definition of sale in the two Bihar Acts at all material times was :—

> "2(g) "sale" means, with all its grammatical variations and cognate expressions, and transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge;
>
> Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :
>
> Provided further that notwithstanding anything to the contrary in the Indian Sales of Goods Act, 1930 the sale of any good which

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are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar."

In the present case, we are required only to decide whether, regard being had to the decisions of this Court expounding the ambit of entry No. 48 of List II Seventh Schedule of the Government of India Act 1936, the tax could not be demanded as there was no sale of sugar at all. The entry in question is —

"48. Taxes on the sale of goods and on advertisement."

"Goods" was defined in section 311 as follows :

"Goods" include all materials, commodities and articles."

The white Paper had the entry "taxes on the sale of commodities and on the turnover". It was altered to "taxes on the sale of goods" and as pointed out by Gwyer, C. J., *In re The Central Province & Berar Act No. XIV of 1938*, (1) it is idle to speculate what the reason was. The expression "sale of commodities" would not have taken the mind to the Sale of Goods Act as the redrafted entry does.

There is no provision in the whole of the Government of India Act 1935 which expressly seeks to limit the meaning of the plain words "taxes on the sale of goods" which include all materials, commodities and articles. Such a limitation could of course arise from a competing entry in List No. 1. Otherwise the entry conferred powers as large and plenary as those of any sovereign legislature. The ambit of

(1) [1939] F.C.R. 18.

the entry, prior to the inauguration of the Constitution, was the subject of three leading decisions by the Federal Court, in one of which there was also an appeal to the Privy Council. The first case was *In re The Central Provinces and Berar Act No. XIV of 1938,* (1) a reference under section 213 of the Constitution of 1936. In that case the imposition of sales tax on retail sales of motor spirit and lubricants was questioned on the ground that though described as tax on the sale of motor spirit etc., the tax was, in effect, a duty of excise under entry 45 of List I and there being an overlap between the two entries that in List I must prevail. Legislative practice in respect of Excise Duty was invoked but as sales-tax legislation did not exist in India before 1938 there was no legislative practice to consider on the meaning of the express "tax on sale of goods". The Government of India claimed that the entry 48 List II must be limited to a direct tax like a turnover tax which is not identifiable in the price. Taxes on retail sales, it was argued, being indirect and identifiable in the price, were more of the nature of an excise duty and the pith and substance of the Act being this the impugned Act was bad.

The main argument on behalf of the provinces, which was accepted, was that the Constitution Act must not be construed in any narrow and pedantic sense. Gwyer, C.J., expressed himself forcefully on this point in the following words :—

> " I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it....."

The essence of the argument on the part of the Provinces was that if only a turnover tax (which was a species of sales-tax) was meant why was a wider expression used in the entry ? It was, therefore, contended that the entry should not be truncated and the

(1) [1939] F.C.R. 18.

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plain words of the entry should be given their normal and ordinary meaning. The contention of the Provinces prevailed. Though the learned judges pointed out that the words were "taxes on the sale of goods" and not "sales tax" *simpliciter*, thereby excluding taxes on services which in some systems are regarded also as sales-tax, the words were wide enough to include more than a mere turnover tax. It was held that the power included a power to levy a tax or duty on the retail sale of goods and this did not impinge upon the power of the Legislative Assembly to make laws "with respect to" duties of excise.

In the next case the *Province of Madras* v. *Boddu Paidanna & Sons* (1). Government of India reversed its stand and contended that the power of the Provincial Legislatures did not extend to levying sales-tax on first sales but only after the goods were released by the producer or manufacturer. The argument of the Government of India was not accepted and it was declared that the power of a Provincial Legislature to levy a tax on the sale of goods extended to sales of every kind and at all stages between a producer or manufacturer and a consumer. The Central Government had filed a suit and the third case before the Federal Court was an appeal from that decision. The Federal Court followed its own decision in *Boddu Paidanna's case.* (1) The Central Government appealed to the Judicial Committee and the judgment is to be found in *Governor-General in Council* v. *Province of Madras.* (2) The Judicial Committee examined in detail the provisions of the Madras General Sales Tax Act 1938 to emphasize its essential character and observed that—

> "Its real nature, its "pith and substance," is that it imposes a tax on the sale of goods. No other succinct description could be given of it

(1) [1942] F.C.R. 90. (2) [1945] F.C.R. 179 P.C.

except that it is a "tax on the sale of 'goods.' It is, in fact, a tax which according to the ordinary canons of interpretation appears to fall precisely within entry No. 48 of the Provincial Legislative List."

In repelling the contention that first sales were not included in the entry their Lordships observed that it did violence to the plain languages and implied the addition of the words "other than first sale of goods manufactured or produced in India." The Judicial Committee expressed itself in complete agreement with the two decisions of the Federal Court.

The ambit of the entry was thus settled to be that it included all 'sales of goods' though not 'services' from the first sale by the producer or manufacturer to the last sale to the consumer and that the tax could be collected on wholesales or retail sales as well as on the turnover. It was however pointed out that the expressions "sales-tax" and "taxes on the sale of goods" were not the same, the first including sales other than those of goods. No definition of what is "sale" was attempted in these cases either with or without reference to the Sale of Goods Act.

Thus it was firmly established that the entry "taxes on the sale of goods" authorised the making of laws for the imposition of tax on all transactions of sale of goods from the manufacturer or producer to consumer. It also could be imposed on the turnover which meant the sum total of prices for which taxable goods were sold in a particular period. The definition of "goods" was enlarged to include "commodities, materials and articles." The word "commodities" indicated "articles of trade", the word "materials" indicated "matter from which things are made", (the use of the word being the same as in the expression 'raw materials') and by "articles" was meant "any particular thing." In this way it was

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clearly indicated that articles sold by way of a trade or otherwise were equally within the expression 'goods' and also finished articles and raw materials from which finished articles are made.

The entry was framed in 1935 in the form with which we are concerned. Previously it read in the white paper "taxes on sale of commodities and turnover." The reframed entry was wider in one respect (it included materials and articles in the sense explained) and apparently narrower in another (by omitting 'turnover') than the original entry. There was no occasion to expound the meaning of 'goods' in the two Federal Court decisions but the decisions laid down that 'turnover' was included even though not expressly mentioned.

I have already said above that prior to 1938 a tax on the sale of goods was not imposed in India. It is claimed that in ancient times sales-tax was levied in India but we do not have to delve into these matters. The tax, as it is known today, is of comparatively modern growth though economists have traced it to Ptolemies, Greeks and Romans. Findlay Shirras and other writers give us the history of the tax. It was imposed in a recognisable form in Spain in 1342 and was known as the *skabala*. This notorious tax continued for five hundred years. In France it was also imposed in the fourteenth century but was soon given up. We are not concerned with these ancient progenitors of the modern tax. They could not have influenced the selection of the tax or its form. The modern tax was the result of the First World War. Germany imposed in 1916 a turnover tax called '*die Umsatzsteuer*' and that is the form in which the tax is collected there. France followed a year later but with a transaction tax which was known as '*L' impot sur le chiffre d'affaires*'. Soon other countries followed as it was almost as productive as Customs and income-tax.

By the time the Government of India Act 1935 was passed, no less than thirty countries had imposed this tax in different forms. India, however, was not one of them.

The period in India following the First World War opened with the Government of India Act with its Devolution Rules and the allocation of taxes by the Scheduled-tax Rules, to the Provinces framed in 1920. The latter Rules contained only octroi and taxes on markets and trades, professions and callings which resembled very distantly, the modern sales-tax. Indeed, sales-tax was first visualized in the Report of the Taxation Enquiry Committee (1924-25) but only as a modification of the octroi through the intermediate steps of taxing markets and slaughter-houses. It was hoped that price competition would stop inclusion of the tax in the price. It would have been a vain attempt to convert an indirect tax into a direct one. The Committee visulised it as a composition tax from traders but it was realised that the tax would soon get converted into a tax on sales of goods, or, of services like those of a doctor or goldsmith and that it would be difficult to separate services from goods in case where the two were combined. It was also recognised that turnover taxes imposed on persons in respect of raw materials and finished goods tended to be cumulative, but taxes imposed at one point did not have that vicious tendency. The difficulty of entrepot trade in octroi, where goods bore the tax whether or not consumed, sold or used was avoided because the tax under retail sales-tax scheme was payable only when the goods were actually sold and being *ad valorem* bore lightly on cheap goods. The suggestions were—

(1) A turnover tax on retail merchants;

(2) registration of such dealers;

(3) collection of taxes quarterly;

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(4) licensing of and charging of fees from petty traders and hawkers whose turnovers were uncertain as no accounts were maintained by them.

Sales-tax particularly that imposed on goods assumed by 1935 different forms in different countries. Its incidence was sometimes the turnover, sometimes wholesale and sometimes the retail sale. In Canada and Australia it was a producers' or manufacturers' tax almost of the nature of excise. In France the excise and sales-tax were interchangeable, the former being a replacement tax on the turnover of the manufacturer. In Germany the tax included both goods and services, in France services were excluded unless there was a commercial element. In England, it took the form of a purchase tax. France also devised a simpler method by imposing a *forfait* a lump sum which represented, so to speak, a quit tax. In Belgium it was collected by stamps from both the seller and the buyer according to their respective invoices. In America the position was unique. It can be stated from a passage from Beuhler's Public Finance (3rd Edn.) page 410—

> "A sale tax is an excise in so far as it is imposed upon domestic transaction of commodities, and it may also have some of the aspects of customs duties because national sales taxes commonly fall upon importing and sometimes upon exporting. The popular name for American excises is sales taxes. Not all excises are imposed upon sales or the privilege of selling, however, for they may be placed upon the purchase or use of commodities, including services."

The varieties this elastic tax took in that country is illustrated from the following passage from the same author—

> "Here, again, there is no standard usage, for selected sales taxes are often called sales taxes,

limited sales taxes, selective sales taxes, and special sales taxes, while general sales taxes may be called sales taxes, turnover taxes, manufacturers' sales-taxes, retails sales-taxes and gross receipts or gross income-taxes."

It was in the background of these laws of foreign countries and the recommendations of the Taxation Inquiry Committee that the entry in the Government of India Act 1935 was framed. Taxes on the sale of goods being a kind of commodity taxes had to be demarcated from other commodity taxes like excise, octroi, terminal tax, market dues etc. The difficulty was solved by viewing the goods as the subject of taxation in different stages. These stages were production, movement sale and consumption. Taxes on production of goods which were excise proper were given to the centre with certain exceptions (Entry 45 list I and Entry 40 of list II), taxes on sale of goods were given to the Provinces (Entry 48 List II), while taxes on movement of goods were divided—those carried by railway and air being allotted to the centre as terminal taxes (Entry 58 List I) and those carried by inland waterways being allotted to the Provinces (Entry 52 List II). Taxes on the entry of goods in a local area for consumption, use or sale (octrois) were allotted to the Provinces (Entry 49 List II). This was the demacation of commodity taxes in addition to local taxes for local purposes.

The two cases of the Federal Court to which detailed reference has been made above outlined the scope of competing entries relating to duties of excise and taxes on the sale of goods. It was pointed out that though there was an overlap the taxes were different. In the recent case of *The Automobile Transport (Rajasthan) Ltd.* v. *The State of Rajasthan* (1). I have given the history of the distribution of the heads of revenue on the eve of the Government of India Act 1935 and have there

(1) [1963] 1 S.C.R. 491.

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pointed out that the attempt was to give adequate resources to the Provinces to enable Provincial Governments to undertake nation-building activities. It was there pointed out by me that experts at that time were in favour of alloting an elastic tax like sales-tax to the Provinces as the main source of revenue and abolish altogether the category of deficit Provinces and the subventions. It was expected that land revenue would have to be reduced and income-tax could not be increased beyond a point. The only tax that was new and fell imperceptibly upon consumers was the sales-tax and it was allotted to the Provinces. It was expected to be a very productive tax, an expectation which has been amply fulfilled. In 1954-55, this tax alone yielded about 60 crores and it has been even more productive since.

The inroads upon the tax were many but they were resisted in the pre-Constitution period by the Provinces both in Courts and in administration. Indeed, appeals were made in cases before the Federal Court, not to cut down unduly the ambit of the natural words and Mr. Justice Jayakar mentioned them in his judgment with sympathy. I feel that what he said will bear repetition here :—

> "A powerful appeal was made to us by the Advocates-General of the Provinces that, consistently with its terminology, we should so interpret entry No.41 (List II) as to give it a content sufficiently extensive for the growing needs of the Provinces. It was argued that the provincial autonomy granted by the new scheme of government would be unmeaning and empty, unless it was fortified by adequate sources of revenue. Whatever value such an appeal may have in a judicial decision, I personally appreciate it, and I feel no doubt that the interpretation that I am placing on

entry No. 48 (list II) is sufficiently practical to leave an adequate source of revenue in the hands of the Provinces without making inroads on Central preserves. I may add here that the several authors I have been able to consult on this point agree in their opinion that, since the War, a tax on the sale of goods has proved to be both productive and practicable in many countries, under circumstances not very different from those prevailing in the Provinces of India. The yield naturally varies with the scope and rates of the tax, business conditions and administrative efficiency, but it is stated that the tax itself has become a major source of revenue in a number of countries, yielding more than the income-tax in a few instances, and nearly as much as other sources of revenue in others." *In re The Central Provinces & Berar Act No. XIV of 1938* (1).

The two cases of the Federal Court having established the area of operation of entry No. 48 List II in relation to the competing entry relating to excise, the Provinces attempted to extend the tax to cover all situations. This was done by incorporating definitions of 'sale' which in some respects were inconsistent with the definition in the Indian Sale of Goods Act. The Taxation Enquiry Commission (1953-54) gave in its report an analyses of how these definitions ran and I find it convenient to quote from the report (page 10, para 24 Vol. III) :—

"In Madras, Mysore, Travancore-Cochin and Hyderabad, sale means transfer of property in the course of trade or business. By implecation, all other sales are excluded. Casual sales by individuals, sales of food by hotles attached educational institutions, sales of old furniture, for example, by firms not dealing

(1) [1939] F.C.R. 19 at p. 119.

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in furniture and so on are, therefore, not liable for the tax in these States. The States of Bengal and Delhi define sale as transfer of property in goods for money consideration, which accordingly excludes transfers for other consideration like exchange or barter. According to the Acts of certain States, the Sale is deemed to have taken place in the territory of the State, if at the time when the contract of sale or purchase was made, the goods were actually in those States. In certain States, the transfer of property in goods supplied in the execution of a contract is also included in the definition of sale."

The definitions led to a variety of decisions on the meaning of the word "sale" which were likely to bewilder the common man. The Taxation Inquiry Commission summed up the situation in the following words :—

> "The layman who asks : "What is a sale" would not have to go without an answer, he would find plenty of replies in the reported judgments of courts of law; and he would not be a layman if, piecing them together, he was able to say when, where and how a sale because a sale which a sales tax may tax."

From the earliest times the extension of the word "sale" was in three recognisable directions. Firstly, the definition by a fiction took in transactions of sale in which the goods were produced in the Provinces or were in the Province at the time the contract of sale took place, no matter where the contract could, in law, be said to have taken place. In other words, by a fiction incorporated in the definition of sale, the *situs* of sale could be established in the Province. Secondly, forward transactions in which the passing of property was postponed to a future date, if at all it took place, were included in the definition of "sale". Thirdly,

materials in a works contract, where the bargain was for a finished thing, were treated as the subject matter of sale.

Laws in which transactions of sale were sought to be taxed on the ground that goods were in the province or some part of the component elements of a contract of sale took place in the Province were generally upheld by the High Courts. In these cases the doctrine of *nexus* was extended to sales-tax legislation following the analogy of the decision of the Privy Council in *Wallace Brothers etc. & Co.* v. *Commissioner of Income-tax, Bombay.* (1) The cases recognised the sovereignty of Provincial Legislatures which were erected by the British Parliament in its own image and which within the jurisdiction conferred by a legislative entry enjoyed powers as large and ample as those of the British Parliament. It was generally held that in the Plenitude of that power it was open to the Provincial Legislatures to tax transactions of sale in which there was a sufficient nexus between the Province and the taxable event namely the sale, and that the Provincial law could by a finction bring the whole transaction into the Province for purposes of tax.

The Supreme Court also took substantially the same view in the *State of Bombay* v. *The United Motors Ltd.*, (2); *Bengal Immunity Co. Ltd.* v. *State of Bihar* (3); *Tata Iron and Steel Co. Ltd.* v. *State of Bihar* (4) and *Commissioner of Sales-tax* v. *Husenali* (5).

The meaning of the world 'sale' in the Entry was laid down in several cases but I shall refer to only one of them. In *Poppatlal* v. *State of Madras,* (6) Venkatarama Ayyar, J., (Rajamannar, C. J. concurring) observed as follows :

> "The word 'sale' has both a legal and a popular sense. In the legal sense it imports

(1) [1948] F.C.R. 1 P.C.
(2) [1953] S.C.R. 1069.
(3) [1952] 2 S.C.R. 603.
(4) [1958] S.C.R. 1355.
(5) [1959] Supp. 2 S.C.R. 702.
(6) A.I.R. (1953) Mad. 91.

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passing of property in the goods. In its popular sense it signifies the transactions which results in the passing of property. To a lawyer the legal sense would appear to be the correct one to be given to the word in the Sales Tax Act. That is the conception which is familiarised in the provisions of Sale of Goods Act. If one leaves out of account sales tax legislation which is of comparatively recent origin, questions relating to sale of goods usually come up before the Courts only in connection with disputes between the sellers and purchasers. If the goods perish, on whom is the loss to fall ? If the purchaser becomes insolvent before payment of price can the goods be claimed by the trustee in bankruptcy?

For deciding these and similar questions it is necessary to determine at what point of time the property in goods passed to the purchaser. Sometimes when the point for determination is as to jurisdiction of Courts to entertain suits based on contract, it may be material to consider where property in the goods passed, that being part of the cause of action. These being the questions which are accustomed to be debated in connection with sale of goods, it is natural that a lawyer should, as a matter of first impression approach the question of sale under the Sales Tax Act with the same concept of a sale. But if the matter is further considered it will be seen that considerations which arise under the Sales Tax Act are altogether different from those which arise under the Sale of Goods Act.

The object of the Sales Tax Act is to impose a tax on all sales and it is a tax imposed on the occasion of sale.....So far as the Government is concerned, it would be

immaterial at which point of time property in the goods actually passed from the seller to the buyer. Of course, there must be a completed sale before tax can be levied and there would be a completed sale when property passes. That is the scope of the definition of 'sale' in section 2 (h). But when once there is a completed sale, the question when property passed in the goods would be a matter of no concern or consequence for purposes of the Sales Tax Act. The Government is interested only in collecting tax due in respect of the sale and the only fact about which it has to satisfy itself is whether the sale took place within the Province of Madras. In this context the popular meaning of the word is the more natural and there is good reason for adopting it..... Our conclusion accordingly is that the word 'sale' in the Madras General Sales Tax Act must be understood in a popular sense and sales tax can be levied under the Act if the transaction substantially takes place within this Province, notwithstanding that the property in the goods does not pass within the State."

Against the decision of the High Court of Madras an appeal was filed in this Court and the judgment of this Court is reported in [1953] S.C.R. 677. The appeal was allowed. On the question of territorial nexus this Court agreed with the Madras High Court but on the question of the meaning of the word 'sale' it expressed itself differently. In an earlier case (*State of Travancore Cochin* v. *The Bombay Co. Ltd.* (1)), this Court had reserved the question whether the word 'sale' had the same meaning as in the law relating to the sale of goods or a wider meaning. In *Poppatlal Shah's case* (2) the Supreme Court, referred to the decision of the Madras High Court that the word was used in a popular sense and without any expression of

(1) [1952] S.C.R. 1112. (2) A.I.R. (1953) Mad. 91.

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disapproval held that there was no indication of the popular meaning of sale in the definition in the Madras General Sales Tax Act where unmistakably stress was laid 'on the element of transfer of property in a sale and no other.' The Bench held that the presence of goods within the province at the time of the contract would have made the sale, if subsequently completed, a sale within the province by reason of the Explanation added by Act XXV of 1947 but as the Explanation was not in operation during the relevant period the assessment of sale tax was held to be illegal and unwarranted by the law as it then stood.

It would appear from this that this Court took the view that the word 'sale' in the entry "Taxes on the sale of goods" was used in a sense wider than that commonly accepted in the law relating to sale of goods, and the judgment of Venkatarama Ayyar, J., in the Madras High Court on this part was not questioned. Then came a decision of the Allahabad High Court from which an appeal was brought to this Court. The judgment of this Court is reported in the *Sales Tax Officer, Pilibhit* v. *Messrs Budh Prakash Jai Prakash* (1). The definition of the word 'sale' in the U.P. Sales Tax Act (XV of 1948) included 'forward contracts', and this part of the definition was declared *ultra vires* entry 48 in List I of the Government of India Act 1935 and Explanation III to section 2 (h) of that Act which provided that forward contract "shall be deemed to have been completed on the date originally agreed upon for delivery and also section 3-B taxing turnover of dealers in respect of transactions of forward contracts were also declared *ultra vires*. Venkatarama Ayyar, J., speaking for this Court held that under the statute law of England and also of India there was a well-recognised distinction between "sales" and "agreement to sell" though they were grouped under the generic name of "contract of sale." The distinction, it was pointed out, lay in the transfer of property which, if simultaneous

(1) [1955] 1 S.C.R. 243.

with agreement, made for a sale, but if in the future, operated only for an agreement to sell. In the latter case property could only pass as required by section 23 of the Sale of Goods Act. Relying on the observation of Benjamin on Sale that—

"In order to constitute a *sale* there must be :

(1) An agreement to sell, by which alone the property does not pass; and

(2) an *actual sale*, by which the property passes,"

the learned judge observed that though the definition of a *contract of sale* included a mere agreement to sell as well as an actual *sale*, there was a distinction between the two which led to different remedies and entry No. 48 when it spoke of 'sale' meant a completed sale involving transfer of title. The question whether the legislature in the exercise of its sovereign powers for purposes of taxing the event of sale could treat a sale as complete when there was a final agreement for purchase and sale even though price was not paid was apparently not mooted before this Court. Emphasis was laid on the definition of 'turnover' as 'the aggregate of the proceeds of sale by a dealer' and it was pointed out that there could be no aggregate of prices unless the stage had been reached when the seller could recover the price under the contract, it being well-settled in the law under the sale of goods that "an action for price is maintainable only when there is a sale involving transfer of the property in the goods to the purchaser" and that "where there is only an agreement to sell, then the remedy of the seller is to sue for damages for breach of contract and not for the price of the goods". The exceptional circumstance when under an agreement between the parties the price is payable on a day certain irrespective of delivery was considered not material for the purpose of the discussion.

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In these cases by the application of the legislative practice relating to sale of goods the meaning of the expression "taxes on sale of goods" was determined and future contracts in which delivery and payment of price were deferred were held to be outside the purview of the Entry. There can hardly be any doubt that the entry is concerned with a completed sale because it is only a 'sale' which can be taxed and not anything which is short of a sale and if a transaction which is sought to be taxed is merely in the region of an agreement *de futuro* there is no taxable event. The opinion that if there be a completed sale then the law dealing with taxation would be indifferent whether price was paid or not expressed by Venkatarama Ayyar, J., in *Poppatlal Shah's case*(1) of the Madras High Court was not accepted.

Then came the third batch of cases. This batch was concerned with the taxing of materials which were supplied and used as part of building or repair operations, like bricks, timber and fittings in buildings girders, beams, rails etc. in bridges, spare parts in repair of motar vehicles etc. Two distinct views were held by the High Courts. The Madras High Court in *sub nom Gannon Dunkerley & Co.* v. *State of Madras* (2) held that such transactions did not involve a sale of goods and there could be no tax. A contrary view was expressed in *Pandit Banarsidas* v. *State of Madhya Pradesh* (3) where it was held that such contracts involved both labour as well as materials and in as much as materials were goods and property in them passed, it was within the competence of the Provincial legislatures to separate the sale of goods from the composite and entire transactions and to tax them. It was pointed out that legislative practice in relation to the Sale of Goods Act was not conclusive, and though it could not be doubted that a limited legislature could not create a power for itself which did not flow from an entry, the entry itself must be given the widest amplitude

(1) A.I.R. (1953) Mad 91. (2) (1954) 5 S.T.C. 216.
(3) (1955) 6 S.T.C. 93.

possible and its scope should not be cut down by anything not found in the Constitution Act 1935. It was, therefore, concluded :—

> "The text being explicit, the text is conclusive alike in what it directs and what it prohibits. The necessary conditions for the impost, however, were that there should be a sale of goods. The selection of the taxable event and the severance of transactions of sale from other transactions in which they might be embedded was a necessary part of the power. The legislature could not say that a contract of service amounted to a sale of services (goods) but it could tax a genuine transaction of sale of goods whatever form it took."
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> x x x x x
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> "If a building contract was not split up into its component parts, that is to say, material and labour, in legislative practice relating to the ordinary regulation of sale of goods there is no warrant for holding that it could not be so split up even for purposes of taxation."

Some High Courts accepted the decision in *Gannon Dunkerley's case* and some others the decision in *Pandit Banarsidas's case.*(1), In all these cases there were appeals to this Court. All these apeals were heard together. The leading judgment was delivered in *Gannon Dunkerley's case.* The Madras view was accepted and the view expressed in *Pandit Banarsidas's case* (1) was not accepted. It is contended for the appellants that this view of the Supreme Court controls the present case and it is, therefore, necessary to follow the reasoning in some detail. Before I do so I shall refer to a case of the House of Lords which influenced in no small measure the decision of this Court. That case is *Kirkness* v. *John Hudson & Co. Ltd.* (2).

(1) (1955) 6 S.T.C. 93.

(2) (1955) A.C. 696.

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Under section 29 of the Transport Act 1947 (10 & 11 Geo. C.49) the company's railway wagons were vested on January 1, 1948, in the British Transport Commission. These wagons were already under requisition to the Ministry of Transport under the powers contained in Regulation 53 of the Defence (General) Regulations, 1939. Later the company received compensation. This amount was higher than the written down value. A balancing charge of £ 29,021 was made under section 17 of the Income-tax Act, 1945 (8 & 9 Geo. 6 C. 32) in an assessment under clause I of schedule D to the Income-tax Act, 1918. The company appealed against the balancing charge and succeeded. Section 17 (1) of the Income-tax Act 1945 (which in its purport resembled section 10 (2) (vii) of the Indian Income-tax Act (1922) ordained that a balancing charge or allowance should be made if certain events occured, one such event being "(a) the machinery or plant *is sold*, whether still in use or not". The question was whether there was such a 'sale' justifying a balancing charge. It was contended for the Revenue that the word sale had a wider meaning than a contract and a conveyance of property and that in its legal meaning it did not involve a contract at all but just the transfer of the property in or ownership of something from A to B for a money price, whether voluntary or affected by operation of law or compulsory. Passages were cited from Benjamin on sale (2nd Edn. p. 1), Halsbury's Laws of England (2nd Edn. vol. xxi p.5), Blackstones Commentaries 19th Edn. (1836) vol. II p. 446, and Chalmer's Sale of Goods(11th Edn. p. 161) to show that a bargain only shows a mutual assent but it is the transfer of property which is the actual sale. Analogy of Lands Clauses Consolidation Act 1845, Stamp Act and other Acts was invoked and later Finance Acts were also called in aid where such compulsory transactions were described as sale or purchase. The House of Lords by a majority of

4 to 1 overruled these contentions. It was held that the vesting of the wagons in the Transport Commission by operation of section 29 of the Transport Act and the payment of compensation in the shape of transport stock did not constitute a sale and the analogy of compulsory acquisition of land did not apply, since the procedure there was entirely different. The word 'sale' in s. 17 of the Income-tax Act 1945, it was held, imported a consensual relation and the meaning of the section being plain, it was not possible to go to later Acts to construe the section. I shall quote a few passages from the speeches to show how this conclusion was reached so as to be able to show how the same reasoning was used in connection with the building contracts.

Viscount Simonds pointed out that what was to be construed were the two words 'is sold' in section 17 (1) (a) of the Income-tax Act 1945, that there was nothing in the Act to give a special colour or meaning to the words and that analogous transactions could net help to decide that should be the meaning. Agreeing with Singleton L. J. where he said—"what would anyone accustomed to the use of the words 'sale' or 'sold' answer ? It seems to me that everyone must say "Hudsons did not sell," Viscount Simonds went on to say :—

> "When Benjamin said in the passage quoted by Singleton and Birkett. JJ., from his well-known book on sale, 2nd. ed.p.1, that by the common law a sale of personal property was usually termed a 'bargain and sale of goods' he was by the use of the word 'bargain' perhaps unconsciously emphasizing that the consensual relation which the word 'bargain' imports is a necessary element in the concept. In this there is nothing new, the same principle is exhibited in the Roman Law, for the opening words of Title 23 of the third book of the

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Institutes of Justinian "De Emptione et venditione" are "emptio et venditio *contrahitur* simulatque de pretio convenerit".....sometimes the contract for sale is itself the sale, as so often in the sale of goods: sometimes, and particularly in the sale of land, it is regarded as a part of the sale as, for example, when it is said by a modern writer that "the first step in the sale of land is the contract for sale (see Cheshire, Modern Real Property 7th Ed.p.631). But it is immaterial whether the contract is regarded as the sale itself, or as a part of it, or a step in, the sale or as a prelude to the sale: there is for the present purpose no substance in any such distinction. The core of it is that the consensual relation is connoted by the simple word 'sale' ".

Lord Reid also emphasised the consensual relation in 'sale' as its vital element and observed :—

" 'Sale' is, in my opinion, a nomen juris, it is the name of a particular consensual contract. The law with regard to sale of chattels or corporeal movables is now embodied in the Sale of Goods Act, 1893. By section 1 (1) "A contract of sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for money consideration, called the price," and by section 1 (3): "where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell." As a contract of sale, as distinct from an agreement to sell and unlike other contracts, operates by itself and without delivery to transfer the property in the thing sold, the

word "sale" connotes both a contract and a conveyance or transfer of property."

Lord Reid agreed "that 'sale' is *a word which has become capable in an appropriate context of having a meaning wider than its ordinary and correct meaning.* But it is only permissible to give to a word some meaning other than its ordinary meaning if the context so requires". Lord Tucker in agreeing observed :—

> "I feel that the answers must be that the word is unambiguous and denotes a transfer of property in the chattel in question by one person to another for a price in money as the result of a contract express or implied. This is in substance the definition of "sale" given in the second edition of Benjamin on sale, but for present purposes it is sufficient to emphasize that natural assent is an essential element in the transaction. It is no doubt true that the contract or agreement to sell may precede the formal instrument or act of delivery under which the property passes but to describe a transfer of property in a chattel which takes place without the consent of transferor and transfer as a sale would seem to me a misuse of language. By express enactment or by necessary implication from the context any word may be given a meaning different from or wider than that which it ordinarily bears, and this may apply to the word "sale" where it appears in a context relating to the process of compulsory acquisition of land....."

I do not find it necessary to quote from the minority view of Lord Morton of Henryton but he did point out that the word 'sale' for 100 years was being used in connection with transactions by which the property of A had been transferred to B, on payment of compensation to the owner but without

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the consent of the owner and said of the question posed by Singleton L. J. that if it were put to ten persons unconnected with the company, five of them might say "No, the wagons were taken over under the Transport Act" and the other five might say, "yes", adding, possibly, "but it was a compulsory sale" or "because they had to do it".

I have paused long over this case but only because the line of reasoning of this case has been closely followed in *Gannon Dunkerley's case*. The decision of the Court of Appeal, later approved by the House of Lords, had also influenced in a large measure the decision of the Madras High Court earlier in the same case.

In *Gannon Dunkerley's case* Venkatarama Aiyar, J., posed the question thus :—

> "The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are *ultra vires*, in so far as they seek to impose a tax on the supply of materials in execution of works contract, treating it as a sale of goods by the contractor and the answer to it must depend on the meaning to be given to the words "sale of goods" in Entry 48 in List II of Sch. VII of the Government of India Act, 1935."

His Lordship accepted that building materials were 'goods' in view of the definition and narrowed the inquiry to whether there was "a sale of those materials within the meaning of that word in Entry 48." The learned judge then pointed out that in interpreting a Constitution a liberal spirit should inspire courts and the widest amplitude must be given to the legislative entries and they should not be cut down by resort to legislative practice and that subjects of taxation in particular should be

taken in *rerum natura* irrespective of previous laws on the subject. The learned judge next asked the question in what sense the words 'sale of goods' were used, "Whether popular or legal, and what its connotation is either in the one sense or the other." After noticing meanings of "sale" as given by divars authors, it was laid down that it meant transfer of property in a thing from one person to another for a money price. It was next pointed out that in popular sense a sale "is said to take place when the bargain is settled between the parties, though property in the goods may not pass at that stage" and the observations of Sankey, J., (later Viscount Sankey L. C.) in *Nevile Reid & Co. Ltd.* v. *C. I. R.* (1) that the words 'sale' in the British Finance Act, 1918, should not be construed in the light of the Sale of Goods Act, 1893 but in a commercial and business sense, were rejected as *obiter* and opposed to the decisions of this Court in *Poppatlal Shah's case* (2) and *Budh Prakash's case* (3) where "executory agreements" were not held to be sales within the Entry. It was observed—"We must accordingly hole that the expression 'sale of goods' in Entry 48 cannot be construed in its popular sense and that it must be interpreted in its legal sense. What its connotation in that sense is must now be ascertained. For a correct determination it is necessary to digress somewhat into the evolution of the law relating to sale of goods".

The learned judge next referred to Roman Law of *emptio venditio* and pointed out that the consideration of sale could not be anything but only money or something valuable and that it was so recorded in the Institutes of Justinian Title XXIII and that *Emptio Venditio* was a consensual contract. The learned judge next referred to Benjamin on sale and observed that according to that learned author to constitute a *valid sale* there must be a concurrence

(1) (1927) 12 Tax. Cas. 545. (2) A.I.R. (1953) Mad. 93.
(3) (1955) 1 S.C.R. 243.

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of the following elements vis :—

"(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." (Vide 8th edn. p. 2)

"In 1893 the Sale of Goods Act, 56 & 57 Vict. c. 71 codified the law on the subject, and s. 1 of the Act which embodied the rules of the common law runs as follows :

1.—(1) "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

It was then pointed out that in section 77 of the Indian Contract Act 1872 sale was defined as "the exchange of property for a price involving the

transfer of ownership of the thing sold from seller to buyer". It was then held that in view of the scheme of the Indian Contract Act sections 1—75 a bargain was an essential element and that even after the Indian Sale of Goods Act the position had not changed. It was next pointed out that "Thus, if merely title to the goods passed but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for transfer was not money but other valuable consideration, it may then be exchange or barter but not sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale". The State in the case urged four points to resist the conclusion that the words "sale of goods" in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act 1930. These contentions were examined seriatum and rejected and it was concluded thus :—

> "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."

In so far as building contracts were concerned two reasons why there could not be a sale of goods were mentioned. The first was that there was no agreement express or implied to sell 'goods'. It was observed :—

> ".....We are concerned here with a building contract, and in the case of such a

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contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables."

The second reason was that the property in the building materials does not pass in the materials regarded as 'goods' but as part of immovable property. It was observed :—

> "When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle *quicquid Plantatur solo, solo cedit* and it vests in the other party not as a result of the contract but as the owner of the land."

I shall refer to two other cases which were decided with *Gannon Dunkerley's case*. In *Pandit Banarasi Das* v. *State of Madhya Pradesh* (1) it was observed at page 437.

> "It should be made clear, however, in accordance with what we have already stated, that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work, and that nothing that we have said in this judgment shall bar the sales tax authorities from deciding whether a particular contract falls within one category or the other and imposing a tax on the agreement of sale of materials, where the contract belongs to the latter category."

In *Mithanlal* v. *State of Delhi* (2) from a composite transaction involving work and materials, the

(1) [1959] S.C.R. 427. (2) [1959] S.C.R. 445.

materials were held liable to sales tax under a law made by Parliament for a Part C State. This was held to fall within the residuary powers of Parliament without any specific reference to any particular entry or entries in Legislative Lists. I shall now proceed to discuss the facts of the present case in relation to the decisions on Entry 48 of List II, Seventh Schedule of the Government of India Act 1935.

Before considering the facts of this case in the light of the Sugar and Sugar Products Order 1946, I shall summarise what I have said so far. Sales tax is a tax which may be laid on goods or services. It assumes numerous shapes and forms. It is a modern tax being the product of the First World War. The concept of 'sale' is of course much older and even the English Sale of Goods Act 1893 on which our own statute is based, was prior to the first imposition of tax in modern times. In India, the tax was first levied in 1937 under laws made under entry No. 48 which read—"Taxes on the sale of goods". It was introduced as the main source of revenue to the Provinces under a scheme of Provincial Autonomy. Being a commodity tax it came into competition with other commodity taxes like excise but it was held that the entry comprised, wholesale, retail and turnover taxes from the stage of manufacture or production to consumption. Later textual interpretation based on statutes relating to sale of goods and books on the subject of sale, pointed out intrinsic limitations. One such limitation was that the term 'sale' was used in the limited sense it bears in that part of the law of contract which is now incorporated in the Sale of Goods Act. As a result of this fundamental consideration 'forward contracts' were held to be outside the scope of the Entry. The sale, it was held, had to be a completed sale with passing of property before the tax could become payable. A further limitation was pointed out in certain cases relating to building

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contracts in which it was held that though property in materials passed, it did so without an agreement, express or implied, in that behalf, and only when the materials ceased to be goods and became immovable property. It was held that the supremacy of the Provincial Legislatures did not extend to levying a tax on sales in these circumstances by modifying the definition of sale. It was however held that if the parties agreed to divide a works contract into labour plus materials, the tax might be leviable. It was also held that a tax on building materials was leviable by the legislature having power to levy a tax not expressly mentioned. It was, however, held that if the taxing Province had the goods at the time of the contract or there was other substantial connection with the contract by reason of some element having taken place there, the Legislature could validly make a law which treated the whole transaction as having taken place in the Province.

The argument in this case is that the tax can only be placed upon a transaction of sale which is the result of mutual assent between the buyer and seller and observations in *Gannon Dunkerley's case* where stress is laid upon the consensual aspect of 'sale' are relied upon. It is true that consent makes a contract of sale because sale is one of the four consensual contracts recognised from early times. *"Consensu fiunt obligationes in emptionibus venditionibus"* and *"Ideo autem istis modis consensu dicimus obligationes contrahi"*. But consent may be express or implied and it cannot be said that unless the offer and acceptance are there in an elementary form there can be no taxable sale. The observations in *Gannon Dunkerley's case* were made in connection with materials utilised in the construction of buildings, roads, bridges etc. It was there pointed out that there must at least be an agreement between the parties, express or implied, in respect of some 'goods' as 'goods' and the levy of the tax on building

materials was struck down because "there is no agreement to sell materials as such, and that property in them does not pass as movables."

The commodity with which we are concerned is sugar and it is delivered as sugar. Thus one part of the reasoning from *Gannon Dunkerley's case* which rested on the passing of property in building materials as a part of realty does not apply. It is also quite clear that the tax is being demanded after the sugar has changed hands or expressing it in legal phrase when property in it has passed. It is argued that by reason of the Control Order there was no bargaining. It is pointed out that the control of sugar operated to fix ex-factory price, to determine who should be the supplier and who should receive the supply, to fix the quantity, quality and the time of delivery. The question which we are deciding is not a question arising under the Sale of Goods Act but under a taxing entry in a Constitution. The entry described a source of revenue to the Provinces. The Provincial Legislature made its laws taxing sales of commodities like sugar. In a period of emergency the Federal Government imposed certain controls to regulate prices and supplies. This control involved a permit system under which every Province had to indent its requirements to the Controller and every sugar mill had to inform the Controller of the existing and future stocks. What the Controller did was to permit a particular mill to supply sugar of a stated quality and quantity to a named Province. The mill then had to send the sugar on pain of prosecution and forfeiture and receive price according to the fixed rates. Bargaining, it is said, was not possible but bargaining in the sense of offer and acceptance may be express or implied. That after the permit was obtained the two parties agreed to 'sell' and 'purchase' sugar admits of no doubt.

I shall now analyse the whole transaction and see how the element of compulsion and control affect

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the existence of a sale. First there is the fixation of price by the Controller. Can it be said that there is no sale because the price is fixed by a third person and not by the buyer and seller. This is the old controversy between Labeo and Proculus that if price is fixed by a third person a contract of sale results or not. Labeo with whom Cassius agreed, held that there was not, while Proculus was of the contrary opinion :

> "Pretium autem certum esse debet. nam alioquin si its inter nos convenerit, ut quanti Titius rem aestemasuerit, tanti sit empta, Labeo negavit ullam uim hoc negotium habere, cuius opinionem Cassius probat. Ofilius et eam emptionem et uenditionem cuius opinionem Proculus secutus est." (Gaius III, 140).

This was solved by Justinian holding that there was :

> "Sed nostra decisio its hoc constituit."
> (Inst. III, 23, 1)

I do not think the modern law is any different. So long as the parties trade under controls at fixed price and accept these as any other law of the realm because they must, the contract is at the fixed price both sides having or deemed to have agreed to such a price. Consent under the law of contract need not be express it can be implied. There are cases in which a sale takes place by the operation of law rather than by mutual agreement express or implied. See Benjamin on Sale (8th Edn. p. 91). The present is just another example of an implied contract with an implied offer and implied acceptance by the parties. What I have said about price applies also to quantity and quality. The entry in No. 48 of List II Seventh Schedule dealt with sale of goods in all its forms. We have seen above how numerous are these forms. The entry was expressed in six simple words but was meant to include a power to

tax sale of goods in all its forms. It was not meant to operate only in those elementary cases where there is an offer by A and an acceptance by B with the price as consideration. The concept of taxes on sale of goods is more complicated and the relations of people do not always take elementary forms. When the Province after receiving the permit telegraphed intructions to despatch sugar and the mill despatched it, a contract emerged and consent must be implied on both side's though not expressed antecedently to the permit. The indent of the Province was the offer to purchase sugar of such and such quality and quantity. The mills by quoting their stocks offered to sell sugar. The controller brought the seller and purchaser together and gave them his permission with respect to a particular quantity aud quality. There was thus an implied contract of sale in the words of the Digest (XII, 1, IX, 4)

> "Si cui libera universorum negotiorum administratio a domino permissa fuerit, isque ex hic negotiis rem vendiderit et tradiderit facit eam accipientis."

No doubt, there is compulsion in both selling and buying, perhaps more for the mills than for the Provinces. But a compelled sale is nevertheless a sale as was held by the House of Lords in *New Castle Breweries* v. *Inland Revenue Commissioner* (1927) 96 L.J.K.B. 735. The case in *Kirkness* v. *John Hudson & Co. Ltd.* was different because the section there interpreted required a 'sale' and there was no sale express or implied when the wagons were taken away and compensation was paid in the shape of transport stock. There a sale in its ordinary forms was obviously meant though it was recognised that 'sale' in other context has other meanings.

It was argued that there must be mutuality. That one party must be free to offer and must offer and the other side must be free to accept and must

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accept the offer before a sale can be said to arise. But sales often take place without volition of a party. A sick man is given medicines under the orders of his doctor and pays for them to the chemist with tax on the price. He does not even know the names of the medicines. Did he make an offer to the chemist from his sick bed ? The affairs of the world are very complicated and sales are not always in their elementary forms. Due to short supply or maldistribution of goods, controls have to be imposed. There are permits, price controls, rationing and shops which are licensed. Can it be said that there is no sale because mutuality is lost on one account or another ? It was not said in the *Tata Iron and Steel case* (1) which was a case of control, that there was no sale. The entry should be interpreted in a liberal spirit and not cut down by narrow technical considerations. The entry in other words should not be shorn of all its content to leave a mere husk of legislative power. For the purposes of legislation such as on sales tax it is only necessary to see whether there is a sale express or implied. Such a sale was not found in "forward contracts" and in respect of materials used in building contracts. But the same cannot be said of all situations. I for one would not curtail the entry any further. The entry has its meaning and within its meaning there is a plenary power. If a sale express or implied is found to exist then the tax must follow. I am of the opinion that in these transactions there was a sale of sugar for a price and the tax was payable. I would, therefore, dismiss these appeals with costs.

BY COURT: Having regard to the judgment of the majority, all these appeals(Nos. 237 and 633—636 of 1961) would be allowed with costs—one hearing fee.

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(1) [1958] S.C.R. 1355.